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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LIST OF LATEST SOURCES EXAMINED

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 Extra-terr. Cas.
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 1887, 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.

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
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
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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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EVIDENCE

IN

TRIALS AT COMMON LAW

Book I (*continued*): ADMISSIBILITY

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INTRODUCTORY: THEORY AND HISTORY OF THE HEARSAY RULE

CHAPTER XLIII.

§ 1360. **Nature of the Analytic Rules.** Of the Auxiliary Rules (*ante*, § 1171) aiming at the amelioration of probative value, the second type is the Analytic Rule, *i.e.* a rule which accomplishes the desired aim by subjecting the offered evidence to a scrutiny or analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value. Such a rule differs from a Preferential rule (*ante*, §§ 1171, 1286) in that it does not purport to require one kind of testimony before another can be resorted to. It differs from a Prophylactic rule (*post*, § 1813) in that the latter operates preventing or eliminating beforehand the possible defects of the evidence; while the present type of rule operates by exposing at the trial those not otherwise thus forestalled or eliminated. That it differs from the Synthetic or Quantitative rules (*post*, § 2030) is clear enough. Finally, it differs from the Simplificative rules (*post*, § 1863) in that it does not rigidly strike out and exclude the evidence as undesirable, but merely insists on accompanying its admission by tests calculated to expose possible defects.

There is but one rule of the Analytic type, — the Hearsay rule; though this rule involves two branches or processes, Cross-examination and Confrontation. The details of these two branches can be later examined (*post*,

§§ 1367–1418). At this point it is desirable first to examine the theory and the history of the Hearsay rule in general.

§ 1361. **Nature of Hearsay, as an Extra-judicial Testimonial Assertion.** When a witness A on the stand testifies, "B told me that event X occurred", his testimony may be regarded in two ways: (1) He may be regarded as asserting *the event upon his own credit, i.e.* as a fact to be believed because he asserts that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that event is rejected, because he is not qualified by proper sources of knowledge to speak to it. This involves a general principle of Testimonial Knowledge, already examined (*ante*, §§ 657, 665), and does not involve the Hearsay rule proper.

(2) But suppose, in order to obviate that objection, that we regard A as not making any assertion about event X (of which he has no personal knowledge), but as testifying to the utterance in his hearing of *B's statement* as to event X. To this, A is clearly qualified to testify, so that no objection can arise on that score.

The only question, then, can be whether this *assertion of B, reported by A*, is admissible as evidence of the event X, asserted by B to have occurred. It is clear that what we are now attempting to do is to prove event X by B's assertion; the utterance of B's assertion being itself proved by A's testimony to it. In other words, merely the making of B's assertion is properly proved by A; but the occurrence of event X is also sought to be proved, by this assertion of B, which was uttered out of court, but is offered testimonially for the same purpose as if it were being made presently by B on the stand. This, the true significance of hearsay testimony, is brought out in the following passages:

1743, *Craig* v. *Earl of Anglesea*, 17 How. St. Tr. 1162: "If declarations of persons dead were to be admitted, they would in effect have the force of original testimony."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. VI, c. IV: "It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses: (1) a supposed percipient and extrajudicial narrating witness, stating at some antecedent point of time, in the hearing of any person not on that occasion invested with the authority of a judge, some matter of fact as having had place; and (2) a deposing, or say judicially narrating witness, who bears testimony not to the truth of that matter of fact, but to its having actually been asserted on the extrajudicial occasion in question by the extrajudicially stating or narrating witness."

1860, Chief Justice APPLETON, Evidence, 174: "In all cases of hearsay the effective witness is the individual, whether party or not, whose supposed statements the narrating witness relates. The individual testifying is merely the conduit or pipe through whose agency the impressions of some one else are conveyed to the Court. The real proof is the hearsay statement." [1]

It is these extra-judicial testimonial assertions which the Hearsay rule prohibits. The Hearsay rule points out that B's assertion, offered testimonially,

§ 1361. [1] So also Sir J. F. Stephen, in his Report on the Indian Evidence Act (quoted in Syed Ali and Woodroffe's edition of the Act, 1898, Appendix).

is not made on the stand and presently, but out of court anteriorly, and challenges it upon that ground. The Hearsay rule tells us that B's assertion (even assuming B to have been qualified, by knowledge and otherwise, as witness) cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. The Hearsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter.

What is the nature of the test thus required by the Hearsay rule?

§ 1362. **Theory of the Hearsay Rule.** The fundamental test, shown by experience to be invaluable, is the test of *Cross-examination*. The rule, to be sure, calls for two elements, Cross-examination proper, and Confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable (*post*, § 1395).

1. The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness may be best brought to light and exposed by the test of Cross-examination. Of its workings and its value, more is to be seen in detail (*post*, §§ 1367–1394). It is here sufficient to note that the Hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination:*

1743, *Craig dem. Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1160: the legitimacy of the plaintiff as heir was in issue; the declarations of Mrs. Piggot, a deceased intimate friend of his alleged mother, were offered. "This was objected to by defendant's counsel, who insisted that hearsay was not evidence; . . . that Mrs. Piggot is dead, and where persons are dead, the law hath not provided for their testimony, nor will it substitute a mere declaration in the place of an oath; . . . that the admitting hearsay evidence in the present affair would introduce a dangerous precedent, in regard the other side could not have the benefit of cross-examining; in some cases, it is true, hearsay evidence is admitted from the necessity of the thing; . . . that in civil cases there is not the same necessity because a bill in equity may be filed to perpetuate the testimony of ancient witnesses, and then the evidence may be cross-examined; but Mrs. Piggot being dead, no declaration of hers can be evidence, because the defendant has no opportunity to cross-examine her. . . . The COURT would not admit the hearsay of Mrs. Piggot's declaration to deponent to be made use of as evidence, on the principal reason that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining."

1806, Mr. (later V. C.) *Plumer*, arguing in *Lord Melville's Trial*, 29 How. St. Tr. 747: "It is a universal principle of the law of evidence (subject to certain exceptions) that what one man says, does, or writes, behind the back of another, cannot be received in any criminal court to affect anybody but himself. . . . Every individual who stands upon his trial in a British court of justice has a clear right to have the witness brought in the front of the Court, to be submitted to his cross-examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact."

1881, Lord BLACKBURN, in *Dysart Peerage Case*, L. R. 6 App. Cas. 503: "In England, hearsay evidence, that is to say, the evidence of a man who is not produced in court and who therefore cannot be cross-examined, as a general rule is not admissible at all."

1812, KENT, C. J., in *Coleman* v. *Southwick*, 9 John. 50: "Why not produce S. to tes-

tify what he told the defendant, instead of resorting to a bystander who heard what he said. . . . Hearsay testimony is from the very nature of it attended with all such doubts and difficulties, and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.' . . . The plaintiff by means of this species of evidence would be taken by surprise and be precluded from the benefit of a cross-examination of S. as to all those material points which have been suggested as necessary to throw full light on his information."

1827, Duncan, J., in *Farmers' Bank* v. *Whitehill*, 16 S. & R. 89: "The general objection to the deposition of John Buck is that it is in the nature of hearsay evidence and that the defendant had no opportunity of cross-examination."

1851, Drummond, J., in *U. S.* v. *Macomb*, 5 McLean 286: "The ground upon which we proceed in each case is the presumption of the truth of the declarations, they being subjected to the tests which the law recognizes, — the presence of the accused and the right of cross-examination. . . . Of course it is clear that such testimony [as a mere sworn statement before a magistrate] could not be admitted in a court of law; for, first, the witness was living; and, secondly, the defendant had no opportunity of cross-examining him; and, however the authorities may differ as to the first, they all agree as to the second point, that being an indispensable prerequisite to the introduction of testimony."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. VI, c. I, § 2: "In every instance that inferiority in respect of probative force, in consideration of which the term Makeshift [*i.e.* Hearsay] was found applicable with equal propriety to them all, will be seen to have for its cause the absence of one of the principal securities for correctness and completeness, viz. interrogation 'ex adverso' at the hands of a party whose interest, in the event of its being incorrect or incomplete, may in proportion to that incorrectness or incompleteness be made to suffer by it."

2. In the foregoing passages, Cross-examination alone is mentioned as the test required by and involved in the Hearsay rule. In most instances, however, we find the *Oath* coupled with Cross-examination in the definition of the rule. That this coupling is merely accidental may easily be shown; but the following passages, naming both oath and cross-examination, serve at least to exhibit the general notion that has commonly been conceded to characterize the Hearsay rule:

1716, Serjeant *Hawkins*, Pleas of the Crown, b. II, c. 46, § 44: "How far hearsay shall be admitted. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination."

1773, Mr. *Peckham*, objecting, in *Fabrigas* v. *Mostyn*, 20 How. St. Tr. 135, to testimony about a statement of a native magistrate (or mustastaph) in Minorca: "Hearsay is no evidence. . . . Now can what he has said in Minorca to this witness be admitted as evidence here? The mustastaph is living, why don't they produce him? If they had brought him here, we could have his evidence on oath and could cross-examine him to the facts."

1837, *Wright* v. *Tatham*, 7 Ad. & E. 313, 5 Cl. & F. 689; letters were offered from absent persons, treating the testator as a competent person. Mr. *Cresswell*, objecting: "All the letters were inadmissible, because they presented statements which could not be verified by oath, and subjected to the test of cross-examination. . . . In a particular case the assertion, without oath, of a respectable man might influence a reasonable mind; but the rule established for the safe administration of justice in general is that evidence

unconfirmed by oath and not subject to cross-examination shall not be received." Mr. *Starkie*, on the same side: "The witness from whom it comes ought to be cross-examined as to the means he had of forming a judgment and the diligence and good faith with which they were applied. Here that test is wanting. . . . It may well be suggested [that the writers had other motives]. Suggestions of that kind are to be excluded only by submitting to those tests of knowledge and sincerity which the law requires. . . . The admission of evidence not on oath will be found in all cases to depend upon its being subject to tests which guarantee knowledge and sincerity." The letters were excluded as hearsay, on the following grounds. COLTMAN, J.: "The administering of an oath furnishes some guarantee for the sincerity of the opinion, and the power of cross-examination gives an opportunity of testing the foundation and the value of it." BOSANQUET, J.: "If the writers of these letters were produced as witnesses and examined upon oath, their opinion would be receivable in evidence, because the ground of their knowledge and the credibility of their testimony might be ascertained by cross-examination." WILLIAMS, J.: "It is opinion presented in such a shape as makes it inadmissible for want of the sanction of an oath, under which evidence of opinion is always given; which sanction is required for this weighty reason, — that opinion, however imposing from the real or supposed respectability of the person expressing it, may, after diligent and patient inquiry and examination before those to whose judgment all evidence is addressed, be deemed by them to rest upon a precarious foundation or upon none at all." ALDERSON, B.: "The general rule is that facts are to be proved by testimony of persons on oath and subjected to cross-examination. . . . If, therefore, the letters are to be used as proofs of the opinion of the writers respecting Mr. Marsden's capacity, the objection to their admissibility is that this opinion is not upon oath, nor is it possible for the opposite party to test by cross-examination the foundation on which it rests."

1867, O'BRIEN, J., in *Gresham Hotel Co.* v. *Manning*, Ir. R. 1 C. L. 125: "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross-examination, and would not . . . be exempted from the general rule excluding hearsay evidence."

1817, SWIFT, C. J., in *Chapman* v. *Chapman*, 2 Conn. 348: "It is a general principle in the law of evidence that hearsay from a person not a party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross-examine."

1843, SHAW, C. J., in *Warren* v. *Nichols*, 6 Mete. 261: "The general rule is that one person cannot be heard to testify as to what another person has declared in relation to a fact within his knowledge and hearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: first, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and, secondly, because the party upon whose interests it is brought to bear has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the facts depends."

1868, BREESE, C. J., in *Marshall* v. *R. Co.*, 48 Ill. 476: "The general rule is that hearsay evidence . . . is not admissible, for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth, — the author of the statements not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observation."

1872, KINGMAN, C. J., in *State* v. *Medlicott*, 9 Kan. 283, 287: "These rules [as to hearsay] have been adopted to guard against the manifest danger to human life that is so liable to arise from the admission as evidence of declarations not made under the sanction of an oath and not offering to the party to be affected by them an opportunity of cross-examination, or to call attention to omitted facts that if stated might modify or completely overturn the inference drawn from the declarations made. . . . These rules have been found so essential as safeguards in the investigation of truth that they have become fundamental in

our system of jurisprudence, and some of them have been placed for greater security in our constitutions. No matter how convincing the testimony may be to the intelligent mind, unless it can be presented under fixed rules it cannot be received."

1892, FIELD, C. J., in *Com.* v. *Trefethen*, 157 Mass. 185, 31 N. E. 961: "The argument, in short, is that such evidence is hearsay. It is argued that such declarations are not made under the sanction of an oath, and that there is no opportunity to examine and cross-examine the person making them, so as to test his sincerity and truthfulness or the accuracy and completeness with which the declarations describe his intention." [1]

In the preceding passages, the testing required by the Hearsay rule is spoken of as cross-examination *under oath*. But it is clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule. That this is so is seen by the perfectly well-established rule that a statement made under oath (for example, in the shape of a deposition or an affidavit or testimony before a magistrate) is nevertheless inadmissible if it has not been subjected to cross-examination (*post*, §§ 1373–

§ **1362.** [1] *Accord:* ENGLAND: 1811, Wood, B., in Berkeley Peerage Case, 4 Camp. 406; 1820, Abbott, C. J., in Doe *v.* Ridgway, 4 B. & Ald. 54; 1832, R. *v.* Davlin, Jebb Cr. C. 127; 1867, Lush, J., in Smith *v.* Blakey, L. R. 2 Q. B. 326; 1869, Byles, J., in R. *v.* Jenkins, L. R. 1 C. C. R. 193; 1876, Jessel, M. R., in Sugden *v.* St. Leonards, L. R. 1 P. D. 154; UNITED STATES: *Federal:* 1823, Story, J., in Nicholls *v.* Webb, 8 Wheat. 326, 333; 1869, Miller, J., in Allen *v.* Killinger, 8 Wall. 487; 1870, Peck, J., in Medway *v.* U. S., 6 Ct. of Cl. 434; 1873, Field, J., in Chaffee *v.* U. S., 18 Wall. 541; *Alabama:* 1830, White, J., in Drish *v.* Davenport, 2 Stew. 270; 1875, Manning, J., in Walker *v.* State, 52 Ala. 193; *Arkansas:* 1852, Johnson, C. J., in Cornelius *v.* State, 12 Ark. 804; *Connecticut:* 1860, Sanford, J., in State *v.* Dart, 29 Conn. 153, 155; *Illinois:* 1855, Skinner, J., in Starkey *v.* People, 17 Ill. 20; 1862, Walker, J., in Barnes *v.* Simmons, 27 Ill. 513; 1885, Craig, J., in Digby *v.* People, 113 Ill. 128; *Indiana:* 1869, Ray, J., in Morgan *v.* State, 31 Ind. 199; *Kentucky:* 1800, Muter, C. J., in Cherry *v.* Boyd, Litt. Sel. Cas. 8; 1855, Simpson, J., in Walston *v.* Com., 16 B. Monr. 15, 35; 1872, Hardin, J., in Leiber *v.* Com., 9 Bush 13; *Louisiana:* 1858, Voorhies, J., in State *v.* Brunetto, 13 La. An. 45; *Maine:* 1858, Rice, J., in Heald *v.* Thing, 45 Me. 392; *Maryland:* 1860, Le Grand, C. J., in Green *v.* Caulk, 16 Md. 572; 1874, Alvey, J., in Maitland *v.* Bank, 40 Md. 559; *Massachusetts:* 1851, Fletcher, J., in Lund *v.* Tyngsborough, 9 Cush. 40; 1852, Shaw, C. J., in Com. *v.* Starkweather, 10 Cush. 60; 1856, Thomas, J., in Bartlett *v.* Emerson, 7 Gray 176; *Mississippi:* 1852, Yerger, J., in Lampley *v.* Scott, 24 Miss. 539; *Nebraska:* 1886, Reese, J., in Ponca *v.* Crawford, 18 Nebr. 557, 26 N. W. 365; *New Hampshire:* 1847, Parker, C. J., in Patten *v.* Ferguson, 18 N. H. 529; *New Jersey:* 1826, Ewing, C. J., in Westfield *v.* Warren, 8 N. J. L. 250; 1889, Beasley, C. J., in Estell *v.* State, 51 N. J. L. 184, 17 Atl. 118; *New York:* 1818, Thompson, C. J., in Wilson *v.* Boerem, 15 John. 286; 1884, Earl, J., in Waldele *v.* R. Co., 95 N. Y. 274; *North Carolina:* 1833, Daniel, J., in State *v.* May, 4 Dev. 334; 1842, Gaston, J., in State *v.* Patterson, 2 Ired. 353; 1855, Pearson, J., in State *v.* Shelton, 2 Jones L. 364; 1872, Rodman, J., in State *v.* Williams, 67 N. C. 14; 1887, Davis, J., in State *v.* Hargrave, 97 N. C. 458, 1 S. E. 774; 1894, Burwell, J., in Propst *v.* Mathis, 115 N. C. 526, 20 S. E. 710; *Ohio:* 1856, Bartley, C. J., in Simmons *v.* State, 5 Oh. St. 343; *Pennsylvania:* 1813, Tilghman, C. J., in Longenecker *v.* Hyde, 6 Binn. 1; 1815, Id., in Com. *v.* Stewart, 1 S. & R. 344; 1823, Id., in Buchanan *v.* Moore, 10 S. & R. 275; 1827, Gibson, C. J., in Moritz *v.* Brough, 16 S. & R. 409; 1885, Green, J., in Railing *v.* Com., 110 Pa. 105, 1 Atl. 314; *South Carolina:* 1819, Cheves, J., in Drayton *v.* Wells, 1 Nott & McC. 248; 1844, Richardson, J., in State *v.* Campbell, 1 Rich. L. 126; 1846, Id., in Walker *v.* Meetze, 2 Rich. 571; 1851, Evans, J., in Robinson *v.* Blakely, 4 Rich. 588; 1880, McGowan, J., in State *v.* Belcher, 13 S. C. 459, 462; *South Dakota:* 1909, State *v.* Heffernan, 24 S. D. 1, 123 N. W. 87 (careful opinion by McCoy, J.); *Tennessee:* 1848, Green, J., in Phillips *v.* State, 9 Humph. 249; *Texas:* 1895, Brown, J., in Byers *v.* State, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 761; *Vermont:* 1881, Veazey, J., in State *v.* Wood, 53 Vt. 564; *Virginia:* 1853, Allen, J., in Brogy's Case, 10 Gratt. 729.

So also in *Treatises:* 1801, Peake, Evidence, 10; 1802, McNally, Evidence, 360; 1806, Evans, Notes on Pothier, II, 250; 1810, Swift, Evidence, 121; 1843, Greenleaf, Evidence, § 124.

1377, 1708). In other words, a statement made under oath is, merely as such, equally obnoxious to the Hearsay rule.[2] Owing to the practice of requiring an oath (or its modern substitute, an affirmation) before proceeding to examination and cross-examination, the case does not happen to arise of testimony which has been tested by cross-examination and yet lacks the oath, so that the tenor of the rule as above stated cannot be tested by that situation. But it is sufficiently and clearly demonstrated (as above noted) by the fact that, even though an oath has been taken, the statements are still excluded if not subjected to cross-examination; as well as by the further fact that, whenever an exception to the Hearsay rule (*post*, § 1422) is found established, *i.e.* whenever statements not subjected to cross-examination are exceptionally received, it is not required that they shall have been made under oath.

It is thus apparent that the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination, and that the judicial expressions (above quoted) coupling oath and cross-examination had in mind the oath as merely the ordinary accompaniment of testimony given on the stand, subject to the essential test of cross-examination.

§ 1363. **Spurious Theories of the Hearsay Rule.** Occasionally there have been advanced other reasons or definitions of the Hearsay rule, — though without much emphasis, and usually as supplementary only to the orthodox theory.

(1) It has been said, for example, that hearsay assertions are to be excluded because of the *risk of incorrect transmission* of the statements by the one reporting them:

> 1851, FLETCHER, J., in *Lund* v. *Tyngsborough*, 9 Cush. 40: "The danger that casual observations would be misunderstood, misremembered, and misreported, increases the number and force of the objections to the admission of hearsay."
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> 1868, BREESE, C. J., in *Marshall* v. *R. Co.*, 48 Ill. 476 (after naming the real reason) "And the misconstruction to which such evidence is exposed from the ignorance or inattention of the hearers, or from criminal motives, are powerful additional objections."

To this supposed reason there are two conclusive answers: (*a*) This theory would exclude only *oral assertions;* yet the Hearsay rule excludes with equal strictness the best-authenticated written assertions of all sorts, — letters, sealed documents, affidavits, and the like, — and, of the numerous exceptions to the rule, only one or two show any special favor to written assertions. (*b*) *Other oral statements*, not offered as exceptions to the Hearsay rule, but as admissions (*ante*, § 1048), or as impeaching evidence (*ante*, § 1017), or as 'res gestæ' utterances (*post*, § 1768), are never excluded because they are oral, and never admitted because they are written; and yet they are equally

[2] 1899, Vann, J., in Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2 ("Declarations made under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence").

obnoxious to this supposed policy of excluding that which is liable to incorrect and garbled transmission.

(2) It has been said, by eminent names, that hearsay evidence possesses some *intrinsic weakness:*

1813, MARSHALL, C. J., in *Mima Queen* v. *Hepburn*, 7 Cranch 295: "That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

1836, STORY, J., in *Ellicott* v. *Pearl*, 10 Pet. 436: "[Besides lacking oath and cross-examination, its fault is] . . . that it is peculiarly liable to be obtained by fraudulent contrivances, and above all that it is exceedingly infirm, unsatisfactory, and intrinsically weak in its very nature and character."

The charge of "intrinsic weakness", so far as this vague expression is open to interpretation, seems to mean nothing more than that such statements lack the trustworthiness that the test of cross-examination might supply. The further suggestion of a peculiar liability to fraudulent manufacture seems to mean that oral utterances of the sort can by false witnesses be placed in the mouth of absent persons; and no doubt this is so. But, in the first place, this is not true of written statements offered and authenticated in court, and yet the Hearsay rule equally excludes these; and, in the second place, it is just as true of the other oral and receivable utterances above named, and yet these are equally admissible with written statements. There seems to be no soundness in either of the above suggestions.

(3) The Hearsay rule has sometimes been stated in part by describing the distinct principle above named (*ante*, § 1361, par. 1) requiring *personal knowledge* as one of a witness' qualifications:

1842, Professor *Simon Greenleaf*, Evidence, § 98: "It is requisite that whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be said or done, and should not testify from information given by others, however worthy of credit they may be."

But here we are not regarding the reported statement of the absent person as a testimonial assertion; we are thinking of the witness on the stand as speaking directly to the ultimate fact, and we are denying the sufficiency of his knowledge of this fact. This is not a question of the Hearsay rule, but of the witness' Testimonial Qualifications (*ante*, §§ 657, 1361).[1]

(4) We sometimes think of "hearsay" as a merely *anonymous utterance* or rumor; but such anonymity is not the source of the Hearsay rule's exclusion. An anonymous assertion would in any event be excluded, because the author is not shown to be qualified by knowledge and otherwise. The Hearsay rule assumes that the declarant is qualified as a witness (*post*, § 1424); but it still excludes the untested assertion, even though made by a qualified person.

§ 1363. [1] Judicial opinions illustrating this use of the term will be found *ante*, § 657.

§ 1364. **History of the Rule.** Under the name of the Hearsay rule, then, will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it. The history of the Hearsay rule, as a distinct and living idea, begins only in the 1500s, and it does not gain a complete development and final precision until the early 1700s. Before tracing its history, however, from the time of what may be considered its legal birth, it will be necessary to examine a few salient features of the preceding century, in order to understand the conditions amid which it took its origin.

One distinction, though, must be noticed even before this preliminary survey, — the distinction between requiring an extra-judicial speaker to be called to the stand to testify, and requiring one who *is already on the stand* to speak from personal knowledge (*ante*, § 1361, par. 1). The latter requirement had long ago been known in the early modes of trial preceding the jury. In the days when proof by compurgation of oath-helpers lived as a separate mode alongside of proof by deed-witnesses and other transaction-witnesses, "the witness was markedly discriminated from the oath-helper; the mark of the witness is knowledge, acquaintance with the fact in issue, and moreover, knowledge resting on his own observation."[1] Such a witness' distinctive function was to speak 'de visu suo et auditu.'[2] The principle was not fully carried out; for a deed-witness need not have actually seen it executed, and might merely have promised by attestation to appear and vouch in court.[3] But at any rate this principle, so far as it prevailed, concerned a different mode of trial, "trial by witnesses", which jury-trial supplanted.[4] Afterwards, nearly three centuries later, when jury-trial itself had changed, and witnesses (now in the modern sense) became once more a chief source of proof, the old idea reappeared and was prescribed for them; the witness would speak to "what hath fallen under his senses",[5] and this became in the modern law a fundamental principle.[6] But at the time now to be considered, when jury-trial was coming in (say the 1300s), that principle belonged in what was practically another mode of trial, and did not affect the development.

§ **1364.** [1] 1892, Brunner, Deutsche Rechtsgeschichte, II, 397; 1902, Schröder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed. 772.

[2] 1898, Thayer, Preliminary Treatise on Evidence, 18, 499.

The main conclusions, concerning the historical effect of these distinctions, drawn by Professor Melville M. Bigelow, "The Old Jury" (Mass. Historical Society, 1916, p. 310; reprinted 1920 in his Papers on the Legal History of Government), seem far-fetched and negligible.

[3] Thayer, *ubi supra*, 98; and cases cited *ante*, § 1292. A good additional illustration occurs in Seld. Soc., Select Civ. Pl., I, No. 76; and as late as 1543, in Rolfe *v.* Hampden, Dyer 53 *b*, a survival of this is seen in the case of two will-witnesses who "deposed upon the report of others." This was probably because such witnesses were originally transaction-witnesses, not document-witnesses, and in their latter character the earlier trait survived, as the history of the parol-evidence rule indicates (*post*, § 2426).

[4] Thayer, *ubi supra*, 17, 500; Brunner, Entstehung der Schwurgerichte, quoted *infra*.

[5] 1670, Vaughan, C. J., in Bushel's Trial, 6 How. St. Tr. 999, 1003; 1696, Holt, C. J., in Charnock's Trial, 12 id. 1454.

[6] Cases cited *ante*, § 657.

What we are here concerned with is a different notion, namely, that *when a specific person, not as yet in court, is reported to have made assertions about a fact, that person must be called to the stand*, or his assertion will not be taken as evidence. That is to say: Suppose that A, who does not profess to know anything about a robbery, is offered to prove that B, who did profess to know, has asserted the circumstances of the robbery; here B's assertion is not to be credited or received as testimony, however much he may know, unless B is called and deposes on the stand.

Preliminary. As to the history of this Hearsay rule proper, it is necessary at the outset to notice briefly certain important conditions which prevailed at the beginning of the 1500s.

(*a*) And, first, it is clear that there was, up to about that time, no appreciation at all of the necessity of calling a person to the stand as a witness in order to utilize his knowledge for the jury. On the contrary, the leading conditions and influences of jury-trial permitted and condoned the practice of the jury's obtaining information by consulting informed persons not called into court:

1872, Professor *Heinrich Brunner*, The Origin of Jury Courts, 427, 452: "We may not interpret the verdict 'ex scientia', in the domain of English law, as a verdict based on personal perception. The jurors of the assize were certainly entitled to give a verdict based on the communications of trustworthy neighbors. Glanvill makes it requisite, for the jurors' knowledge, 'that they should have knowledge from their own view and hearing of the matter or through the words of their fathers and through such words of persons whom they are bound to trust as worthy.' Thus they exhibit really in their verdict the prevailing conviction of the community upon the matter in question. For ascertaining this, ample opportunity is furnished by the 'view' and by the period of time elapsing between the view and the swearing in court. If their verdict agreed with the opinion throughout the community, they had nothing to fear from an attaint. . . . Thus the juror of the English law who gives a verdict 'ex scientia' (with reference to the view of lands had) is a 'knowledge-witness' simply, whether his knowledge rests on his own perceptions or on another's communication. . . . The English knowledge-witness [juror] is not an eye-witness, not a 'testis de scientia' in the sense of the later Norman law."[7]

1895, Sir *F. Pollock* and Professor *F. W. Maitland*, History of the English Law, II, 622, 625: "Some of the verdicts that are given must be founded on hearsay and floating tradition. Indeed, it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony. . . . At the least a fortnight had been given to them in which to 'certify themselves' of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants. . . . Separatively or collectively, in court or out of court, they have listened to somebody's story and believed it."

[7] Professor Brunner goes on to point out (p. 453 ff.) that since in France the judicial use of "trial by witnesses" proper came early into prominence (in the 1300s and 1400s) through the civil or canonical system, and since the contrast between these two competing methods led the former to be called 'testes de scientia', and the jurors merely 'testes de credentia', the jury system became discredited as an inferior one and ultimately fell into disuse. In other words, the lack of any sharp discrimination in England as to the sources of the jury's "knowledge" was the marked feature which enabled it to survive, in contrast to the fate of its kindred institution in Normandy, where circumstances had led to the emphasizing of its inferior sources of knowledge. Compare also Glasson, Histoire du droit et des institutions de la France, VI, 544 (1895).

The ordinary witness, as we to-day conceive him, coming into court and publicly informing the jury, was (it must be remembered) in the 1400s a rare figure, just beginning to be known.[8] Of persons thus called, the chief kinds were the preappointed ones, — deed-witnesses and other transaction-witnesses; and even these, with the jury, "all went out and conferred privately as if composing one body; the witnesses did not regularly testify in open court." [9] Even where facts were involved which, as we should think, needed other testimony, the counsel stated them by allegation, and a special witness might or might not be present to sustain the allegations.[10] Well into the 1400s "it was regarded as the right of the parties to 'inform' the jury after they were impanelled and before the trial." [11] In 1450 it is said by Chief Justice Fortescue, "If the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable", [12] *i.e.* it is not the offence of maintenance.[13] Note that the only objection thought of is that of maintenance. In 1499 a juror, in a certain trial where a thunderstorm had caused a separation without leave, talked with a friend of one of the parties, and this, from the same point of view, was held not unlawful.[14]

Such practices of obtaining information from informed persons not called were a chief reliance for the early jury. In fact, the strict notions then prevailing as to the offence of maintenance tended to discourage the coming of witnesses. In the 1400s "it was by no means freely done"; [15] and when, in 1562–63,[16] compulsory process for ordinary witnesses was first provided, the measure came rather as a protection for the witness against the charge of maintenance than for any other reason.[17] In short, as late as through the 1400s, there was not only no feeling of necessity for having every informant come to testify publicly in court, but there was still a discouragement of such a general process; and the jury might and did get a great deal of its knowledge by express inquiry from specific persons not called, or by the counsel's report of what had been or would be said by persons not called or not put on the stand.

(*b*) But in the meantime certain conditions were changing in a significant respect. Contrasting the end of the 1400s and the beginning of the 1600s, it appears, as the marked feature, that the proportion between the quantity of information obtained from ordinary witnesses produced in court and of

[8] Note 20, *infra*.

[9] Thayer, *ubi supra*, 97, 102; this continued probably into the 1500s.

[10] Thayer, *ubi supra*, 121, 133.

[11] Thayer, *ubi supra*, 92; in Palgrave's "The Merchant and the Friar", there cited, an account of a trial for robbery in London in 1303 represents the sheriff as saying, when asked by the judge whether the jury is ready: "The least informed of them has taken great pains to go up and down in every hole and corner of Westminster — they and their wives — and to learn all they could concerning his past and present life and conversation."

[12] Y. B. 28 H. VI, 6, 1; cit. Thayer, 128; see also the petition quoted ib. 125.

[13] Again, in 1504 (Y. B. 20 H. VII, 11, 21; cit. Thayer, 129), Rede, J., says: "If the jury come to my house to be informed of the truth, and I inform them, that is not maintenance."

[14] Y. B. 14 H. VII, 29, 4; cit. Thayer, 132.

[15] Thayer, *ubi supra*, 130.

[16] St. 5 Eliz. c. 9, § 6.

[17] The history of compulsory process is examined *post*, § 2190.

information by the jury itself contributed or obtained was in effect reversed. The former element, in the 1400s, was "but little considered and of small importance",[18] but by the early 1600s the jury's function as judges of fact, who depended largely on other persons' testimony presented to them in court, had become a prominent one, perhaps a chief one.[19] It is necessary to appreciate that the ordinary witness (as we conceive him) did not come to be a common feature of jury trials till the very end of the 1400s.[20] Thus during the 1500s the community was for the first time dealing with a situation in which the jury depended largely, habitually, and increasingly, for their sources of information, upon testimonies offered to them in court at the trial.

(*c*) This, then, is the reason why another notion (a marked feature of the 1500s and early 1600s) should come into particular prominence at that epoch and not before. During that period much is found to be said, in the trials, about the number of witnesses, their sufficiency in quantity and quality. Juries were just beginning to depend for their verdict upon what was laid before them at the trial, and it was thus natural enough that they should begin to ask themselves, and to be urged by counsel to consider, whether they had been furnished with sufficient material for a right decision. Much begins to be thought and said, in statutes and otherwise, about having witnesses "good and lawful", "good and pregnant", "good and sufficient."[21] There was, moreover, already in existence at that time, well known to a large proportion of the legal profession, and only waiting for a chance to be imported and adopted, a mass of rules in the civil and canon law about the number of witnesses necessary in given cases, and the circumstances sufficient to complement and corroborate testimony deficient in number. Throughout the State trials of the 1500s and early 1600s, the accused is found insisting that one witness to each material fact is not enough.[22] In spite of these repeated appeals to the numerical system of the civil law, they produced no permanent impression in the shape of specific rules, except in treason and perjury.[23] But the general notion thoroughly permeated the times, and barely escaped being incorporated in the jury system.

In a particular respect it left an impression material to the present inquiry. There had hitherto been no prejudice against the jury's utilizing information

[18] Thayer, *ubi supra*, 130.

[19] For example, in 1499, Vavasour, J., says: "Suppose no evidence is given on either side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or the other; and so the evidence is not material to help or harm the matter" (Y. B. 14 H. VII, 29, 4, cit. Thayer, 133); while in the early 1600s, Coke says (3 Inst. 163) that "most commonly juries are led by deposition of witnesses." Another indication is seen in the practical disuse of the attaint by the end of the 1500s (Thayer, *ubi supra*, 138, 150, 153, 167), due largely to the fact that the jury now depended so much upon testimony in court.

[20] Thayer, *ubi supra*, 102, 121, 122, 126.

[21] In other respects, also, this was a time significant of a desire to see to the sufficiency of the evidence placed before a jury; see Thayer, *ubi supra*, 179, 180, 430.

[22] A single example must suffice; in Lord Strafford's Trial (1640), 3 How. St. Tr. 1427, 1445, 1450, he argues: "He is but one witness, and in law can prove nothing"; such "therefore could not make faith in matter of debt, much less in matter of life and death."

[23] The treason-statutes, coming in 1547–1554, will be noted later.

The history of the numerical system, and of its failure to obtain a foothold in our law, is examined *post*, § 2032.

from persons not produced. But now that their verdict depended so much on what was laid before them at the trial, and now that the sufficiency of this evidence, in quantity and quality, began to be canvassed, it came to be asked *whether a hearsay thus laid before them would suffice*. It was asked, for example, whether, if there was one witness testifying in court from personal knowledge and another's hearsay statement offered, the two together would suffice.[24] Again, it was discussed in Queen Mary's reign (1553), whether, of the two accusers required in treason, one could testify by reporting a hearsay.[25] In Raleigh's trial (1603), Chief Justice Popham, refusing to produce Cobham to testify, explained that, "where no circumstances do concur to make a matter probable, then an accuser may be heard in court, and not merely by extra-judicial statement; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced";[26] that is, a hearsay statement was sufficient if otherwise corroborated. So, too, the notion that persisted in the 1600s, that a hearsay statement, though not alone sufficient, was nevertheless usable in confirmation of other testimony,[27] was a direct survival of this treatment of hearsay from the standpoint of numerical sufficiency. During the 1500s nothing was settled in this direction; the matter was being debated and doubted. But the important feature is that the doubt about using hearsay statements — *i.e.* testimony from persons not called — was merely incidental to a general canvassing of the numerical and qualitative sufficiency of testimony, which in turn was a novelty arising from the jury-conditions of the 1500s.

It appears, then, that at the entrance to the 1500s (*a*) there had hitherto been no conception of a special necessity for calling to the stand persons to whose assertions credit was to be given; (*b*) that by the 1500s the increasing dependence of the jury on the evidence laid before them in court (as distin-

[24] 1541, Rolfe *v.* Hampden, Dyer 53*b* (of three witnesses to a will, "two deposed upon the report of others, and the third deposed of his own knowledge", and there was no apparent objection, "though the jury paid little regard to the testimony aforesaid"); 1622, Adams *v.* Canon, Dyer 53*b*, note (disbursement of money for P.; of two witnesses, one "deposed that he himself knew it to be true, and being examined why he would swear that, answered, 'because his father had said so'; and in this case much was said about the deposition of witnesses; first, that if one witness depose of his own knowledge of the very point in question, and the other in the circumstances, that shall be sufficient ground for the judge to pass sentence"; here the "circumstances" means the hearsay statement, as shown by Pyke *v.* Crouch, *infra*). The earlier loose practice in this respect is seen in a London case of 33 Edw. I., cited in Bateson's Borough Customs, II, Introd. p. 32 (Selden Society Pub., XXI, 1906).

[25] 1553, R. *v.* Thomas, Dyer 99*b* ("It was there holden for law, that of two accusors, if one be an accusor of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accusor"); 1556, Dyer, 134*a*, note (under the treason statute requiring two accusers, "an accusation under the hands of the accusers or testified by others is sufficient"); 1628, Coke, 3d Inst. 25 ("The strange conceit in 2 Mar. [Thomas's Case], that one may be an accuser by hearsay, was utterly denied by the justices in Lord Lumley's Case [1572]", "reported by the lord Dier under his own hand, which we have seen, but [is] left out of the print"); approved by Hale, Pleas of the Crown (1680), I, 306, II, 287.

This notion of quantity, as associated with hearsay, is seen also in certain coeval rules on the Continent, declaring (for example) one witness upon personal knowledge to be equal to two or three going upon hearsay (Pertile, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 1, p. 388; Esmein, Histoire de la procédure criminelle en France, 1882, pp. 269, 369).

[26] As reported in Jardine's Criminal Trials, I, 427.

[27] *Infra*, note 33.

guished from their other sources of information) gave a new importance to such evidential material; and (*c*) that there was thus much debate as to the sufficiency of witnesses in number and kind, and that incidentally doubt began to be thrown on the propriety of depending on extra-judicial assertions, either alone or as confirming other testimony given in court.

With this preliminary survey, the process may now be traced of making more precise and comprehensive the general notion against hearsay which thus sprung into consciousness. It will be convenient to consider, first, hearsay statements in general, and, next, hearsay statements under oath; for the rule as it affected the latter had both an earlier origin and a slower development.

I. *Hearsay statements in general.* (1) In the first place, then, there is no exclusion of hearsay statements. Through the 1500s and down beyond the middle of the 1600s, hearsay statements are constantly received, even against opposition.[28] They are often objected to by accused persons, and are sometimes said by the judge to be of no value or to be insufficient of themselves, and are even occasionally excluded. In short, they are regarded as more or less questionable, and the doubt particularly increases in the 1600s; but, in spite of all, they are admissible and admitted. Nor is this result due to any abuse or irregularity peculiar to trials for treason or other State prosecutions; it is equally apparent in the rulings in the few civil cases that are reported. The practice is unmistakable.

(2) In the meantime, the appreciation of the impropriety of using hearsay

[28] 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, Jardine's Crim. Trials, I, 157, 158, 159, 179, 201, 206, 210 (various letters and other hearsay statements are used against the accused); 1590, Stranham *v.* Cullington, Cro. Eliz. 228 (prohibition for suing for tithes: "they said that hearsay shall be allowed for a proof"); 1601, Webb *v.* Petts, Noy 44 ("the witness said that for a long time, as they had heard say, the occupiers . . . had used to pay annually to the parson 3s."; held that "a proof by hearsay was good enough to maintain the surmise within the statute 2 Ed. 6"); 1622, Adams *v.* Canon, Dyer 53*b*, note (a hearsay admissible for one witness; see quotation *supra*); 1632, Sherfield's Trial, 3 How. St. Tr. 519, 536 (information in the Star Chamber against a vestryman of New Sarum for breaking a painted glass window; to show that the Bishop had warned him not to do it, one of the Court offered a letter from the Bishop, "but this being out of course, and a thing to which the defendant could make no answer, was not approved of"); 1640, Earl of Strafford's Trial, 3 How. St. Tr. 1381, 1427 ("they prove very little but what they took upon hearsays"); 1644, Archbishop Laud's Trial, 4 How. St. Tr. 315, 383 (argued for defendant: "He adds what Sir Thomas Ailsbury's man said. . . . But why doth he rest upon a hearsay of Sir Thomas Ailsbury's man? Why was not this man examined to make out the proof?"), 391 (argued for defendant: "Of all which there is no proof but a bare relation what Mr. H., Mr. I., and Sir W. B. said; which is all hearsay and makes no evidence, unless they were present to witness what was said [by me to them]"), 395 (argued for defendant: "This is but Sir E. P.'s report, and so no proof, unless he were produced to justify it"); again at 399, 402, 432, 534, 538 (in all these instances the hearsay statements are received); 1663, Moders' Trial, 6 How. St. Tr. 273, 276 (bigamy; a witness testified that he once saw the first husband, not produced, "and the man did acknowledge himself to be so"; the Court: "Hearsays must condemn no man; what do you know of your own knowledge?" but the statement gets in); 1669, Hawkins' Trial, 6 How. St. Tr. 921, 935 (collateral charge that defendant picked N.'s pocket; N.'s statements to that effect were given by the witness, in spite of the defendant's demand that N. be called; Sir Matthew Hale was judge); 1670, Style's Practical Register 173 (citing a case of 1646).

For the history and theory of the Hearsay rule on the Continent, see a learned and exhaustive essay by Eugen Kulischer, "Das Zeugnis von Hörensagen" (Zeitschrift für privat- und öffentliches Recht, 1907, XXXIV, 169).

statements by persons not called is growing steadily. By the second decade after the Restoration, this notion receives a fairly constant enforcement, both in civil and in criminal cases.[29] There are occasional lapses;[30] but it is clear that by general acceptance the rule of exclusion had now become a part of the law as well as of the practice. There even is found[31] a counsel for the prosecution stopping "for example's sake" its violation by his own witness. No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place.[32]

[29] It is worth noting that the not uncommon belief which attributes most of the reforms in the rules of evidence in criminal trials to the Commonwealth of 1649 or the Revolution of 1688 is hardly well founded. In the present case, for example, the new idea comes in with the Restoration régime, 1660–1685; and this is generally true of the other matters of improvement (as noted *post*, §§ 2032, 2250). The Commonwealth went on with very much the same practices as the royal government which it overthrew; witness the argument (*infra*) of Mr. Prynne, who was one of the most vigorous opponents of Charles I. At the Restoration, much warning seems to have been taken, and it is then that the decided amelioration is apparent; the trials of the Regicides, for instance, were (contrary to the general impression) almost models of fairness, considering the prior practice. What was left to be done was done under Anne, after 1700, rather than under William. Even Scroggs, in 1678, did not much violate existing rules; and the real abuses and irregularities occurred chiefly in the terrible time of unrest and mutual suspicion, just before and after the Duke of York's accession, and at the hands of the unscrupulous Jefferies, whose faults were chiefly his own and abnormal.

Compare the similar opinion of Professor Willis-Bund, State Trials for Treason, 1882, vol. II, Introd. xx.

[30] *E.g.* in the cases *infra* of 1680, 1681, 1682, 1686.

[31] *E.g.* in Colledge's Trial, *infra*.

[32] 1673, Pickering *v.* Barkley, Vin. Abr. "Evidence", P, b, 1, vol. XII, 175 (to show the mercantile usage construing a policy, "a certificate of merchants" was read in court; but "the Court desired to have the master of the Trinity-house and other sufficient merchants to be brought into court to satisfy the Court 'viva voce'"); 1676, Rutter *v.* Hebden, 1 Keb. 754 (objected that a contradictory statement of a witness could not be proved because not made on oath; but allowed); 1679, Bishop Burnet on the Popish Plot, 6 How. St. Tr. 1406, 1422, 1427 (refers to a part of Dugdale's testimony as "only upon hearsay from Evers, and so was nothing in the law"); 1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1325, 1336 (a deceased person's statements as to persons injuring him, received; one of the statements was offered as a death-bed declaration; and counsel adds, "there are little circumstances which are always allowed for evidence in such cases, — where men receive any wounds, to ask them questions while they are ill, about it, who hurt them"); 1678, Ireland's Trial, 7 How. St. Tr. 79, 105 (the defendant, to prove an alibi at St. Omer's college in France, offered to bring "an authentic writing" "under the seal of the college and testified by all in the college, that he was there all the while"; Atkins, J.: "Such evidences as you speak of we would not allow against you; therefore we would not allow it for you"; afterwards, members of the college were produced in person); 1679, Samson *v.* Yardley, 2 Keb. 223 (appeal of murder; what a witness, now dead, swore on the indictment was excluded; "what the witness dead had said generally, being but hearsay of a stranger, and not of a party [in] interest, they would not admit, which might be true or false"); 1680, Anderson's Trial, 7 How. St. Tr. 811, 865 (charge of being a priest and saying mass at the Venetian ambassador's; a letter of the ambassador, then out of the kingdom, denying his saying of mass, not admitted for the defendant); 1680, Gascoigne's Trial, 7 How. St. Tr. 959, 1019 (one Barlow being offered as a witness, but being apparently afraid to speak, one Ravenscroft offered to tell what Barlow had told him the night before; Pemberton, J.: "You must not come to tell a story out of another man's mouth"; yet after some objection he was allowed to tell the whole story); 1681, Plunket's Trial, 8 How. St. Tr. 447, 458 (other persons' statements of defendant's acts, admitted without objection), 461 (Witness: "Mr. L. B. told me that he did hear of the French —"; Pemberton, L. C. J.: "Speak what you know yourself"); 1681, Busby's Trial, 8 How. St. Tr. 525, 545 (witness offers an affidavit of a register of births; Street, B.: "You ought to have brought the man along with you to testify it"; Witness: "The sexton is an old man about 60 years of age and could not come"; Street, B.: "That does not signify anything at all"); 1681, Colledge's Trial, 8 How. St. Tr. 549, 603 (seditious publication; the Attorney-General himself stops a prosecution-witness who tells what the printer said as to the author), 628 (another counsel for the prosecution does the same; "we must not permit this for example's sake, to tell what others said"), 663 (counsel for prosecution: "You

(3) At the same time, and along with this general rule of exclusion, there is still a doctrine, clearly recognized, that a hearsay statement may be used as confirmatory or corroboratory of other testimony.[33] Here we have the survival of that notion about sufficiency and quantity, already referred to. A hearsay statement, by itself, is insufficient as the sole foundation for a conclusion; by itself it "can condemn no man", and so, by itself, it is excluded; but, when it merely supplements other good evidence already in, it is receivable. This limited doctrine as to using it in corroboration survived for a long time in a still more limited shape, *i.e.* in the rule that a witness's own prior consistent statements could be used in corroboration of his testimony on the stand;[34] and the latter was probably accepted as late as the end of the 1700s.[35]

(4) In the meantime, the general rule excluding hearsay statements comes

must not tell a tale of a tale of what you heard one say"); 1682, Lord Grey's Trial, 9 How. St. Tr. 127, 136 (hearsay statements plentifully received without objection); 1684, Hampden's Trial, 9 How. St. Tr. 1053, 1094 (hearsay statements excluded; Jefferies, L. C. J.: "You know the law; why should you offer any such thing?"); 1684, Braddon's Trial, 9 How. St. Tr. 1127, 1181, 1189 (Mr. J. Withins: "We must not hear what another said that is no party to this cause"); 1686, Lord Delamere's Trial, 11 How. St. Tr. 509, 548 (hearsay statements put in without check); 1692, Stainer *v.* Droitwich, 1 Salk. 281 (an exception to the hearsay rule discussed as such); 1693, Thompson *v.* Trevanion, Holt 286, Skinner 402 (a hearsay statement, received apparently as an exception); 1696, Charnock's Trial, 12 How. St. Tr. 1377, 1454 (Holt, L. C. J., alludes to the objection as well founded, and informs the jury when charging them: "Therefore I did omit repeating [to you] a great part of what D. said, because as to him it was for the most part hearsay"); 1697, Pyke *v.* Crouch, 1 Ld. Raym. 730 (if a testator sends a duplicate of his will to a stranger "and the stranger sends back a letter" mentioning its receipt, "after the death of the stranger such letters may be read as circumstantial evidence" to prove that such a duplicate was sent).

[33] 1679, Knox's Trial, 7 How. St. Tr. 763, 790 (the witness' former statement offered; L. C. J. Scroggs: "The use you make of this is no more but only to corroborate what he hath said, that he told it him while it was fresh and that it is no new matter of his invention now"); 1683, Lord Russell's Trial, 9 How. St. Tr. 577, 613 (L. C. J. Pemberton: "The giving evidence by hearsay will not be evidence": Attorney-General: "It is not evidence to convict a man if there were not plain evidence before; but it plainly confirms what the other swears"); 1692, Cole's Trial, 12 How. St. Tr. 876 (Mrs. Milward: "My lord, my husband [now deceased] declared to me that he and Mr. Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche"; Mr. J. Dolben: "That is no evidence at all, what your husband told you; that won't be good evidence, if you don't know somewhat of your own knowledge"; Mrs. Milward: "My lord, I have a great deal more that my husband told me to declare"; Mr. J. Dolben: "That won't do; what if your husband had told you that I killed Dr. Clenche, what then? This will stand for no evidence in law; we ought by the law to have no man called in question but upon very good grounds, and good evidence upon oath, and that upon the verdict of twelve good men." Nevertheless, he let her relate more of what her husband told her about the plot to kill Dr. Clenche; in charging the jury, he referred to it as "no evidence in law . . . especially when it is single, without any circumstance to confirm it"); 1725, Braddon, Observations on the Earl of Essex' Murder, 9 How. St. Tr. 1229, 1272 ("It is true, no man ought to suffer barely upon hearsay evidence; but such testimony hath been used to corroborate what else may be sworn").

[34] 1682, Lutterell *v.* Reynell, 1 Mod. 282 (it was proved that one of the witnesses for the plaintiff had often "declared the same things" as now; and L. C. B. Bridgman "said, though a hearsay was not to be allowed as direct evidence, yet it might be made use of to this purpose, viz. to prove that W. M. was constant to himself, whereby his testimony was corroborated"); *ante* 1726, Gilbert, Evidence, 149 ("A mere hearsay is no evidence: . . . but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions; . . for such evidence is only in support of the witness that gives in his testimony upon oath").

[35] 1767, Buller, Trials at Nisi Prius, 249, and cases cited *ante*, § 1123.

over into the 1700s as something established within living memory. It is clear that its firm fixing (as above observed) did not occur till about 1680; and so in the treatises of the early 1700s the rule is stated with a prefatory "It seems."[36] By the middle of the 1700s the rule is no longer to be struggled against;[37] and henceforth the only question can be how far there are to be specific exceptions to it.

What is further noticeable is that in these utterances of the early 1700s the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that "the other side hath no opportunity of a cross-examination." This reason receives peculiar emphasis in the final and comprehensive application of the rule to a peculiar class of statements made prior to the trial in hand, namely, statements made under oath. These come now to be considered.

II. *Hearsay statements under oath.* (1) As early as the middle of the 1500s a first step had been attempted towards requiring the personal production of those who had already made a statement upon oath. This requirement was limited to trials for treason; and the circumstances leading up to its introduction are described in the following passage:

1696, Bishop *Burnet*, arguing in the House of Lords, at *Fenwick's Trial*, 13 How. St. Tr. 537, 752: "There passed many attainders in that reign [of H. VIII], only upon depositions that were read in both houses of parliament. It is true, these were much blamed, and there was great cause for it. . . . In Edward VI's trial, the lord Seymour was attained in the same manner [*sc.* without being heard], only with this difference, that the witnesses were brought to the bar and there examined, whereas formerly they proceeded upon some depositions that were read to them. At the duke of Somerset's trial [in 1551], which was both for high treason and for felony, in which he was acquitted of the treason but found guilty of the felony, depositions were only read against him, but the witnesses were not brought face to face, as he pressed they might be.[38] Upon which it was that the following parliament enacted that the accusers (that is, the witnesses) should be examined face to face, if they were alive."[39]

[36] 1716, Hawkins, Pleas of the Crown, II, 596, b. II, c. 46, § 44 ("As to the Fifth Point, viz. of parol evidence, and how far hearsay shall be admitted. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination"); 1736, Bacon, Abridgment, Evidence, (K) ("It seems agreed that what another has been heard to say is no evidence, because the party was not on oath; also, because the party who is affected thereby had not an opportunity of cross-examining").

[37] 1701, Captain Kidd's Trial, 14 How. St. Tr. 147, 177 (Witness: "Here is a certificate [of my reputation] from the parish where I was born"; L. C. B. Ward: "That will signify nothing; we cannot read certificates; they must speak 'viva voce'"); 1716, Earl of Wintoun's Trial, 15 How. St. Tr. 804, 856; 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 323, 455; 1725, L. C. Macclesfield's Trial, 16 How. St. Tr. 767, 1137; 1743, Craig dem. Annesley *v.* Anglesea, 17 id. 1160 (a statement of Mrs. P., deceased, as to a material fact was offered; after some debate, the Court excluded it "on the principal reason that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining"); 1754, Canning's Trial, 19 How. St. Tr. 383, 406 (rule undisputed).

[38] This may be seen in the duke's trial, 1 How. St. Tr. 520.

[39] Substantially the same account as Bishop Burnet's is given in Rastal's Statutes (?), I, 102, as quoted in a note to the Duke of Somerset's Trial, 1 How. St. Tr. 520; but no edition of any of Rastal's books seems to contain such a passage.

The statute of 1553, thus referred to as first requiring the witness' production on the trial, was St. 5 Edw. VI, c. 12, § 22.[40] This was followed by a similar provision in 1554, St. 1 & 2 P. & M. c. 10, § 11.[41] But this early step was premature; the innovation was too much in advance of the times; and it had only a short life. From the very year of the latter enactment, until the end of the succeeding century, it remained by judicial construction a dead letter. The means by which this result was reached was another section (§ 7) in the act of Philip and Mary, providing that trials for treason should be conducted "according to the common law", *i.e.* without any requirement of two witnesses or of producing witnesses; so that since the requirement of § 11 applied only to trials for the treasons defined by that very statute, the Crown, by bringing prosecutions on other definitions of treason (common law or statutory), was free from any such requirement.[42]

This judicial construction was perhaps strained, and was abandoned after the Revolution and under William III's government. Nevertheless it was clear law for a century and a half; and, when Sir Walter Raleigh insisted so urgently on the production of Lord Cobham, he was truly answered by Chief Justice Popham that "he had no law for it."[43]

[40] "Which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that which they have to say to prove him guilty", unless he confesses.

[41] Upon arraignment for treason, the persons "or two of them at the least", who shall declare anything against the accused "shall, if they be then living and within the realm, be brought forth in person before the party arraigned if he require the same, and object and say openly in his hearing what they or any of them can against him."

[42] 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873, 880, 883 (the defendant in vain invoked the treason-statute); 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, 978, 992 (by the prosecuting Serjeant: "the law was so for a time, in some cases of treason, but since the law hath been found too hard and dangerous for the prince, and it hath been repealed"): 1586, Abington's Trial, 1 How. St. Tr. 1142, 1148 ("You stand indicted by the common law and the statute of 25 Edw. III . . . and in that statute is not contained any such proof"); 1603, Raleigh's Trial, 2 How. St. Tr. 16, 18; Jardine's Cr. Tr., I, 418, 420 (Popham, C. J.: "Sir Walter Raleigh, for the statutes you have named, none of them help you. The statutes of the 5th and 6th of Edward VI and of the 1st Edward VI are general; but they were found to be inconvenient and are therefore repealed by the 1st and 2d of Philip and Mary, which you have mentioned, which statute goes only to the treasons therein comprised, and also appoints the trial of treasons to be as before it was at the common law"); 1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1401 (same rule). Compare the decisions by which the same result was reached for the requirement of two witnesses (*post*, § 2032). There was another similar statute about the same time, but it apparently was ineffective for the same reason: 1558, St. 1 Eliz. c. 1, § 27 (no person to be convicted of ecclesiastical offences or treason under this act — against heresy and foreign church authority — unless the two required witnesses, or such as are living and within the realm, "shall be brought forth in person face to face before the party so arraigned, and there shall testify and declare what they can say against the party so arraigned, if he require the same").

[43] The learned Mr. Jardine, in his Criminal Trials, I, 514, has vindicated this trial against the unjust criticisms of later times: "This doctrine and practice [of 1690 and later], however, though directly the reverse of those which preceded them, were not founded upon any legislative provision or any recorded decision of the Courts. But at the period of Raleigh's trial, there was, perhaps, no point of law more completely settled, than that the statute of the 1 & 2 Philip and Mary, c. 10, had repealed the provisions of the statute of the 5th of Edward VI, respecting the production of two witnesses in cases of treason. . . . If, therefore, the Judges who presided on Raleigh's trial were to abide by the solemn and repeated decisions of their predecessors, and the uniform practice of the Courts of law for centuries, they could do no otherwise, consistently with their duty, than decide as they did."

Thus this limited attempt to require personal production, instead of 'ex parte' depositions by absent persons, perished at its very birth. So far as this statutory attempt at the beginnings of a hearsay rule is concerned, it played no further part at all; except perhaps as furnishing a moral support for the opinion which was already working towards a general hearsay rule.

(2) That at this time, then (say, until the early 1600s), the general absence of any hearsay rule (as already noted) allowed equally the use of this specific class, namely, extra-judicial statements taken under oath, is clear enough. It appears as well in ordinary felony trials[44] as in treason trials.[45]

(3) It had, of course, always been usual (though, as just seen, not essential) to have the deponent present at the trial; but in such cases the general practice in State trials seems to have been, first to read aloud his sworn statement to the jury, and then to have him confirm it by declaring that it was "willingly and voluntarily confessed without menace or torture or offer of torture."[46] This went on till well into the 1600s. The sworn statement was still the main or the sufficient thing; but it was thought proper to have it openly adopted by the witness, so as to show that the prosecution did not fear a recantation. Thus the emphasis came gradually to be transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essential thing.

(4) About this time, however, and markedly by the middle of the 1600s (coincidently with the general movement already considered), the notion tends to prevail, and gradually becomes definitely fixed, that *even an extra-judicial statement under oath should not be used* if the deponent can be personally had in court. This much has now been gained; and it is seen in civil and in criminal trials equally.[47] About this time the great dramatist reveals the arrival of a popular notion of the justice of the rule:

[44] 1615, Weston's Trial, 2 How. St. Tr. 911, 924; 1615, Elwes' Trial, 2 How. St. Tr. 935, 941.

[45] To the instances of this already cited above, construing the treason statute, may be added the following: 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, *passim;* 1586, Mary Queen of Scot's Trial, 1 How. St. Tr. 1162, 1183; 1590, Udall's Trial, 1 How. St. Tr. 1271, 1302. Mr. Jardine, in his Criminal Trials, I, 514, says: "At the time of Raleigh's trial, most of the circumstances objected to by Sir John Hawles [under William III, about 1696] were strictly legal and justifiable: for instance, at that time, the depositions of absent persons were read as the usual course of evidence which had prevailed for centuries in State prosecutions; this mode of proof constituted the general rule, and the oral examination of witnesses was the exception, which was in practice sometimes allowed, but was as often refused, and never permitted but by the consent of the counsel for the prosecution." He also asserts (Introd., I, 25) that "the ordinary mode of trying persons indicted for murder, robbery, or theft" forbade the use of depositions; but his only authority for this statement is Sir Thomas Smith's description of a trial, which does not sustain him; and the citations in the note above seem to disprove his belief.

[46] The following list is only a selection: 1586, Babington's Trial, 1 How. St. Tr. 1127, 1131; 1589, Earl of Arundel's Trial, 1 How. St. Tr. 1250, 1252; 1600, Earl of Essex' Trial, 1 How. St. Tr. 1333, 1344; 1616, Earl of Somerset's Trial, 2 How. St. Tr. 965, 978. Compare the cases cited *ante*, § 818, under Confessions. The following case indicates a growing inclination to insist on this 'viva voce' confirmation where the original examination was technically defective: 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 402 ("certain examinations having been taken by the lords without an oath, it was resolved [by all the judges] those could not be used until they were repeated upon oath").

[47] The first suggestion of this view seems to occur in the following cases: 1583, Puckley v. Bridges, Choice Cases in Ch. 163, quoted

Richard Second, IV, 1.
Bishop. "Thieves are not judged but [= unless] they are by to hear,
Although apparent guilt be seen in them."
1613 (*circa*) *King Henry VIII*, II, 1:
1 *Gent.* . . . "The great duke
Came to the bar. . . .
The king's attorney, on the contrary,
Urged on the examinations, proofs, confessions,
Of divers witnesses; which the duke desired
To have brought 'viva voce' to his face;
At which appeared against him his surveyor," etc.

However, the deponent's statement can still be used, if he cannot be had in person, — for example, because of his death (and there is much vacillation of opinion as to the sufficiency of other causes, such as absence beyond sea); and nothing is as yet said as to the further objection that the deposition was not taken subject to cross-examination. The significant feature of this stage is the thought that the hearsay statement is usable only in case of necessity, *i.e.* the deponent ought to be produced if he can be. But the thought that in any case there must indispensably have been an opportunity for cross-examination has not been reached.

1 Swanst. 171 (witnesses deceased and beyond seas; depositions in the Star Chamber, etc. used); 1590, Udall's Trial, 1 How. St. Tr. 1271, 1283 (examination on oath of one T. read, T. being beyond seas; but it does not appear that the latter circumstance was essential). In Raleigh's Trial (1603), 2 How. St. Tr. 16, 18, Raleigh is willing to concede that Lord Cobham's deposition could have been used, "where the accused is not to be had conveniently"; yet there it was used, though Cobham was "alive, and in the House."

But thereafter the precedents indicate a general acceptance of the notion stated above: 1612, Tomlinson *v.* Croke, 2 Rolle's Abr. 687, pl. 3 (deposition receivable if the deponent is dead, not if he is living); 1613, Fortescue & Coake's Case, Godb. 193 (depositions in chancery not to be read at law "unless affidavit be made that the witnesses who deposed were dead"); 1629, Anon., Godb. 326 ("if the party cannot find a witness", then his deposition "in an English court, in a cause betwixt the same parties", may be read); 1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 421 (a defendant in rape demanded that the lady be "produced face to face; which she was; who by her oath 'viva voce' satisfied the audience"); 1636, Dawby's Case, Clayt. 62 (admitted, when dead); 1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 672 (most of the witnesses spoke 'viva voce'; a deposition was used of one who "was in town but he could not stay"); 1658, Mordant's Trial, 5 How. St. Tr. 907, 922 (all sworn except one, an escaped prisoner whose deposition was used); 1666, Lord Morley's Case, Kel. 55, 6 How. St. Tr. 770 (depositions before a coroner might be read if the deponent were dead, or unable to travel, or detained by defendant; but not if unable to be found); 1673, Blake *v.* Page, 1 Keb. 36 (speaks of the affidavit of an absent person as allowable, but apparently by consent only); 1678, Bromwich's Case, 1 Lev. 180 (like Lord Morley's Case); 1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1338 (a physician offers his prior deposition before the magistrate; the Court: "You must give it again 'viva voce'; we must not read your examination before the Court"); 1685, Oates' Trial, 10 How. St. Tr. 1227, 1285 (deposition of a witness not found after search, excluded); 1692, Harrison's Trial, 12 How. St. Tr. 833, 851 (deposition taken by the coroner in the defendant's absence, read because the defendant had eloigned the deponent). When this necessity for the witness' absence could be foreseen (as when a deposition 'de bene' was asked for before trial), there are some early indications that cross-examination would be a required condition: 1606, Matthews *v.* Port, Comb. 63 ("The witnesses may be examined [prior to trial] before a judge, by leave of the Court, as well in criminal causes as in civil, where a sufficient reason appears to the Court, as going to sea, etc., and then the other side may cross-examine them"); 1662, St. 13 & 14 Car. II, c. 23, § 5 (in certain insurance claims, seamen being often the witnesses, an oath 'de bene' may be administered, "timely notice being given to the adverse party, and set up in the office before such examination, to the end such witness or witnesses may be cross-examined").

(5) By the middle of the 1600s, the orthodox tradition in favor of allowing the use of extra-judicial sworn statements had thus become decidedly weakened and was on the point of giving way. Nevertheless, there was still a tradition of orthodoxy; and this tradition was in harmony with the practice of influential modes of trial other than trial by jury in the common-law courts.[48] A fixed rule to the contrary was consciously an innovation; and this innovation, though now on the point of prevailing, remained still to be established and to acquire orthodoxy. From the middle of the century we see the idea still progressing. The state of opinion is illustrated by one of the prosecutions conducted by the anti-Stuart party just before it obtained the upper hand and deposed Charles I:

> 1643, Col. *Fiennes' Trial*, 4 How. St. Tr. 185, 214; the defendant, tried by court-martial, argued that "no paper-deposition ought to be allowed by the law, in cases of life and death, but the witnesses ought to be all present and testify 'viva voce': that he had not had notice of the commission "so that he might cross-examine the witnesses"; then Mr. *Prynn*, for the prosecution, answered, among other things, that in the civil law and courts-martial trials were as usual "by 'testimoniis' [*i.e.* depositions] as by 'testibus viva voce'; that in the Admiralty, a civil law court, as likewise in the Chancery, Star Chamber, and English courts formed after the civil law, they proceed usually by way of deposition; that even at the common law in some cases, depositions taken before the coroner, and examinations upon oath before the chief justice or other justices, are usually given in evidence even in capital cases; that the high Court of Parliament hath upon just occasions allowed of paper depositions in such cases"; and the depositions were "upon solemn debate" admitted.

This case, to be sure, was no precedent for a common-law trial, and it occurred amidst a bitter political controversy; but it sufficiently illustrates the unsettled state of opinion and the tendency of the time.[49] Yet no final settlement came under the Commonwealth, nor under the Restoration, nor directly upon the Revolution.[50]

[48] *Ante* 1635, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Collect. Jurid. 200 ("It is a great imputation to our English courts that witnesses are privately produced", in chancery: pointing out that the ecclesiastical Court does otherwise, and reciting a recent reform of L. C. Egerton that witnesses should be produced before the opponent, "that the other side might examine him also if they please"); 1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 769, 772 (Banks, Attorney-General, arguing in the Star Chamber, says: "The proceedings in this court, as in all other courts, is by examination of witnesses returned in parchment, not 'viva voce'").

[49] A reflection of the English rule in this period is seen in the following colonial records: 1660, Mass. Revised Laws and Liberties, Whitmore's ed., "Witnesses", § 2 (a witness' testimony may be taken before the magistrate, but, if the witness lives within ten miles and is not disabled, it shall not be used "except the witness be also present to be further examined about it; provided also that in capital cases all witnesses shall be present, wheresoever they dwell"; repeated in the Revision of 1672); 1692, Proprietor *v.* Keith, Pa. Colon. Cas. 117, 124 (affidavits were offered to prove the truth of a libel; but the Court "were very unwilling to have them read, saying it was no evidence unless the persons were present in court"; yet they permitted some to be read, since the witnesses could not be present "by reason of the extremity of the weather"). See also Browne's History of Maryland, 84.

[50] Mr. Jardine, in his Criminal Trials, Introd., I, 25, 29, says: "The ancient mode of proof by examinations [under oath of absent persons] continued to be the usual and regular course [in cases of treason or other state offences] during the reigns of Elizabeth, James I, and Charles I. . . . During the Commonwealth the practice of reading the depositions of absent witnesses entirely disappeared, and has never been since revived. . . . It is believed that not a single instance can be produced of the reading of the deposition of an absent witness on the trial of a criminal (except in cases expressly provided for by statute), since the reign of Charles I." It would,

(6) By 1680–1690 (as already noted) had come the establishment of the general rule against unsworn hearsay statements. This must have helped to emphasize the anomaly of leaving extra-judicial sworn statements unaffected by the same strict rule. By 1696, or nearly a decade after the Revolution, that anomaly ceased substantially to exist. A few rulings under the Restoration had foreshadowed this result;[51] but in that year it was definitely and decisively achieved in the trials of Paine and of Sir John Fenwick. The former was a ruling by the King's Bench after full argument, and came in January.[52] The latter, coming in the next November,[53] involved a lengthy debate in Parliament; and, though the vote finally favored the admission of the deposition, the victory of reaction was in appearance only; for the weighty and earnest speeches in this debate must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination, and made it impossible thereafter to dispute the domination of that rule as a permanent element in the law.[54]

however, seem that the instances in note 47, *supra*, show the practice to have been sanctioned even until after the Revolution; Mordant's Trial, above cited, certainly shows that it did not cease during the Commonwealth. Mr. Jardine seems to have had a general but incorrect notion that the older methods ceased with the Commonwealth; for example, that torture did not cease, as he believes it did, has been noticed *ante*, § 818; see also note 29, *supra*.

[51] *Ante* 1668 (no date or name), Rolle's Abr., II, 679, pl. 9 (depositions taken by bankruptcy commissioners, not admitted, "in a suit in which comes in question whether he was a bankrupt or not, or to prove anything depending on it, for the other party could not cross-examine the party sworn, that is the common course"); 1669, R. *v.* Buckworth, 2 Keb. 403 (perjury; testimony of a deceased witness sworn at the trial where the perjury was committed, received; by two judges to one); *ante* 1680, Hale, Pleas of the Crown, I, 306 ("The information upon oath taken before a justice of the peace" is admissible in *felony*, if the deponent is unable to travel, yet in *treason* this is "not allowable, for the statute requires that they be produced upon arraignment in the presence of the prisoner, to the end that he may cross-examine them"); 1688, Thatcher *v.* Waller, T. Jones 53 (deposition before the coroner of one beyond sea, admitted; but held that a deposition before a justice of the peace should not be received; the case of the coroner standing on the ground of a record); 1694, R. *v.* Taylor, Skinner 403 (affidavit not admissible); and the citations at the end of note 47, *supra*.

[52] 1696, R. *v.* Paine, 5 Mod. 163 (libel; a deposition of B., examined by the mayor of Bristol upon oath but not in P.'s presence, was offered; it was objected that "B. being dead, the defendant had lost all opportunity of cross-examining him", and the use of examinations before coroners and justices rested on the special statutory authority given them to take such depositions; the King's Bench consulted with the Common Pleas, and "it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination"; the reports of this case in 1 Salk. 281, 1 Ld. Raym. 729, are brief and obscure).

[53] It is a little singular that R. *v.* Paine is not cited by any of the numerous debaters in Fenwick's Trial. The date of the former is given as Hilary Term, 7 Wm. III, which must have been January, 1696, or ten months before Fenwick's Trial. It is cited in Bishop Atterbury's Trial, in 1723, *infra*.

[54] 1696, Fenwick's Trial, 13 How. St. Tr. 537, 591–607, 618–750 (the sworn statement before a justice of the peace of one Goodman, said to have absented himself by the accused's tampering, was offered on a trial in Parliament; a prolonged debate took place, and this deposition, termed hearsay, was opposed on the precise ground of "a fundamental rule in our law that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence", "by which much false swearing was often detected"; the deposition was finally admitted, Nov. 16, by 218 to 145 in the Commons, and the attainder passed by 189 to 156 in the Commons and by 66 to 60 in the Lords; but it is clear from the debate that many of those voting to receive the deposition did so on the theory that Parliament was not bound to follow the rules of evidence obtaining in the inferior Courts; the speeches claiming that

(7) From this time on, the applicability of the Hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned.[55] From the beginning of the 1700s the writers upon the law assume it as a settled doctrine;[56] and the reason of the rule in this connection is stated in the same language already observed in the history of the rule in general, namely, that statements used as testimony must be made where the maker can be subjected to cross-examination.[57]

(8) There were, however, two sorts of sworn statements which, being already expressly authorized by statute, though not expressly made admissible, might be thought to call for special exemption, namely, the sworn examination of *witnesses before justices of the peace* in certain cases, and of *witnesses before a coroner*. That the rule excluding depositions taken without cross-examination should be applied to those of the former sort was not settled until the end of the 1700s.[58] That it should apply to those of the latter sort never came to be conceded at all in England,[59] — at least, independently of statutory regulation in the 1800s; and long tradition availed to preserve the use of these, though only as a distinct exception to a general rule.

(9) That general rule, from the early 1700s, was clearly understood to exclude alike sworn and unsworn statements made without opportunity to the opponent for cross-examination. From that period the rule could be broadly stated in the words of a judge writing just two centuries later: [60] "Declara-

those rules would admit it were half-hearted and evasive; moreover, the prosecution only ventured (595) to offer it as "corroborating evidence"; see *supra*, note 33).

[55] The last remnant of hesitation is found in Bredon *v.* Gill, 1697, 2 Salk. 555, 1 Ld. Raym. 219, 5 Mod. 279 (question whether on statutory appeal from excise-commissioners to appeal-commissioners depositions below could be used or the witnesses should "be brought in again personally and be examined 'viva voce'"; ruled at first that "the law does not make 'viva voce' evidence necessary, unless before a jury; in other cases depositions may be evidence"; but afterwards, 'mutata opinione', the Court required examination 'de novo'). But the persistence with which the older notion lingered on is seen in Bishop Atterbury's Trial, 16 How. St. Tr. 323, 463, 471, 495, 503, 523, 536, 595, 607, 608, 616, 673; here an examination before the Council, not on oath, of one since dead, was on an impeachment voted by a majority of the Lords to be received; but the vote was clearly the result of hot partisanship, and the managers of the impeachment conceded that their evidence was not legal; in this trial the first citation of R. *v.* Paine occurs, at p. 536.

[56] 1730, Emlyn, Preface to State Trials, 1 How. St. Tr. xxv ("The excellency therefore of our laws above others I take to consist chiefly in that part of them which regards criminal prosecutions. . . . In other countries . . . the witnesses are examined in private and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present and at liberty to cross-examine them"); *ante* 1726, Gilbert, Evidence, 58 ff.; 1747, Eade *v.* Lingood, 1 Atk. 203 (deposition before bankruptcy commissioners, excluded).

[57] See the quotations in the preceding six notes.

[58] 1739, R. *v.* Westbeer, 1 Leach Cr. L., 4th ed., 12 (deceased accomplice's information upon oath, admitted, though it was objected that the defendant "would lose the benefit which might otherwise have arisen from cross-examination"); 1762, Foster, Crown Law, 328 (the eminent author regards a deceased deponent's examination before either coroner or justices as admissible, not discriminating as to the accused's presence and cross-examination); 1789, R. *v.* Woodcock, 1 Leach Cr. L., 4th ed., 500 (justice of the peace's examination of the victim of an assault, excluded); 1790, R. *v.* Eriswell, 3 T. R. 707 (justice of the peace's examination of a pauper as to his settlement; a divided Court); 1801, R. *v.* Ferryfrystone, 2 East 54 (the excluding opinion of the preceding case confirmed).

[59] R. *v.* Eriswell, *supra;* and cases cited *post*, § 1374.

[60] 1889, Vann, J., in Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2.

tions under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence."

One noteworthy consequence, having an important indirect influence on other parts of the law of Evidence, was the addition of a new activity to the accepted functions of the counsel for an accused person. In 1695 [61] counsel had been allowed, in treason only, to make full defence for the accused; but until 1836 [62] no law allowed this in felony. Yet as soon as the right of cross-examination was established, it was indispensable that trained counsel should be permitted to conduct it, if it were to be effective.[63] And so in a short time this practice (without technical sanction) forced itself on the judges in criminal trials:

> 1883, Sir *James Stephen*, History of the Criminal Law, 1, 424: "The most remarkable change introduced into the practice of the courts [from the middle of the eighteenth century] was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. . . . In Barnard's trial [in 1758] his counsel seem to have cross-examined all the witnesses fully. . . . On the other hand, at the trial of Lord Ferrers two years later, the prisoner was obliged to cross-examine the witnesses without the aid of counsel. . . . The change [of law by the statute of 1836] was less important than it may at first sight seem to have been."

Indirectly, this resulted speedily in a new development, to a degree before unknown, of the art of interrogation and the various rules of Evidence naturally most applicable on cross-examinations, — particularly, the impeachment of witnesses.[64]

Furthermore, it resulted ultimately in the breakdown of the old fixed tradition that a criminal trial must be finished in one sitting. The necessary sifting of testimony by cross-examination took double and treble the time used of yore. Under vast inconvenience, the old tradition was preserved, until at last it yielded, from very exhaustion, to the new necessities.[65]

What we find, then, in the development of the Hearsay rule is: (1) A period up to the middle 1500s, during which no objection is seen to the use by the jury of testimonial statements by persons not in court; (2) then a period of less than two centuries, during which a sense arises of the impropriety of such sources of information, and the notion gradually but definitely shapes itself, in the course of hard experience, that the reason of this impropriety is that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of probing their

[61] St. 7 & 8 Wm. III, c. 3.

[62] St. 6 & 7 Wm. IV, c. 114.

[63] By the prosecuting counsel it had of course already been employed, *e.g.* 1688, Seven Bishops' Trial, 12 How. St. Tr. 183.

[64] As noted *ante*, § 8.

[65] "Mr. Erskine made his celebrated speech in Lord George Gordon's case, 1781, after midnight, and the verdict was given at 5.15 A.M., the Court having sat from 8 P.M. the previous day. In 1794, in Hardy's case, the Court sat from 8 till past midnight" (Sir H. B. Poland, A Century of Law Reform, 1901, p. 63). Until the trial of Hardy, in 1794, "there had not yet been an instance of a trial for high treason that had not been finished in a single day" (Campbell, Lives of the Chancellors, 5th ed., VIII, 307). Compare the citations *post*, § 1864.

trustworthiness by means of cross-examination; (3) Finally, by the beginning of the 1700s, a general and settled acceptance of this rule as a fundamental part of the law.[66]

Such, in brief, seems to have been the course of development of that most characteristic rule of the Anglo-American law of Evidence, — a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure.

§ 1365. **Cross-examination and Confrontation.** The essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of Cross-examination. But a process commonly spoken of as *Confrontation* is also often referred to as an additional and accompanying test or as the sole test.

Now Confrontation is, in its main aspect, *merely another term for the test of Cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i.e.* it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable. The details of this distinction are elsewhere to be examined (*post,* § 1395); it is enough to note here that, so far as confrontation is an indispensable element of the Hearsay rule, it is merely another name for the opportunity of cross-examination.

§ 1366. **Division of Topics.** An exposition of the Hearsay rule embraces four general topics:

I. The Hearsay rule's requirements, and their satisfaction; *i.e.* the *detailed rules* for application of the tests of *Cross-examination* and *Confrontation;*

II. The kinds of assertions admitted as *Exceptions* to the Hearsay rule;

III. Utterances, not being testimonial assertions, to which the Hearsay *rule is not Applicable;*

IV. Hearsay rule as Applicable to Statements *of Members of the Tribunal itself.*

[66] It therefore does not date back so far as our judges have sometimes fondly predicated, — "to Magna Charta, if not beyond it", for instance (Anderson v. State, 89 Ala. 12, 7 So. 429; 1890).

SUB-TITLE I: THE HEARSAY RULE SATISFIED

TOPIC I: BY CROSS-EXAMINATION

CHAPTER XLIV.

IN GENERAL

§ 1367. **Cross-examination as a Distinctive and Vital Feature of our Law.** For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found

increasing strength in lengthening experience.[1] Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediæval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. "You can do anything," said Wendell Phillips, "with a bayonet — except sit upon it." A lawyer can do anything with a cross-examination, — if he is skilful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may "make the worse appear the better reason, to perplex and dash maturest counsels",— may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.[2]

Striking illustrations of its power to expose inaccuracies and falsehoods are plentiful in our records;[3] and it is apparent enough, in some of the great failures of justice in Continental trials, that they could hardly have occurred under the practice of effective cross-examination.[4]

The special weakness of Chancery procedure (which followed Continental traditions) lay in its obstacles to an effective cross-examination.[5] The praise

§ 1367. [1] Approved per Wheeler, C. J., in Bishop *v.* Copp, 1921, 96 Conn. 157, 114 Atl. 682.

[2] Mr. Bentham affirms this in the quotation *post*. Such also was the opinion (expressed in 1890) of an eminent member of the Tokyo Bar, Mr. Masujima, who had entered the Bar at the Middle Temple, London, and had enjoyed an opportunity of comparing the methods there learned with those of his brethren who had been trained in France and Germany. In Continental practice, the examination of witnesses is in theory conducted by or through the judge, by repetition of questions, and in practice cross-examination is so casual or so feeble as to be a negligible quantity. The Common Law Practice Commissioners of 1853 — a body including the eminent names of Jervis, Cockburn, Martin, Bramwell, Willes — declared "the circumstances which give to the system of English procedure its peculiar and characteristic merits" to be 'viva voce' interrogation, cross-examination, publicity, examination in the presence of the tribunal."

[3] See *ante*, §§ 782, 990–996, 1005–1006, 1260, *post*, § 1368, for examples.

[4] For example, in some of the trials set out in the Appendix to Stephen's History of the Criminal Law, vol. I.

Conversely, in the Dreyfus trial (1899), the exposure of the conspirators' particular frauds was due almost entirely to M. Labori's cross-examination.

[5] 1827, Bentham, Rationale of Judicial Evidence, b. III, c. 16 (Bowring's ed. vol. VI, p. 491); 1837, Story, J., in Smith *v.* Burnham, 2 Sumn. 612, 623; 1877, Langdell, Equity Pleading, § 56 ("It is not surprising therefore that the mode of taking testimony in equity fell into disrepute and finally broke down"); 1901, Mr. Augustine Birrell, A Century of Law Reform, p. 189; Mr. W. Blake Odgers, ib. 222 ("Cross-examination under such conditions became a farce"); and the citations *post*, § 1885.

Mr. (Assistant District Attorney) Arthur Train points out the analogous failures of cross-examination through an interpreter ("The Prisoner at the Bar", 1906, p. 239); "It is 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."

of cross-examination and its efficacy as a fundamental test of truth have often been the subject of comment and exposition by our judges and jurists:

Ante 1680, Sir *Matthew* HALE, L. C. J., in his History of the Common Law, c. 12: "The excellency [in English law] of this open course of evidence to the jury in presence of the judge, jury, parties, and council, and even of the adverse witnesses, appears in these particulars: . . . 3dly, That by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge. or any of the jury, or parties, or their council attornies, to propound occasional questions, which beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated."

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 198: "Whoever has had an opportunity of attending courts of judicature and also of seeing the private examinations which are taken upon many of the occasions above alluded to, must be convinced of the great danger of suffering any public or private interests to be affected by such examinations. Wherever the narration of a witness may be the subject of objection on account of his veracity, the failure which justice must experience from the want of an opportunity of trying the fact by a minute examination of circumstances open to contradiction, by fixing the witness to time and place and all other topics not comprised in a general sweeping account, will be manifest to the most cursory observers. . . . But even when all suspicion of veracity is supposed to be out of the question, how very unsatisfactory is the 'ex parte' account of a witness taken under circumstances in which the adverse had not a fair opportunity of cross-examination. . . . The decision of the event by the materiality of facts disclosed on cross-examination is a matter of perpetual occurrence. . . . The experience of every lawyer must furnish many instances of a set of cut-and-dried depositions being unable to stand the test of an open cross-examination."

1811, BAYLEY, J., in *Berkeley Peerage Case*, 4 Camp. 405: "Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the 'ex parte' statement of any witness and still more of a witness brought forward under the influence of a party interested. In this case A., whose legitimacy is supposed to be in issue, has put to J. S. every question he thought fit, and has therefore obtained from him probably not the whole that J. S. knows upon the subject, but all that will benefit A.; while B., against whom this deposition is to be read, has had no opportunity of proposing a single question to J. S., either to put his veracity to the test, or to bring out any other matter within the knowledge of J. S. which would make in his favor. . . . There may be various other considerations in point of interest to influence the father, which if exhibited by cross-examination might in a great degree impeach, if not completely destroy, the effect of the evidence he has given. So it might turn out on cross-examination that he had made other contrary declarations, perhaps equally solemn as those as to which he has been asked, and that his conduct . . . had been such as to throw an entire discredit on his present asseverations."

1824, Mr. *Thomas Starkie*, Evidence I, 96, 129: "The power given to the party against whom evidence is offered of cross-examining the witness upon whose authority the evidence depends constitutes a strong test of both the ability and the willingness of the witness to declare the truth. By this means the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally scrutinized and examined. Under such circumstances it must be very difficult for a witness to interweave a false account so nicely with the truth as to make it consist and agree with all the other circumstances of the case. . . . However artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection for want of consistency between that

which has been fabricated and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. . . . The power and liberty to cross-examine is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. II, c. IX, and b. III, c. XX: "In the character of a security for the correctness and completeness of testimony, so obvious is the utility and importance of the faculty and practice of interrogation that the mention of it in this view might well be deemed superfluous. . . . By interrogations thus pointed, such a security for completeness is afforded as can never be afforded by any general engagement which can be included in the terms of an oath or other formulary. . . . By interrogation, and not without, is the improbity of a deponent driven out of all its holds. . . . The best possible mode of extracting testimony — the mode which a considerate master of a family would employ when sitting in judgment on the conduct of a servant or a child — in a word, the mode by oral interrogation and counter-interrogation, is a production of English growth. Among those who in its native country are so cordial in their admiration of this mode of trial [by jury], there are not twenty perhaps who at this moment are aware that, in contradiction to Roman jurisprudence, the mode of extracting evidence on this occasion is as peculiar to English procedure as the constitution of the court. The peculiarity of the practice called in England cross-examination, the complete absence of it in every system of procedure grounded upon the Roman (with the single exception of the partial and narrow use made of it in the case of confrontation), is a fact unnoticed till now in any book, but which will be as conclusively as concisely ascertained at any time by the impossibility of finding a word to render it by in any other language. . . . No political institution was ever kept more completely hidden from general observation. All mouths are open in praise of trial by jury; and this is the mode of extraction employed on a trial by jury. It has been observed that somehow or other the ends of justice were more effectually accomplished in that sort of court of which the tribunal called a jury was one feature, and the use of this mode of extracting evidence another; but to which of them the effect was principally to be ascribed is a question that seems never to have presented itself. The feature which consists in the composition of the court seems to have engrossed all the praise of it. 'Trial by jury! Ever blessed and sacred trial by jury! Juries for ever!' is the cry; not 'Trial by oral and cross-examined evidence!' It is, however, to this comparatively neglected feature that that most popular of all judicial institutions would be found to be indebted for the least questionable and most extensively efficient, if not the most important of its real merits."

1806, Livingston, Sen., in *Jackson* v. *Kniffen*, 2 John. 35 (rejecting a testator's hearsay declarations): "Besides the danger of tampering with a person who may be known to have made a will, . . . the right of cross-examining is invaluable and not to be broken in upon. How often is testimony which, when first delivered, appears conclusive and irrefragable, entirely frittered away by this process, — so much so, that a witness well sifted not unfrequently proves more against than in favor of the party that produces him. If one eye-witness be worth more than ten hearsay witnesses, a still higher value must be set on proofs made in presence of both parties, compared with 'ex parte' declarations. In one way, the whole truth comes out; in the other, no more than it may suit the witness or his friends to have disclosed. The not being under oath, although a serious objection, is not with me the greatest, because, admitting everything said to be true, so long as it is in the absence of one and at the solicitation of the other party, it should go for nothing. In what way the will was extorted, what menaces were used, why he was afraid of being murdered, . . . with many other inquiries which a public examination might have suggested, would have afforded the jury a much fairer means of arriving at the truth."

1844, Richardson, J., in *State* v. *Campbell*, 1 Rich. L. 126: "The defendant's cross-examination expresses well the searching process and practical test furnished and intended by this rule of law. . . . Experience has proved that it is, of all others, the most effective,

the most satisfactory, and the most indispensable test of the evidence narrated on the witness' stand. . . . I know of no disagreement, among the expounders of evidence, upon the importance of cross-examination."

1846, NISBET, J., in *McCleskey* v. *Leadbetter*, 1 Ga. 551, 555: "I have been thus particular in planting the power of cross-examination upon a foundation laid in authority, because of the sacred character of that right. The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. Without it, 'viva voce' examinations, and more particularly examinations by commission, would be very unsafe; the ingenious witness, or still more ingenious examiner-in-chief, might easily evade the truth and at the same time avoid the pains and penalties of perjury. The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is very often hid, is among the very strongest bulwarks of justice."

1881, RUFFIN, J., in *State* v. *Morris*, 84 N. C. 764: "All trials proceed upon the idea that some confidence is due to human testimony, and that this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth; and trials are appreciated in proportion as they furnish the opportunities for such critical examinations."

§ 1368. **Theory and Art of Cross-examination.** That the process of cross-examination is thus invaluable, the lawyer well knows. But *why* is it invaluable? Just what does it do, and how? What is the theory of its efficiency?

Upon this we commonly reflect but little. Nevertheless, conscious of its power, we must also be conscious of the reasons for its power, if it is to be used intelligently and effectively. Those reasons can best be seen by contrasting cross-examination, as a stage or mode of presenting evidence, with the two other and alternative modes which co-exist with it. Cross-examination by an opponent is to be contrasted, on the one hand, with proof by *direct examination of the same witness by the proponent*, and on the other hand, with proof *by other witnesses called by the opponent*. What will cross-examination succeed in doing, which either of these modes might fail to do?

I. *The Theory of Cross-examination.* 1. *Proof by direct examination of the same witness, contrasted.* The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (*a*) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (*b*) the facts which diminish and impeach the personal trustworthiness of the witness.

(*a*) The *remaining and qualifying circumstances of the subject of testimony* will probably remain suppressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories (*ante*, §§ 768, 785), and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Some one must probe for the possible (and

usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent.[1] Cross-examination, then, *i.e.* further examination by the opponent, has for its first utility the extraction of the remaining qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him.[2]

(*b*) The *facts which diminish and impeach* the personal *trustworthiness or credit of the witness* will also, in every likelihood, have remained undisclosed on the direct examination. These it is the further function of the opponent's examination to extract. Some of them, no doubt, could be as well or sometimes better proved by other witnesses.[3] But many of them can be obtained only from the witness himself, — particularly those which concern his personal conduct and his sources of knowledge for the case in hand. To this extent, again, cross-examination is vital, *i.e.* it does what must be done and what nothing else can do.[4]

2. *Proof by other witnesses called by the opponent, contrasted.* But so far as the rules of law and the circumstances of the case would permit the same facts, obtainable on cross-examination, to be equally proved by other witnesses cognizant of them, why not use the latter mode? The advantages secured by cross-examination are here mainly dramatic; but they are only less important (in the long run) than the foregoing, and they may be (in individual cases) even more emphatic:

(*a*) The first is that the cross-examination *immediately succeeds* in time the direct examination. In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses, to diminish or to conceal their force. Proving the same facts by new witnesses, after others of the proponent have intervened, might lose this benefit, and the counsel's argument at the close might not be able to replace it.

§ **1368.** [1] It is at this point that the Continental system breaks down, for the cross-interrogation is there chiefly by the judge, who has neither the strong interest nor the full knowledge that are required.

The same Continental theory obtains in the modern procedure of the Catholic Church: Codex Juris Canonici Pii X, 1917, Can. 1772 ("Testes seorsim singuli examinandi sunt. Prudenti tamen judicis arbitrio relinquitur post edita testimonia testes inter se aut cum parte conferre, seu, vulgo, 'confrontare' . . ."); Can. 1773, § 2 ("In examine interrogationes non ab alio quam a judice, vel ab eo qui judicis locum tenet, testibus deferendæ sunt. Quapropter si partes, vel promotor justitiæ, vel defensor vinculi, examini intersint et novas interrogationes testi faciendas habeant, has non testi, sed judici vel eius locum tenenti proponere debent, ut ipse eas deferat").

Some valuable comments on French procedure are given in Professor James W. Garner's "Criminal Procedure in France" (Yale Law J., 1916, XXV, 255).

[2] Examples are given, *infra*, par. II.

[3] At this point the contrast *infra*, par. 2, becomes important.

[4] The foregoing two features have been analyzed and emphasized in the following work: 1885, Mr. J. C. Reed, Conduct of a Lawsuit, 2d ed., 280 ("There are at bottom but two kinds of cross-examination, — the one intended to elicit friendly evidence. . . . to make the witness give a complete narrative, if what has been kept back is favorable to your side, . . . and the other, to show the unreliability of the witness"; in the ensuing pages of the above work, this judicious and admirable author develops in detail these two aspects, from the point of view of the tactical art).

The underlying principle of this was eloquently stated by Mr. Evarts, in his epigram "Truth, if truth, will match all round, with material facts, with moral qualities", in the notable passage on the function of cross-examination, beginning "Truth comports with every fact" (Tilton *v.* Beecher, Official Report, III, 674).

(*b*) But, chiefly, the advantage is that the cross-examined witness *supplies his own refutation*. If qualifying or discrediting answers are extracted from him, they are the more readily believed. No other witness' credit intervenes to add a contingency of mistake. If we believed the answers on the direct examination, we must also believe the answers on cross-examination. Moreover, the dramatic contrast of the former and the latter may multiply and even exaggerate the concrete probative effect of the facts extracted. The difference between getting the same fact from other witnesses and from cross-examination is the difference between slow-burning sulphurous gunpowder and quick-flashing dynamite; each does its appointed work, but the one bursts along the weakest line only, the other rends in all directions.[5]

Cross-examination, then, will do things that cannot be done by questioning other witnesses.

What are the lessons to be drawn from this, the nature of cross-examination and its workings, to the technical use of it? The detailed rules and hints of experience for the art of successful cross-examination are without the present purview; for they involve also many considerations of human character rather than of rules of law.[6] But at least the conclusions that depend upon the evidential theory of cross-examination may be noticed:

II. *The Art of Cross-examination.* Since the direct examination may not have disclosed all the remaining and qualifying circumstances of the issues, as known to the witness, and may also have left unrevealed the deficiencies of his knowledge, the suspicions of his motives, and other elements of discredit (*supra*, par. 1, *a* and *b*), it remains for the cross-examiner to evoke these. But what is he about to evoke? What will be the complexion of these facts when extracted? They *may* be what the cross-examiner hopes. And yet they may not be. In the long run, there will be a large proportion of such facts. But for a given witness it is often otherwise. The cross-examiner may already know what is there waiting for disclosure. But if he does not, he is faced by a contingency. He *may* extract the most confirming circumstances for the proponent's own case, which have somehow been left unmentioned. He *may* demonstrate that the credit of the witness is greater, not less, than was supposed. The great axiom, then, of the art of cross-examination, as dependent on the theory, is that *it is a contingency whether the facts that will actually be extracted will be favorable or unfavorable to the cross-examiner's purposes.* It is here that the art (that is, the technical skill) of cross-examination enters. On this hang all the lesser rules of the art. Hence it is that it must call to its aid so many other elements than mere knowledge of law. Experience of human nature, judgment of chances, knowledge of the case, tact of manner, — all these things, and more, have to do with the art. Yet the theory of the process underlies and influences at every

[5] The quotations from Pigott's cross-examination and Judge Daly's anecdote, *infra*, illustrate this principle.

[6] For a collection of references to writers on the art of cross-examination, see *ante*, § 768.

point. To cross-examine, or not to cross-examine, — that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness' testimony. The greatest cross-examiners have always stated this as the ultimate problem.

III. *Illustrations of the theory and the art.* The theory and the art of cross-examination, as thus outlined, are amply illustrated in the annals of recorded trials. From these, a few examples, of manageable compass, must here suffice. With reference to the foregoing analysis (par. 1, *a* and *b*, *supra*), the examples may be grouped under four heads:[7]

1, *a*. Examples of the *utility of a cross-examination*, in bringing out *desirable facts of the case, modifying the direct examination* or otherwise *adding to the cross-examiner's own case:*

1856, Mr. *David Paul Brown*, in "The Forum", II, 456 (this celebrated Pennsylvanian advocate is describing a case of alleged infanticide by poison, administered by its mother, whose seducer had deserted her): "It was shown that a day or two before the death of her infant, the mother had sent for half-an-ounce of arsenic to a grocer's. That after the death the arsenic was taken to the grocer's, and was weighed, and had lost twenty-four grains in its weight. This circumstance, together with the opinion of the chemist, presented a strong case. Neither was sufficient in itself, but together they were dangerous. Of course, the cross-examination as to the weight was very rigid and severe. Upon this particular point it ran thus: 'When the arsenic was purchased, how did you weigh it?' 'I weighed it by shot.' 'How many shot?' 'Six.' 'Of what description?' 'No. 8.' 'When it was returned, did you weigh it in the same scales?' 'Yes.' 'Did you weigh it with the same shot?' 'I weighed it with shot of the same number — for I had no other number.' 'How much less did it weigh?' 'Twenty-four grains less.' It was plain that this testimony bore hard upon the prisoner — but at this stage of the case the Court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers, and took from various uncut bags of No. 8, the requisite number of shot, subjected them to weight in the most accurate scales, and found that the same number of these different parcels of shot varied more in weight than the difference referred to as detected in the arsenic at the time of its return. The shot — the grocers — the apothecary — the scales — were all brought before the Court. They clearly established the facts stated, and enabled us fairly to contend that there had been no portion of the arsenic used, — which argument, aided by the excellent character of the prisoner, proved entirely successful, and after a painful and prolonged trial, she was acquitted; so that her life may be said to have been saved by a shot."

1885, Mr. *John C. Reed*, Conduct of a Lawsuit, 400: "When your evidence is but slight and that of the other side is very strong, you may be reckless in spurring his witnesses to make a complete statement. Your case is so bad that any change in it may be for the better. We add an entertaining and apt illustration. Some time ago the writer while waiting in court watched the trial of a case where the plaintiff sought to recover damages for a breach of warranty. The defendant had sold him a horse with an express warranty that he was sound and kind and free from all 'outs.' The next day the plaintiff noticed that a shoe was loose, and he undertook to drive him to a blacksmith's shop to have him shod, when the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated efforts made it evident that he never would be shod willingly, and therefore he was obliged to sell him. The defendant called two witnesses. The first, an

[7] Almost all of these, under 1, *a* and *b*, *infra*, serve also to illustrate the contrast noted in par. 2, *a* and *b*, *supra*, and no grouping is necessary. Besides the ensuing examples, others will be found quoted elsewhere under other principles (*ante*, §§ 782, 990–996, 1005–1006, 1260).

honest, clean-looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well, and he had shod him about the time referred to in the plaintiff's testimony. 'Did you have any difficulty in shoeing him?' asked the defendant's counsel. 'Not the least. He stood perfectly quiet. Never had a horse stand quieter.' The other, a venerable-looking man, with a clear, blue eye, testified that he had owned the horse and that he was perfectly kind. 'Did you ever have any trouble about getting him into a blacksmith's shop?' 'Well, sir, I don't remember that I ever had occasion to carry him to a blacksmith's shop while I owned him.' The plaintiff's counsel evidently thought that cross-examination would only develop this unpleasant testimony more strongly, so he let the witnesses go. The jury found for the defendant. The next morning, as the writer was sitting in court waiting for a verdict, a man behind him, whom he recognized as the blacksmith, leaned forward and said, 'You heard that horse case tried yesterday, didn't you? Well, that fellow who tried the case for the plaintiff didn't know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him; and so he did. I didn't tell him that I had to hold him by the nose with a pair of pincers to make him stand. The old man said he never took him to a blacksmith's shop while he had him. No more he did. He had to take him out into an open lot and cast him before he could shoe him.' Of course the plaintiff's counsel should have been more searching in the examination, where he could not possibly have made his own case worse."

1888, *Parnell Commission's Proceedings*, 15th day, Times' Rep., pt. 3, p. 125; the Irish Land League was charged with complicity in crime and agrarian outrage; its leaders did not deny the fact of outrages, boycotts, and the like, but did deny that the Land League had any share in them, and claimed that sundry local secret societies and individual miscreants were really responsible. James Burke testified; *Direct examination:* "I am a blacksmith. . . . There was a falling off in my customers. Previously to that, I had received a letter which threatened my life if I shod Bermingham's horses. I gave the letter to the police. I went before the League at Kinvarra." Q. "What for?" A. "I went to look for mercy; I was suffering from boycotting. . . . They told me it was not from there I was boycotted — it was not from the League. Afterwards I subscribed to the League, and paid 1s. Customers returned again and I have had no trouble since." *Cross-examination:* "When they told me that it was not the League that was boycotting me, I believed them. The shilling I paid was the ordinary subscription." . . . Q. "It was not the League who boycotted you?" A. "No." Q. "Do you know who it was?" A. "Some blackguards, I think." G. "There were no blackguards in the League, I hope?" A. "Not that I know of." Q. "All respectable people?" A. "Yes, I believe so." [8]

1888, *Parnell Commission's Proceedings*, 34th and 43d days, Times' Rep., pt. 10, pp. 110, 113, 123, pt. 11, p. 158; a police-superintendent came to testify that at the meetings of the local Land Leagues speeches were habitually made denouncing certain persons, and that outrages upon them followed shortly, the League thus being charged with direct incitement of outrage; this witness had kept a record of the speeches and the ensuing outrages; "every meeting that occurs in the division is reported to me; . . . my record gives a summary of the language used;" and on cross-examination by Sir C. Russell, who asked him to go through the various instances "exhaustively", the witness was led through a number of cases of the sort he alleged; the connection between speech and outrage being sometimes made out by him; on a subsequent day, he was cross-examined by Mr. Davitt as follows, so as to show the slender basis for the witness' assertion of the criminal influence of the League's speeches. Q. "Your experiences of the League cover the counties of Wexford, Carlow, Kilkenny, Tipperary, Waterford — six counties altogether, I believe?" A. "No, eight counties." Q. "And this experience extends over a period of eight years?" A. "Not of all the counties; in some cases over a lesser period." Q. "About how many

[8] So also the examination of David Freeley, ib. 28th day, pt. 8, p. 13.

branches of the League are there in each of these counties?" A. "I have not the return with me. . . . I should say there are branches of the League in every parish." Q. "Then you would say there would be at least 50 branches in each county?" A. "At least that." Q. "Three hundred branches altogether in six counties?" A. "Yes." Q. "These branches meet weekly, I believe?". . . A. "I should say practically they meet once a fortnight." Q. "That would represent a very large number of meetings of each branch every year; and for the total number of branches quite an extraordinary number of meetings — 6000 during the year; multiply that by eight years, we have 48,000 meetings. Now at each of these meetings, I understand, a chairman presides, and if there is a resolution to be proposed it is spoken to by two speakers. That would be three speeches for each meeting?" A. "I only know the procedure from what I see in the papers." Q. "I believe that is the rule. That would be 144,000 speeches in eight years, delivered in branches of the League in these counties of which you have experience of the League and its working. About how many outrages, roughly speaking, did you particularize to Sir C. Russell yesterday as resulting directly from speeches of the Land League?" A. "I gave instances of about two dozen." Q. "About 24. Dividing 24 into 144,000, that would give a very small number of outrages for eight years, would it not?" A. "Yes."[9]

1, *a'*. Examples of the *inutility of a cross-examination*, in bringing out *undesirable facts of the case, strengthening the direct examination:*

1878, Mr. W. N. V. *Bay*, Bench and Bar of Missouri, 151: "In Parker's reminiscences of Rufus Choate is related a story of the cross-examination of a sailor who had turned State's evidence, and was relating the story of a theft of money from the ship while in a distant port. The witness declared that though he had taken the money, it was the defendant, the great advocate's client, that had instigated the theft. 'What did he say to you?' asked Choate. 'Why, he told us,' replied the witness, 'that there was a man in Boston, named Choate, who would get us off even if they caught us with the money in our boots!' This terrible thrust produced an uproar of laughter in the court-room. Yet it is related that Choate's countenance remained absolutely immovable."[10]

[9] Compare also these: 1843, R. *v.* O'Connell, 5 St. Tr. N. S. 1, 252 (cross-examination by Mr. Hatchell); 1875, Tilton *v.* Beecher, N. Y., "Official" Report, II, 116 (cross-examination of Mr. R. E. Holmes, as to the Winsted scandal, by Mr. Fullerton); II, 412 (cross-examination of Mr. J. L. Gay, by Mr. Morris).

The following anecdote perhaps equals any instance ever chronicled: "A certain ex-Governor had on one occasion a client who was indicted for maiming, the specific charge being that the defendant had bitten off the ear of the prosecutor. The case came on for trial and the outcome of it was not very promising for the defendant. While the defence was still being adduced, the defendant leaned over and whispered in the ear of his attorney, saying, 'Call Jack Deans; he was there; he saw the whole thing.' Thereupon in a short while Jack Deans was duly called and put upon the witness stand in behalf of the defendant. 'Now, Mr. Deans,' said the ex-Governor, after some preliminary questions, 'you say that you know the defendant and that you were present at the time of the alleged assault by him on the prosecutor. Tell us what you saw of that occurrence.' 'Well, I was coming 'long the road,' said the witness, 'and I seen 'em gitting up out of the dirt; but I didn't see the defendant hit the prosecutor, and I didn't see him kick him, and I didn't see him bite his ear off.' 'You were in plain view of the parties and you say you did not see any of these things?' asked the ex-Governor, with an expanding chest. 'Yes,' said the witness. Then the prosecuting attorney took a hand, and cross-examined. 'Now, Mr. Deans,' said he, 'you have told the Governor all that you *did not* see of this assault; please tell *me* what you *did* see of it.' 'Well,' said the witness, squirming in his chair and hesitating a long time before proceeding, 'it's so; I *didn't* see the defendant *bite off* the prosecutor's ear. But jest as I got abreast of him I seen him *spit the ear out of his mouth!*' That was enough for the prosecution and a great deal more than enough for the ex-Governor" (13 Green Bag 423). The anecdote of the old gentleman's valet, quoted *post*, § 2094, is also an excellent illustration of the present principle.

[10] This anecdote is related in Brown's Life of Choate, 3d ed. 451, but not so pointedly. Compare the following: 1875, Tilton *v.* Beecher, N. Y., "Official" Report, II, 236 (cross-examination of Mr. Oliver Johnson,

1888, *Parnell Commission's Proceedings*, 72d day, Times' Rep., pt. 20, pp. 145, 247; the Irish Land League was charged with collecting funds to be used for supporting crime and outrage and armed rebellion, and Mr. Parnell was under cross-examination as to the purpose for which he collected money during his tour in America; he admitted accepting money from all sources, including those "physical force" adherents, who favored dynamite-violence and the like, but claimed that he received it for the sole purpose of furthering the peaceable and lawful methods of the Land League; Sir Richard Webster, the attorney-general, in cross-examining, brought up the following significant incident, but by pressing it too far gave opportunity for the witness wholly to explain away and nullify its force; Q. "Do you remember the celebrated occasion at Troy, when a gentleman came forward and offered you '*five dollars for bread and twenty dollars for lead*'?" A. "Yes." Q. "You did not think it necessary to refuse the twenty dollars for lead?" A. "I was very glad to get the money, but not for lead." Q. "In your presence, then, at Troy, a man offered five dollars for bread and twenty for lead?" A. "That was the expression used." [11] Q. "You understood that to mean that some one in the audience was ready to subscribe five dollars for charity and twenty dollars for fighting purposes?" A. "Not a bit of it. I understood that he was ready to subscribe five dollars to our charitable fund and twenty dollars in support of the Land League movement." Q. "Then did you think it a fair description of your agitation to call it 'lead'?" A. "No, I did not think it was." Q. "Why do you think the gentleman meant the Land League by 'lead'?" A. "Because if he had not he would not have given the money to me." Q. "Do you represent that a public offer of twenty dollars for lead in support of your agitation and an acceptance of the sum on your side would be understood as a repudiation of physical force opinions?" A. "At the beginning of my meetings in America I *had declared that I would not receive one cent for arms* or for any unconstitutional or illegal movement. . . . Having made that declaration at the outset of my tour, and having said subsequently nothing inconsistent with that declaration, I consider that no man in his senses would have offered me twenty dollars believing that the money would be used for the very purposes which I had repudiated." . . . Q. "Now, do you not know that that speech about lead was repeatedly quoted in Ireland, and that the construction put upon it was that the subscription was for physical force matters?" A. "By your side it was quoted, I know." Q. "What do you mean by my side?" A. "The Tory party." . . . Q. "Did not Boyton, the Land League organizer, quote the speech as meaning what I have indicated?" A. "I do not know that he did." A. "Do you not know that it has been proved already in this case?" A. "I do not. The only use made of the speech in that sense was when Mr. O'Hanlon tried to break up our meeting in the Rotunda. He wrote a letter to a newspaper next day wanting to know what I had done with these twenty dollars." Q. "And suggesting that the money ought to have gone to the physical force party for the purchase of lead?" A. "Yes; *he thought that I was misappropriating it.*" [12]

1916, Messrs. *L. Esarey* and *E. V. Shockley*, Courts and Lawyers of Indiana (I, 149): "Another slander case. In one of the oldest communities of the Whitewater valley, society had been thrown into two hostile factions by the slanderous statement of one woman that another had stolen a goose. All the women in the community were in the court house as witnesses, and all the men had come to hear the lawyers and see fair play generally. There were a score of witnesses to prove character, — though nobody's character was ever questioned. There was a like number of witnesses to prove the spoken words, — which nobody denied. The whole question hinged on the ownership of the goose. The plaintiff, repre-

by Mr. Fullerton); II, 706 (cross-examination of Mr. James Freelands, by Mr. Fullerton); II, 307 (cross-examination of Mr. Samuel Wilkeson, by Mr. Beach); 1906, Train, "The Prisoner at the Bar", 290 (cross-examination of the old lady).

[11] Here the cross-examiner might well have stopped.

[12] It is just to add that on the next day the cross-examiner returned to the subject with success.

sented by Governor David Wallace, Senator James Noble and General McKinney, proved that she owned and always had owned the goose in question from the time it bursted its shell. The defendant, represented by William R. Morris and Senator O. H. Smith, proved by an equal number of witnesses that *she* had raised and always owned the said goose. She had proved that as a young gosling it had a peculiar habit of wanting to play in the water. The case seemed 'on the ridge.' After noon the plaintiffs asked leave to introduce one more witness. She was a dignified old lady of seventy years. She testified that for sixty years she had been intimately acquainted with geese; knew the one in question well, and knew it belonged to the plaintiff. 'Take the witness,' said Mr. Wallace. Smith was suspicious and advised that no cross-questions be asked. He was overruled, however, and Mr. Morris asked: 'How do you know that this particular goose belonged to the plaintiff?' 'Because she was white and paced. I owned her greatgrandmother, and *she* paced, and so did all of that breed.' The answer was conclusive and determined the suit, in spite of a two-days' argument. Nor did it occur to the defendant or her lawyers that *all geese paced!* The verdict followed of one dollar and costs. But the social factions were not healed."

1, *b*. Examples of the *utility of a cross-examination*, in bringing out, from the witness himself, *facts to lessen his credit:*

1888, *Parnell Commission's Proceedings*, 78th day, Times' Rep., pt. 21, pp. 225, 230, 231; the Land League having been charged with terrorizing and intimidation of the people at large, a Catholic priest who was president of one of the branches was examined for the defence as to the methods of the League; *Direct examination:* Q. "Was any kind of pressure of intimidation exercised to your knowledge to make people join the League?" A. "No; things were done in a very regular way. A notice was posted up asking the people to come and join the League. Those who wished to do so then came and paid their subscriptions. There was no house-to-house-visit, *there was no pressure whatever;* it was perfectly free." . . . *Cross-examined* by Mr. Murphy. Q. "Nothing particular was done, I understand you to say, to induce people to join the Land League?" A. "Nothing, in my district." Q. "Are you quite certain?" A. "Quite certain." . . . Q. "I will call your attention to some of your own speeches. On the 12th of December, 1880, speaking at Craughwell, you say, 'I tell you that *the wretch* who has not joined the League, that that man *deserves to go down to the cold, dead damnation of disgrace.*' That is pretty strong?" A. "Yes." Q. "Did you use those words?" A. "It is possible." Q. "Did you use them?" A. "I may have." Q. "Have you any doubt about it?" A. "I never saw it in print." Q. "Did you use that language?" A. "Very likely I did." Q. "Do you regard that as an invitation to join the League voluntarily or involuntarily?" A. "Well, it does not involve any intimidation." . . . Q. "'To go down to the cold, dead damnation of disgrace'?" A. "Well, it is rather a strong expression, I admit." Q. "Did you believe that that was the proper fate for anyone who did not join the League?" A. "Well, I suppose I used it in order to induce them to join." Q. "Did you use the expression in order to frighten the people?" A. "I suppose *it was in order to induce them to join the League.*"

1888, *Parnell Commission's Proceeding*, 55th day, Times' Rep., pt. 14, p. 252; certain letters, purporting to be Mr. Parnell's, and approving the Phœnix Park assassinations, had been sold to the London "Times" by one Richard Pigott, an Irish editor and informer; these letters had been in fact fabricated by Pigott himself, but until he came under Sir Charles Russell's cross-examination the case for the letter's genuineness was strong; the word "hesitency" occurred in one of the letters and this with other words had been written down by Pigott at the opening of his cross-examination; Q. "Yesterday you were good enough to write down certain words on a piece of paper, and among them was the word 'hesitancy.' Is that a word you are accustomed to use?" A. "I have used it." Q. "Did you notice that you spelt it as it is not ordinarily spelt?"

A. "Yes, I fancy I made a mistake in the spelling." Q. "What was it?" A. "I think it was an 'a' instead of an 'e', or 'vice versa'; I am not sure which." Q. "You cannot say what was the mistake, but you have a general consciousness that there was something wrong?" A. "Yes." Q. "I will tell you what was wrong according to the received spelling. You spelt it with an 'e' instead of an 'a.' You spelt it thus — 'hesitency.' That is not the received way of spelling it?" A. "I believe not." Q. "Have you noticed the fact that the writer of the body of the letter of the 9th of January, 1882 — the alleged forged letter — spells it in the same way?" A. "I heard that remark made long since, and my explanation of my misspelling is that having that in my mind I got into the habit of spelling it wrong." Sir *C. Russell.* "Did your Lordships catch that last answer?" The *President.* "Oh, yes." Q. "You say that your attention was called to the fact a long time ago that in the alleged forged letter 'hesitancy' was misspelt, and you fancy that, your attention having been called to the misspelling, you so got into the habit of spelling it in that way?" A. "I suppose so; I heard so much discussion about it. I never met anybody who spelt every word correctly, scarcely. (Laughter.)" Q. "It had got into your brain?" A. "Yes, somehow or other." Q. "Who called your attention to it?" A. "Several people; it was a matter of general remark." Q. "Do you think that but for the fact of your attention being drawn to the way in which it had been spelt you would probably have spelt it rightly?" A. "Yes." Q. "You know that the [above] letter purports to be dated the 9th of January, 1882; you have already told me that this letter (handing [another] letter to witness) is yours?" A. "Yes, that is right; that is my letter." Q. "But you did not become possessed of this valuable [Parnell] letter, dated January 9, 1882, *until the summer of 1886; and this letter* [of yours] *is prior to that.* The wrong spelling had not got into your head then?" A. "No. I say that spelling is not my strong point." Q. "Did you notice that in this letter you spell 'hesitency' in the same way?" A. "No, I did not." . . . Q. "How do you account for that? Your brain was not injuriously affected at that time?" A. "I cannot account for it." Q. "At all events you cannot account for it by that disturbance of your brain?" A. "No." [13]

1, *b'*. Examples of the *inutility of a cross-examination*, in bringing out *facts which strengthen the witness' credit*, or answers which otherwise give him a *personal victory:*

1840, Mr. *J. C. Jeaffreson*, Law and Lawyers, I, 180: "Jeffreys, the afterwards notorious chief justice and chancellor, was retained in a trial in the course of which he had to cross-examine a sturdy countryman clad in the habiliments of the laborer. Finding the evidence of this witness telling against his client, Jeffreys determined to disconcert him. So he exclaimed in his own bluff manner: 'You fellow in the leathern doublet, what have you been paid for swearing?' The man looked steadily at him, and replied: 'Truly, sir, if you have no more for lying than I have for swearing, you might wear a leathern doublet as well as I.'" [14]

[13] The very effective cross-examination of the medical man, reported by Judge Daley, and the memorable cross-examination of Majocchi, in Queen Caroline's trial (quoted *ante*, § 995), belong here also.

[14] In this same entertaining volume, other like anecdotes may be found at the same page. Of the same order is the following: "Ex-Governor Shaw, of Iowa, lately chosen to be Secretary Gage's successor at the head of the Treasury Department, tells how he once heard a small boy get the better of a lawyer who was cross-examining him. Part of the questioning and the replies thereto were as follows: 'Have you any occupation?' 'No.' 'Don't you do any work of any kind?' 'No.' 'Just loaf around home?' 'That's about all.' 'What does your father do?' 'Nothin' much.' 'Does n't he do anything to support the family?' 'He does odd jobs once in a while when he can get them.' 'As a matter of fact, is n't your father a worthless fellow and a loafer?' 'I don't know, sir; you 'd better ask him. He 's sittin' over there on the jury.'" (Brooklyn Eagle, 1903.)

Mr. Train has collected ("The Prisoner at the Bar", 1906, pp. 286–290) some useful examples on this point.

1869, *Saurin* v. *Starr*, as reported in O'Brien's Life of Lord Russell, 86 (a Sister of Mercy, being expelled for transgression of the rules of the convent, and suing for libel, her counsel was Mr., afterwards L. C. J., Coleridge): "Coleridge's case was that the breaches of discipline were trivial, contemptible. He pressed Mrs. Kennedy [the matron] on the point, asking what had Miss Saurin done. Mrs. Kennedy said, as an example, that she had eaten strawberries. 'Eaten strawberries!' exclaimed Coleridge, 'what harm was there in that?' 'It was forbidden, sir,' said Mrs. Kennedy, — a very proper answer. 'But, Mrs. Kennedy,' retorted Coleridge, 'what trouble was likely to come from eating strawberries?' 'Well, sir,' replied Mrs. Kennedy, 'you might ask what trouble was likely to come from eating apples; yet we know that trouble did come from it.' The answer floored Coleridge."

1878, Mr. *W. V. N. Bay*, Bench and Bar of Missouri, 162: "The following story is told by Edwards: On a trial at Auburn, New York, the counsel for the People, after severely cross-examining a witness, suddenly put on a look of severity, and said: 'Mr. Witness, has not an effort been made to induce you to tell a different story?' 'A different story from what I have told?' 'That is what I mean.' 'Yes, sir; several persons have tried to get me to tell a different story from what I have told; but they could n't.' 'Now, sir, upon your oath, I wish to know who those persons are.' 'Well, I guess you 've tried as hard as any of 'em.'"

Anon., Kentucky Law Journal, IV, 37: "A railroad lawyer who has had much to do with human nature says: 'Never cross-question an Irishman from the old sod.' And he gave an illustration from his own experience:

'A section hand had been killed by an express train, and his widow was suing for damages. The main witness swore positively that the locomotive whistle had not sounded until after the whole train had passed over his departed friend. "See here, McGinnis," said I, "you admit that the whistle blew?" — "Yis, sor, it blew, sor." — "Now, if that whistle sounded in time to give Michael warning, the fact would be in favor of the company, would n't it?" — "Yis, sor, and Mike would be testifying here this day." The jury giggled. — "Very well. Now, what earthly purpose could there be for the engineer to blow his whistle *after* Mike had been struck?" — "I preshume that the whistle wos for the *next man on the track*, sor." — I quit, and the widow got all she asked.'"

§ 1369. **Other Rules concerning Cross-examination discriminated.** We are here concerned solely with the opponent's *right to have cross-examination*, and with the rule which therefore excludes testimonial statements not subjected to cross-examination. Accordingly the inquiry is whether for a given statement it has satisfied this rule or not; and for this purpose we are to pass in review the various sorts of testimonial statements as to which such a question can be raised.

From this inquiry, then, four others must be distinguished, with which cross-examination in other aspects is concerned. (1) There is sometimes a special liberality as to the *kind of fact that may be asked for on cross-examination*. This involves the principles applicable to the admissibility of different sorts of evidence to impeach and discredit a witness. The real problem there involved concerns the mode of proving certain facts or the kind of facts admissible. Thus, certain facts are allowed to be proved by cross-examination only, not by other witnesses; moreover, even upon cross-examination certain kinds of facts are not allowed to be brought out. This subject is elsewhere dealt with (*ante*, §§ 875–1144, particularly §§ 878, 990–996).

(2) In the *order of presenting evidence*, certain stages are to be observed; the direct examination comes first, then cross-examination, and so on.

Whether a certain fact may be asked about on cross-examination may involve these rules as to the order of presenting evidence (*post*, §§ 1866–1900, particularly § 1885). With these rules we are here not concerned.

(3) Cross-examination is chiefly used to discredit the witness thus examined, and there is a rule which forbids the discrediting of one's own witness. Accordingly, the inquiry often arises whether a witness is one's own or the opponent's, — for example, whether one may *cross-examine* (*i.e.* discredit) *a witness called by the opponent but not examined*, or called only to bring documents; in cases of that sort, the rule against impeaching one's own witness is involved (*ante*, §§ 909–918). With that rule we are here not concerned.

(4) Cross-examination, as well as direct examination, involves certain rules as to the *manner of interrogation*,— whether a question may be leading, whether it may be repeated, and the like. These principles are elsewhere dealt with, under Testimonial Narration (*ante*, §§ 768–788).

§ 1370. **Cross-examined Statements not an Exception to the Hearsay Rule.** The Hearsay rule excludes testimonial statements not subjected to cross-examination (*ante*, § 1362). When, therefore, a statement has already been subjected to cross-examination and is hence admitted — as in the case of a deposition or testimony at a former trial,— it comes in because the rule is satisfied, not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favor. This is worth clear appreciation, because it involves the whole theory of the rule:

> 1834, TINDAL, C. J., in *Wright* v. *Tatham*, 3 A. & E. 3, 22 (declaring that this testimony of a deceased subscribing witness at a former trial is equivalent to calling him now and thus obviates the necessity of calling another and living subscribing witness): "[The examination of B. at the former trial] is evidence as direct to the point in issue, and as precise in its nature and quality, as that of P. when called to the stand. . . . The evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the 'viva voce' examination of one of the witnesses remaining alive and actually examined in the cause."
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> 1892, MITCHELL, J., in *Minneapolis Mill Co.* v. *R. Co.*, 51 Minn. 304, 315, 53 N. W. 639: "The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine; neither of which applies to testimony given on a former trial."

§ 1371. **Opportunity of Cross-examination, as equivalent to Actual Cross-examination.** The doctrine requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine* if desired. The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be

disputed at all or be shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. This doctrine is perfectly settled:[1]

1813, ELLENBOROUGH, L. C. J., in *Cazenove* v. *Vaughan*, 1 M. & S. 6: "The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining."

1883, RAPALLO, J., in *Bradley* v. *Myrick*, 91 N. Y. 296: "The witness . . . was subject to cross-examination by the defendant's attorney, if he chose to exercise that right, or in his absence by the Court. . . . On every trial the opposing party has the power to cross-examine. If he does not choose to appear and exercise this power the consequences should fall on him and not on his adversary."

1824, Mr. *Thomas Starkie*, Evidence, 97: "To satisfy this principle, it is not necessary that the party on whose authority the statement rests should be present at the time when his evidence is used, in order that he may then be cross-examined; it is sufficient if the party against whom it was offered has cross-examined or has had the opportunity of doing so, being legally called upon so to do when the statement was made. . . . If the party might have had the benefit of a cross-examination in the course of a judicial proceeding, it is the same thing as if he had actually availed himself of the opportunity."

But, though this doctrine is a practically inevitable corollary of the general principle, it is worth while to note the possible consequences of its looseness, as warnings against an inconsistent strictness shown in other applications of the general principle. For, on the one hand, testimony already subjected to a cross-examination, however thorough, by a former party not in privity with the present opponent is excluded (*post*, § 1388); while, by the present doctrine, testimony never actually tested at all, in consequence of the careless-

§ 1371. [1] *England:* 1693, Howard *v.* Tremaine, 1 Salk. 278 (depositions taken 'in perpetuam'; the opponent to the bill had refused in contempt to answer; depositions admitted); *United States: Cal.* C. C. P. 1872, § 1846 ("A witness . . . can be heard only in the presence of and subject to the examination of all the parties, if they choose to attend and examine"); and the codes following the California Code; *D. C.* 1907, Munster *v.* Ashworth, 29 D. C. App. 84 (counsel left the place, stating that he did not care to cross-examine; admitted); *Ky.* 1900, Small *v.* Reeves, — Ky. —, 59 S. W. 515 (deposition voluntarily not cross-examined; motion to allow cross-examination on the trial, held properly refused in discretion); *La.* 1904, Union I. & F. Co. *v.* Soonenfield, 113 La. 436, 37 So. 20; *Mass.* Gen. L. 1920, c. 233, § 35, Rev. L. 1902, c. 175, § 36 (the Court may exclude a deposition if the "adverse party failed without fault to attend the taking thereof"); *P. I.* 1903, Jové *v.* Palatine Ins. Co., 5 P. R. 115 (sworn testimony, after citation and non-attendance of opponent, admitted); 1904, Moret, *v.* Vazquez, 5 P. R. 489, 505 (similar).

The ruling in U. S. *v.* French, D. C., 117 Fed. 976 (1902), that notice to attend is not sufficient is clearly erroneous. Compare § 1377, *post*.

The intimation in Twohig *v.* Leamer, 48 Nebr. 247, 67 N. W. 152 (1896) that it must affirmatively appear, in using testimony at a former trial, that a cross-examination was had, is also erroneous; for if cross-examination is an ordinary part of the proceedings before that kind of tribunal, it must be assumed that an opportunity for it was given, and an opportunity was sufficient.

The ruling in Hosch Lumber Co. *v.* Weeks, 123 Ga. 336, 51 S. E. 439 (1905), that where the taking party fails to attend but the opponent attends and cross-examines, the latter cannot use his cross-examination but must give notice again and take the deposition again as his own, is both unsound and unjust.

Distinguish the principles of § 912, *ante*, § 1983, n. 7, *post*.

Compare the rulings *post*, § 1378 (notice to attend).

ness, fraud, or incompetence of counsel, or of a privy in interest, is admitted, if merely the opportunity so to test it had existed. On the whole, both err in attempting to create an inflexible rule. No doubt, usually, a mere opportunity to cross-examine can be trusted as a sufficient safeguard; and no doubt, usually, only a privy in interest would apply a sufficient cross-examination. But room should be allowed for the exceptional instances which will certainly occur. The trial Court should have a discretion.

§ 1372. **Division of Topics.** The subject of present inquiry is: What classes of testimonial statements satisfy the rule requiring an opportunity of cross-examination? The various sorts of statements may be grouped as follows, according to the circumstance in which the rule fails to be satisfied:

1. The *kind of tribunal or officer*, before whom the statement was made, as not furnishing a sufficient opportunity; 2. *Notice to the opponent*, as necessary to furnishing a sufficient opportunity; 3. The *nature of the cause*, as to issues and parties, in which the statement was made, as not furnishing a sufficient opportunity; 4. The *course of the examination* itself, as furnishing only an incomplete opportunity.

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

§ 1373. **General Principle; Sundry Tribunals (Commissioners of Land-titles, Pilotage, Bankruptcy, etc.; Arbitrators).** In general the principle is clearly accepted that testimony taken before a *tribunal or officer not* empowered to compel or not in practice *employing cross-examination* as a part of its procedure is inadmissible; and, conversely, the kind of tribunal is immaterial and the testimony is admissible if in fact cross-examination was practised under its procedure:

1767, BULLER, J., Trials at Nisi Prius, 241: "From what has been said it is evident that (as there can be no Cross-examination), a voluntary Affidavit is no Evidence between Strangers. . . . So where there cannot be a Cross-examination, as Depositions taken before Commissioners of Bankrupts, they shall not be read in Evidence."

1825, GRAHAM, B., in *Attorney-General* v. *Davison*, McCl. & Y. 167: "The barrack commissioners were not required to summon the party for the purpose of examining the witnesses; and I have no doubt that they proceeded to examine the witnesses and to make their report without giving notice to the other side; and consequently, as the party had no opportunity of attending or cross-examining the witness, this cannot be legal evidence." GARROW, B.: "In order to affect any party by oral or written testimony, an opportunity should be allowed to him of checking or correcting it by cross-examination."

1806, THOMPSON, J., in *Jackson* v. *Bailey*, 2 Johns, 20: "It is said that this rule ought not to be extended to testimony taken before the Onondaga commissioners [to try land-titles]. . . . Opportunity was given for cross-examining witnesses; and it appears that the title now in question was actually litigated before the commissioners."

1858, EASTMAN, J., in *Orr* v. *Hadley*, 36 N. H. 580: "Neither is it necessary that the former testimony should have been given on the trial of a cause in the exact technical shape of an action. It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination."

Accordingly, testimony has been received or rejected on this account, *i.e.* because an opportunity for cross-examination was or was not a part of the procedure, when given before *bankruptcy-commissioners*,[1] *pilot-commissioners*,[2] *marine hull-inspectors*,[3] *barrack-commissioners*,[4] *land-commissioners*,[5] *county-boards*,[6] *registers*,[7] and *arbitrators*.[8]

§ 1374. **Testimony at Coroner's Inquest.** In *England*, testimony at a coroner's inquest had been frequently admitted before the Hearsay rule was established.[1] During the 1700s, this continued as a traditional exception.[2] The dignity of the office was sometimes put forward as an explaining reason. But the determining circumstance was after all the tradition, as well as the early statutory provision authorizing the reporting of the testimony (though not expressly making it admissible).[3] The anomaly was in effect removed in 1848 by Sir John Jervis' Act,[4] which provided for a cross-examination and expressly made admissible in later proceedings the testimony thus obtained.

In the *United States*, the question has been re-considered upon principle and apart from the traditional English exception, and the proper conclusion has been reached that the lack of cross-examination as an element in coroner's procedure makes such testimony inadmissible:[5]

§ **1373.** [1] *Ante* 1668, Anon. Rolle's Abr. II, 679, pl. 9; 1747, Eade *v.* Lingood, 1 Atk. 203; 1787, Fitch *v.* Hyde, Kirby 258; 1810, Cox *v.* Pearce, 7 Johns. N. Y. 298.

So also *court commissioners* of various sorts: 1906, U. S. *v.* Greene, 146 Fed. 796, — D. C. — (deceased witness' testimony before a U. S. commissioner on a proceeding for extradition, admitted.)

[2] 1843, Com. *v.* Ricketson, 7 John. 298.

[3] 1896, Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563.

[4] 1825, Att'y-Gen'l *v.* Davison, McCl. & Y. 167, quoted *supra;* 1802, Davis *v.* Batty, 1 H. & J. 264, 282, *semble.*

[5] 1806, Jackson *v.* Bailey, 2 John. 20, quoted *supra;* 1797, Montgomery *v.* Snodgrass, 2 Yeates 230 (deposition before a board of property, excluded; "the witness had been cross-examined", yet the board "are not vested with the powers essentially necessary to such a tribunal" as a court); 1798, DeHaas *v.* Galbreath, 2 Yeates 315 (deposition before the same board, excluded).

[6] 1899, Dunck *v.* Milwaukee Co., 103 Wis. 371, 79 N. W. 412.

[7] 1899, Payne *v.* Long, 121 Ala. 385, 25 So. 780.

[8] 1858, Orr *v.* Hadley, 36 N. H. 580 (see quotation *supra*); 1845, Bailey *v.* Woods, 17 N. H. 372; 1794, White *v.* Bisbing, 1 Yeates 400; 1824, Forney *v.* Hallagher, 11 S. & R. 203; 1850, McAdams *v.* Stilwell, 13 Pa. 90, 96.

It was excluded in Jessup *v.* Cook (1798), 1 Halst. 438; but here the witness was not shown unavailable, under § 1402, *post.*

Whether the rules of Evidence, including opportunity to cross-examine, are applicable to such administrative officers, has been considered *ante*, § 4 *a.*

§ **1374.** [1] 1666, Lord Morly's Case, Kelyng 55; 1692, Harrison's Trial, 12 How. St. Tr. 852; cited *ante*, § 1364.

[2] 1754, Robins *v.* Wolseley, 2 Lee Eccl. 135, 421, 442 (referring to the common law); 1790, R. *v.* Eriswell, 3 T. R. 707.

[3] 1554, St. 1 & 2 P. & M. c. 13; 1555, St. 2 & 3 P. & M. c. 10; 1816, St. 7 Geo. IV, c. 64. It is not certain whether St. 1 Wm. IV, c. 22 (1830) was to be regarded as applying to coroners; but testimony before the coroner, continued to be admitted: 1840, Sills *v.* Brown, 9 C. & P. 601, 603.

[4] St. 11 & 12 Vict. c. 42. The English Courts would now exclude testimony not thus taken under cross-examination; 1830, R. *v.* Wall, Russell on Crimes, b. IV, c. IV, § 3; 1866, R. *v.* Rigg, 4 F. & F. 1085; 1921, Barnett *v.* Cohen, 1 K. B. 461 (testimony at coroner's inquest, inadmissible in action for death, except to cross-examine as to contradiction, etc.).

[5] *Accord: Ala.* 1881, Sylvester *v.* State, 70 Ala. 17, 24; *Colo.* 1891, Jackson *v.* Crilly, 16 Colo. 103, 26 Pac. 331 (death of a passenger; testimony of a deceased witness before the coroner, under cross-examination and in the presence of "the respective counsel", excluded, because it did not appear "in whose behalf, in what capacity, nor for what purpose the respective counsel were present"; unsound); *D. C.* 1916, Capital Traction Co. *v.* King, 44 D. C. App. 315 (personal injury; excluded); *Ill.* 1885, Pittsburgh C. & St. L. R. Co. *v.* McGrath, 105 Ill. 172, 3 N. E. 439 (depositions excluded); 1904, Knights Templar & M. L. I.

1842, BRONSON, J., in *People* v. *Restell*, 2 Hill N. Y. 297: "It is said that depositions taken by the coroner on holding an inquest are evidence, although the defendant was not present when they were taken. This doctrine has been gravely questioned, and I am strongly inclined to the opinion that it cannot be maintained. The great principle that the accuser and the accused must be brought face to face and that the latter shall have the opportunity to cross-examine can never be departed from with safety."

1858, NAPTON, J., in *State* v. *Houser*, 26 Mo. 436: "It is true that there may be a few cases in which depositions taken before coroners in England, without any opportunity of cross-examination, have been used against the accused, where the witness subsequently died; but the authority of such cases is questioned, even in that country, by the ablest writers on common law — Starkie, Roscoe, Russell — and it is doubtful whether such testimony would be now received. At all events, such testimony has never been permitted in this country, and in England its admissibility has been altogether placed upon the peculiar dignity and importance attached to the office of coroner; and no such reasons exist here."

Of course, if the coroner's practice does include (as sometimes provided by statute) a right of cross-examination, then testimony there delivered may become admissible afterwards elsewhere.[6]

§ 1375. **Testimony before a Committing Magistrate or Justice of the Peace.** Similar considerations apply to proceedings before a committing magistrate or a justice of the peace. If there was under the procedure of that official an opportunity of cross-examination, the testimony is admissible; otherwise not. There never has been any doubt on this point since the establishment of the general doctrine (*ante*, § 1364) in R. *v.* Paine, in 1696,[1] except in the special case of justices of the peace acting as committing magistrates under the statutes of Philip and Mary (*ante*, § 1374). The statutory provision for such examination, though not expressly making the testimony admissible, was thought by some during the 1700s[2] to imply a special exception, as

Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066 (excluded); 1920, People v. Sorrells, 293 Ill. 591, 127 N. E. 651 (homicide; testimony of deceased witness at the coroner's inquest, excluded); *La.* 1852, State v. Parker, 7 La. An. 83, *semble*; *N. J.* 1915, State v. Murphy, 87 N. J. L. 515, 94 Atl. 610 (testimony given at a coroner's inquest, under cross-examination by counsel for the now accused, undecided; why not have decided it?); *Oh.* 1883, Insurance Co. v. Schmidt, 40 Oh. St. 112 (testimony excluded); *Pa.* 1881, McLain v. Com., 99 Pa. 97; 1844, State v. Campbell, 1 Rich. L. 125 (O'Neall, J., diss.); *P. R.* 1913, Rodriguez v. Porto Rico R. L. & P. Co., 19 P. R. 613; *S. Car.* 1888, State v. Jones, 29 S. C. 225, 227, 7 S. E. 296.

Not decided: 1905, Puls v. Grand Lodge, 13 N. D. 559, 102 N. W. 165.

Contra: 1881, State v. McNeil, 33 La. An. 1333.

[6] *Ark.* Dig. 1919, § 1583 (testimony before a coroner, admissible "on the trial of any person present at his examination"); *Del.* Rev. St. 1915, § 1350 (deposition before a coroner, usable "on the trial of any person present at the examination"); *Mo.* Rev. St. 1919, § 13642 (workmen's compensation; notice of coroner's inquest upon death of employee to be given to parties, "who shall have the right to cross-examine the witnesses"; and the "proceedings" are "admissible in evidence" by certified copy); St. 1921, Mar. 28, p. 425, § 50 (workmen's compensation claims; employer and claimants shall have the right of cross-examination at coroner's inquest); *Tex.* Rev. C. Cr. P. 1911, § 834 (quoted *post*, § 1375); 1894, Meyers v. State, 33 Tex. Cr. 204, 210, 26 S. W. 196 (before a coroner, the defendant present and privileged to cross-examine; admitted).

§ 1375. [1] 5 Mod. 165; quoted *supra*, also *ante*, § 1364.

[2] *E.g.* in R. v. Eriswell (1790), 3 T. R. 707, per Buller, J. (the examination of a pauper, as to his place of settlement, before two justices of the peace was offered at the Quarter Sessions; the judges of the King's Bench were equally divided, but the opinion of Lord Kenyon subsequently prevailed in R. v. Ferryfrystone, 2 East 54, 1801; Kenyon, L. C. J.: "Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause of proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness").

in the case of coroners' examination. But even this supposed exception was by the 1800s repudiated in England.[3] On principle, as has often been pointed out, the question in all such cases depends simply upon whether there was an opportunity of cross-examination:[4]

1696, *R.* v. *Paine*, 5 Mod. 165: "It was the opinion of both Courts [King's Bench and Common Pleas], that the depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination."

1817, RICHARDS, C. B., in *R.* v. *Smith*, Holt N. P. 615, "observed that the statute did not mention the prisoner's presence at all. Undoubtedly, however, the decisions established the point that the prisoner ought to be present that he might cross-examine. But here he had the advantage offered him and omitted to use it."

1835, JOHNSON, J., in *State* v. *Hill*, 2 Hill S. C. 609: "If the accused is present and has an opportunity of cross-examining the witness, the depositions, according to the rule, are admissible. . . . We know, too, how necessary a cross-examination is to elicit the whole truth from even a willing witness; and to admit such evidence, without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community."

[3] 1817, R. v. Smith, Holt N. P. 615, quoted *post*; affirmed in R. v. R. 340 by all the judges; *accord*, 1817, R. v. Forbes, Holt N. P. 599; 1838, R. v. Arnold, 8 C. & P. 621; 1838, R. v. Errington, 2 Lew. Cr. C. 142, per Patteson, J. (answering the objection that St. 7 Geo. IV, c. 64, s. 2, did not require the accused's presence). The statutes in England now require an opportunity of cross-examination; 1848, St. 11 & 12 Vict. c. 42; 1867, St. 30 & 31 Vict. c. 35, § 61. In R. v. Beeston (1854), 6 Cox Cr. 430, Jervis, C. J., said: "[The statute of 11 & 12 Vict. c. 42] adds a rule which the judges had previously engrafted upon the old statutes of P. & M., that there must be full opportunity of cross-examination"; the statute was applied in: 1886, R. v. Griffiths, 16 Cox Cr. 46; 1916, R. v. Noakes, 1 K. B. 581 (cited *post*, § 1406);

So also in *Canada:* Ont. Rev. St. 1897, c. 90, § 10 (on a trial at the general sessions, a deposition taken before the magistrate at the original hearing may be used if the accused was present "and he, his counsel or solicitor, had a full opportunity of cross-examining the witness"); Can. R. S. 1906, Crim. C. § 999 (quoted *post*, § 1380, note 3); Que. 1854, R. v. Peltier, 4 Low. Can. 22.

[4] *Accord:* The authorities cited *post*, § 1398, 1413, also imply this result: *Federal:* 1851, U. S. v. Macomb, 5 McLean 286 (justice of the peace); *Alabama:* 1883, Harris v. State, 73 Ala. 497; *Arizona:* St. 1903, No. 25, Rev. St. 1913, P. C. §§ 753, 881 (preliminary hearing before a magistrate); *Arkansas:* 1895, McNamara v. State, 60 Ark. 400, 30 S. W. 762; *California* (see the statutes and cases cited *post*, § 1413); *Delaware:* Rev. St. 1915, § 3971 (committing magistrate shall examine the witnesses in the accused's presence); *Georgia:* 1882, Robinson v. State, 68 Ga. 833; 1883, Smith v. State, 72 Ga. 115; 1899, Hardin v. State, 107 Ga. 718, 33 S. E. 700; *Kansas:* 1880, State v. Wilson, 24 Kans. 189, 194; *Kentucky:* 1869, O'Brian v. Com., 6 Bush 563, 570; *Louisiana:* Annot. Rev. St. 1915, § 1439 (record by the recorder of New Orleans, or a justice of the peace, of testimony at fire inquest, taken on notice to the occupant, owner, agent, or custodian of property, admissible); *Minnesota:* 1895, State v. George, 60 Minn. 503, 63 N. W. 100; *New York:* N. Y. C. Cr. P. 1881, § 8 (testimony before committing magistrate admissible only if there was cross-examination or the opportunity); *North Carolina:* 1842, People v. Restell, 2 Hill 300; Con. St. 1919, § 4572 (examinations taken by a committing magistrate, usable only if the accused was present and had an opportunity to hear and cross-examine); 1847, State v. Valentine, 7 Ired. 225, 226; *Pennsylvania:* 1865, Howser v. Com., 51 Pa. 338 ("notwithstanding the above-named statute [2 & 3 P. & M. c. 10] had been extended to Pennsylvania, it was displaced by our Constitution, and no 'ex parte' testimony could be given against a prisoner in a capital case"); *Porto Rico:* 1906, People v. Reyes, 10 P. R. 240 (examination before the magistrate, excluded under C. Cr. P. § 11, for lack of defendant's presence); 1908, People v. Hernandez, 13 P. R. 217, 225; 1913, Rodriguez v. Porto Rico R. L. & P. Co., 19 P. R. 613; *South Dakota:* 1909, State v. Heffernan, 24 S. D. 1, 123 N. W. 78; *Texas:* 1876, Johnson v. State, 1 Tex. App. 333, 338 (good opinion); Rev. C. Cr. P. 1911, § 834 (depositions before an "examining Court or jury of inquest", admissible if defendant was present and had the privilege of cross-examination); *Vermont:* 1845, State v. Hooker, 17 Vt. 658, 669 (magistrate); *Wisconsin:* 1897, Pooler v. State, 97 Wis. 627, 73 N. W. 336 (depositions of accomplices excluded, because the defendant was not present at their examination).

In the United States the only instance in which to-day any statutory exception seems to have been made is that of the examination of the *complainant in bastardy;* but it is not clear that an examination taken in the defendant's absence and without some sort of notice given him (*post*, §§ 1378, 1382) would be admissible unless expressly so declared by the statute.[4]

§ 1376. **Depositions; Effect of Other Principles discriminated.** (1) A deposition is not receivable unless taken by an *officer or other person authorized by law.* It can be conceived that cross-questions put informally and recorded in writing might be as effective as a formal cross-examination. But cross-examination in its proper scope signifies a probing and testing under a power to compel answers; hence, that cross-examination which satisfies the rule must be a cross-examination, if not before a regular judge or magistrate, at least before an officer or other expressly authorized person. As to the kind of officer or other person thus authorized, the question involved is one of the constitution of Courts and their officers.[1] Statutes have provided a variety of ways, more or less formal, in which depositions may be taken.[2] So far as the admissibility of a deposition depends upon its being taken by an authorized person, the question is one of judicial machinery, the organization of Courts, and is beyond the present purview.

(2) By Chancery practice, common-law practice, and statutes, *a preliminary order to authorize the taking of a deposition* is usually obtainable only *upon certain conditions*, — the illness or the impending departure of the deponent, and the like. But statutes have often removed these conditions in certain classes of cases. This process of securing in advance the evidential material for a trial is a part of the preliminary procedure of courts, — just as is the process of obtaining discovery from an opponent. These questions of preliminary procedure are without the present purview, which is limited to the admissibility of a deposition already taken.

(3) When a deposition is offered, the principle of Confrontation requires that the witness' *personal attendance be shown impracticable* before the deposition may be used. The conditions thus required are dealt with under that principle (*post*, §§ 1401–1418).

(4) The document offered as a deposition is the testimony of the deponent *in writing.* Testimony by deposition can be only in writing, not oral, and the writing, moreover, must be made and transmitted according to a detailed mode prescribed by statute or by practice. So far as the manner of interro-

[4] *Del.* Rev. St. 1915, § 3085 (the mother's deposition in a bastardy charge may be taken in the defendant's absence if the constable returns "that he cannot be found"); *Ill.* St. 1907, Feb. 11, p. 56 (bastardy complaint; the woman shall be examined by the magistrate upon oath, etc., "in the presence of the man alleged to be the father of the child"). Compare the statutes quoted *post*, § 1417.

§ 1376. [1] For the officers having *power to compel* answers, see *post*, § 2195.

[2] The statutes bearing on the subject may be found from the citations collected *post*, §§ 1380–1383. For the statutes granting *discovery from on opponent*, see *post*, §§ 1856, 1859.

Distinguish also the following: 1921, Tootle v. Payne, 82 Okl. 178, 199 Pac. 201 (if a legal cause for using is shown when the deposition is offered, it is not inadmissible because no cause was mentioned in the notice to take).

gation is involved, the principle is that of the Mode of Testimonial Narration, already dealt with (*ante*, §§ 799–805).[3]

(5) Procedure rules as to the *mode of transmitting* the deposition to the Court, the filing of it before trial, the opening of the officer's envelope, and the like, are for the same reason beyond the present purview.[4]

2. Notice, as affecting Opportunity of Cross-examination

§ 1377. **Depositions: General Principle: Opportunity of Cross-examination required.** The principle of the Hearsay rule, as applied to the use of a deposition, is precisely the same as for testimony obtained in other tribunals, in the instances already reviewed (*ante*, §§ 1373–1375). The mere speaking under oath is not sufficient; the essential condition is that the person against whom the sworn statement is offered should have had an opportunity to cross-examine the deponent (*ante*, § 371). This is universally conceded as a common-law principle:[1]

1763, BULLER, J., Trials at Nisi Prius, 240: "If the witness be examined 'de bene esse', and, before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power of cross-examination, and the rule of the common law is strict in this, that no evidence shall be admitted but what is or might have been under examination of both parties."

1777, MANSFIELD, L. C. J., in *Goodright* v. *Moss*, Cowper 592: "[As to] offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done for this reason, because such person has it not in his power to cross-examine."

1790, KENYON, L. C. J., in *R.* v. *Eriswell*, 3 T. R. 707: "Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness. . . . [In this case the deposition] was 'ex parte', obtained at the instance of those overseers whose parish was to benefit by it, and behind the backs of the parish against whom it has now been used, without having an opportunity of knowing what was going on or attending to have the benefit of a cross-examination. I regard the question as of the last importance and as putting in danger the law of evidence in which every man in the kingdom is deeply concerned."

1811, LAWRENCE, J., in *Berkeley Peerage Case*, 4 Camp. 412: "A deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination."

1863, per CURIAM, in *Waterson* v. *Seat*, 10 Fla. 333 (after pointing out that no notice of a deposition had been given to the opponent, "so as to enable him to cross-interrogate"): "We can conceive of no circumstances under which the notice may be dispensed with.

[3] For the *conclusiveness of the magistrate's report* of testimony, see *ante*, §§ 1326, 1349. For the use of the magistrate's report *without calling the magistrate in person*, see *post*, § 1667. For the *authentication* of a *deposition* or *magistrate's report*, see *post*, §§ 1676, 1681, 2164.

[4] 1921, Emery & Co. v. American Refrig. T. Co., — Ia. —, 184 N. W. 750 (deposition taken for one trial and offered at a second trial without filing).

§ 1377. [1] The rule in Chancery was not so strict, presumably because (*ante*, § 1367) cross-examination in Chancery was almost futile: 1767, Buller, Nisi Prius, 240; 1827, Story, J., in Gass v. Stinson, 3 Sumner 98, 104 (examining the authorities); 1842, St. 15 & 16 Vict. c. 86. But the principle existed: 1859, Rehden v. Wesley, 26 Beav. 434 (Romilly, M. R.: "This is clear that if you intend to use the answer of one defendant against another defendant, the latter must have the right of cross-examination").

The plainest principle of natural justice, as well as our statute, require it. It is stated by one of the earliest writers [2] (to enforce the rule on the subject) that even the Almighty would not proceed to pronounce sentence against our great ancestor without giving him notice, and therefore first called to him, 'Where art thou, Adam?' "

§ 1378. **Same: Notice and Sufficient Time; Attendance cures Defective Notice.** The opportunity of cross-examination involves two elements, (1) *notice* to the opponent that the deposition is to be taken at the time and place specified, and (2) a *sufficient interval of time* to prepare for examination and to reach the place.

(1) Where a deposition is taken for pending litigation, the *parties* to whom *notice* is to be given are definitely ascertainable, and the requirement of it, apart from statutory exceptions, is indispensable.[1] But where a deposition is taken with a view to use in litigation not yet begun (' in perpetuam memoriam '), it may not be possible to ascertain the names of all the interested parties, and the question may thus arise whether a deposition so taken may be used against a person who never received any notice and could not by diligence have been notified. This question does not seem to have been judicially decided; [2] but, so far as a statute has authorized a mode of notice by advertisement or the like, it would seem that this by implication sanctions the use of such a deposition, as a necessary deviation from the strict requirements of principle.

(2) The requirements as to the *interval of time* are now everywhere regulated by statute (*post*, §§ 1380–1383); the rulings in regard to the sufficiency of time are thus so dependent on the interpretation of the detailed prescriptions of the local statutes that it would be impracticable to examine them here.[3] But whether or not the time allowed was supposably insufficient or was precisely the time required by statute, the *actual attendance* of the party obviates any objection upon the ground of insufficiency, because then the party has actually had that opportunity of cross-examination (*ante*, § 1371) for the sole sake of which the notice was required.[4] On the other hand, the

[2] The learned judge's reference here is probably not, as might be supposed, to Genesis III, 9, but to Fortescue, De Laudibus Legum Angliæ (1470), where the famous chief justice alludes to the above passage in Genesis.

§ 1378. [1] See the statutes and cases *post*, §§ 1380–1382. Apart from statute, the notice may be *oral:* 1847, Milton *v.* Rowland, 11 Ala. 732, 736 ("the form or manner of notice is of no importance, when one in point of fact is proved").

Whether the notice must be served on *party* or *attorney* depends chiefly on statutory wordings: 1906, Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484. Ordinarily, notice to the attorney will suffice: 1919, Streeter's Dependents *v.* Hunter, 93 Vt. 483, 108 Atl. 394 (rule for notice to attorney or party, considered).

Defects in the designation of *residence* etc. are immaterial if they did not in fact mislead: 1908, Rock Island Plow Co. *v.* Schoening, 104 Minn. 163, 116 N. W. 356.

But the requirement of notice does not apply to 'ex parte' testimony, miscalled depositions, used as a *sworn complaint* to authorize a magistrate's issuance of a warrant: 1909, State *v.* Stevens, 19 N. D. 249, 123 N. W. 888.

[2] See the statutes and cases cited *post*, § 1383.

[3] See some of them cited *post*, § 1381; 1921, U. S. *v.* Goldstein, 8th C. C. A., 271 Fed. 838 (reasonableness of time of notice, on the facts).

[4] *Ala.* 1862, Aicardi *v.* Strang, 38 Ala. 326, 328 (applied to written interrogatories); *Ark.* 1849, Caldwell *v.* McVicar, 9 Ark. 418, 422 ("Where the party appears, by himself or attorney, and makes his appearance, cross-

failure of the opponent to attend, after sufficient notice, leaves it still true that there has been the necessary opportunity,[5] which is sufficient on the same principle (*ante*, § 1371).

(3) Further details of procedure involve no new fundamental principle, and are regulated by variously phrased statutes.[6]

§ 1379. **Same: Plural Depositions at the Same Time and Different Places.** The principle requiring an opportunity of cross-examination is clearly violated in the case of plural depositions appointed by one party for the same time at different places, so that it becomes impossible for the opponent to attend in person for cross-examination at both. Here he is deprived of the opportunity for cross-examination in one at least of the depositions:

1881, GRAY, C. J., in *Cole* v. *Hall*, 131 Mass. 90: "The manifest design of the Legislature is that the adverse party shall have opportunity to attend in person, or at least by his attorney duly instructed in the cause, to cross-examine the witnesses. . . . If depositions are taken at different places at or near the same time, it is within the power of the court, when the depositions are offered in evidence, to suppress the depositions of those witnesses whom the adverse party has thereby been deprived of reasonable opportunity to cross-examine. . . . In this, as in many other matters concerning the introduction of evidence, much must be left to the discretion of the judge presiding at the trial."

1895, ALLEN, J., in *Evans* v. *Rothschild*, 54 Kan. 747, 39 Pac. 701: "Where testimony is taken by deposition, it is in one sense a part of the trial of the cause, and the only chance given to the opposing party to confront the witnesses whose depositions are taken under the notice is to attend before the officer who takes them. The only opportunity to apply the tests necessary to correct errors or detect falsehood in the statements drawn out on direct examination is that afforded by cross-examination at the same time. A party to an action has a right, if he deems it necessary, to be personally present when depositions are being taken affecting his interests. He is not required to employ a multitude of attorneys to protect his interests at different places on the same day, nor does the fact that he chooses to intrust his interests to the care of an attorney (other than the one who tries the case for

examines, objects to a question, to the competency of the witness, or does any substantive act connected with the taking of the depositions, and it so appears in the depositions regularly certified, the party will not at the hearing of the cause be allowed to object that no legal notice had been given"); *Cal.* 1858, Jones *v.* Love, 9 Cal. 68, 70 ("Having appeared and cross-examined, it was too late afterwards to make the objection" of short notice); 1908, Bollinger *v.* Bollinger, 153 Cal. 190, 94 Pac. 770 (attendance waives all irregularity in the form of notice; but the correct theory is not that there is a waiver, but that 'de facto' opportunity to examine is all that is needed); *Colo.* 1895, Ryan *v.* People, 21 Colo. 119, 40 Pac. 777; *Col.* (*Dist.*) 1907, Munster *v.* Ashworth, 29 D. C. App. 84 (notice for deposition of witness M., three others were produced); *Ill.* 1850, Greene Co. *v.* Bledsoe, 12 Ill. 267, 271; *Ind.* 1844, Connersville *v.* Wadleigh, 7 Blackf. 102, 104; 1847, Doe *v.* Brown, 8 Blackf. 443, 444; *Ia.* 1859, Nevan *v.* Roup, 8 Ia. 207, 210; 1859, Mumma *v.* McKee, 10 Ia. 107, 110, *semble*; *Ky.* 1811, Talbot *v.* Bradford, 2 Bibb 316; *Md.* Ann. Code 1914, Art. 35, § 30; 1905, Real Estate T. Co. *v.* Union T. Co., 102 Md. 41, 61 Atl. 228; *N. J.* 1868, State *v.* Bassett, 33 N. J. L. 26, 31; *Pa.* 1860, McCormick *v.* Irwin, 35 Pa. 111, 118; *Wis.* 1862, Cameron *v.* Cameron, 15 Wis. 1, 5.

Contra: 1861, Hunt *v.* Gaslight Co., 1 All. 343, 348 (on the fallacious ground that "it was impossible for them [the opponent] to say with certainty that the deposition would not be admitted"; this assumes that the law could not be known beforehand, — an assumption which would confuse all legal rules).

For the time of *objections to competency* and *relevancy*, see *ante*, §§ 18, 486, 586.

[5] Cases cited *ante*, § 1371; and the following: 1895, Moore *v.* Triplett, — Va. —, 23 S. E. 69 (but in the special class of statutory proceedings here covered, *i.e.* sale of infant's lands, etc., under Code §§ 2435, 2619, actual presence was held necessary).

[6] Decisions upon miscellaneous details have been placed in § 1382, *post*.

him) at one place, require him or his principal counsel to attend on the same day at another place."

Under such circumstances, that deposition should be suppressed for which the opponent lost the opportunity of cross-examination, *i.e.* he is allowed to attend either, and the one not attended is excluded.[1] If in fact he succeeds in having representatives at both, then both become admissible, for there has been for both an actual opportunity of cross-examination.[2] But where he refrains from attending either, he practically waives the opportunity (*ante*, § 1371) as to both, and therefore both are admissible.[3] The policy of excluding both, merely because the appointments are incompatible,[4] cannot be supported.

§ 1380. **Same: Notice as a Requirement; English and Canadian Statutes.** The requirement of *notice to the opponent as the basis of furnishing* an opportunity for cross-examination has been almost invariably preserved in its integrity in the statutory regulation of the subject. The few deviations have occurred chiefly in provisions respecting notice to absent or unknown parties, respecting the discretion that may properly be allowed a trial Court in making exceptions. This statutory regulation became necessary for the main purpose of vesting the common-law Courts with that power which, by singular ineptitude, they conceived themselves to lack or to be somehow prevented from exercising with due freedom — the power of authorizing depositions to be taken before appointed officers.[1] The statutes conferring the power have thus usually also specified the requirements to be observed in giving notice to the opponent.

In *England* this statutory reform came piecemeal. The chief enactments have been five: (1) in 1830–31, 1 Wm. IV, c. 22, a statute giving to all superior

§ **1379.** [1] 1861, Hankinson *v.* Lombard, 25 Ill. 573; 1879, Collins *v.* Richart, 14 Bush 625; 1897, Cross *v.* Cross, — Ky. —, 41 S. W. 272 (notice to take on the same day that the opponent was taking another in the same suit on a previous notice, insufficient); 1867, Fant *v.* Miller, 17 Gratt. Va. 187, 226; and cases quoted *supra*.

[2] 1906, Ivey *v.* Bessemer C. C. Mills, 143 N. C. 189, 55 S. E. 613 (notice to attend in F. and in P.; the opponent attended at P., and the deposition at F. was not taken); 1878, Latham *v.* Latham, 30 Gratt. Va. 340.

[3] 1879, Hay's Appeal, 91 Pa. 268; see Blair *v.* Bank (1850), 11 Humph. Tenn. 88.

[4] *Ia.* Code 1919, § 7396 ("if notices are given in the same case by the same party of the taking of depositions at different places on the same day, thay shall be invalid"); *Ky.* 1815, Waters' Heirs *v.* Harrison, 4 Bibb 89; *Me.* Rev. St. 1916, c. 112, § 4 (if notice of two depositions at the same time and place is given, or if deceptive means are used to prevent attendance, the Court "may reject them"); *N. H.* 1856, Scammon *v.* Scammon, 33 N. H. 60; *N. D.* Comp. L. 1913, § 1074 (contested elections to legislative assembly; depositions at more than two places at the same time by either party, allowable only by court order); *S. D.* Rev. C. 1919, § 7352 (legislative election contests; "testimony . . . shall not be taken at more than two places at the same time by either party"). The following ruling is sound: 1893, Wytheville B. & I. Co. *v.* Teeger, 90 Va. 277, 282, 18 S. E. 195 (notice on same day of deposition in another State in another suit in which proponent of present deposition was not a party though his counsel was engaged; admitted).

§ **1380.** [1] A deposition could be authorized by the cumbrous methods either of the personal attendance of a judge of the Court (1606, Matthews *v.* Port, Comb. 63), or of a postponement of trial till the opponent consented (1774, Mansfield, L. C. J., in Mostyn *v.* Fabrigas, Cowp. 161, 174); but otherwise the party must sue out a commission in chancery (1827, L. C. Eldon, in Macaulay *v.* Shackell, 1 Bligh N. S. 96, 119, 131).

Courts the power of authorizing depositions both abroad and at home;[2] (2) in 1867, 30 & 31 Vict. c. 35, § 61, a statute extending the power to criminal proceedings for indictable offences; (3) the Judicature Act of 1873, 36 & 37 Vict. c. 66, Rules of Procedure, Order XXXVI; (4) the Judicature Act of 1875, 38 & 39 Vict. c. 77, § 17, the Rules of the Supreme Court (Order XXXVII) superseding the foregoing Rules and covering the same ground; (5) in 1883, the Rules of the Supreme Court (Order XXXVII), made under authority of the same Act (c. 77, § 17), and superseding all prior civil regulations; and (6) a few later statutes extending the principle of the foregoing to new fields.[3]

Under the statute of 1830–31, the mode of taking depositions was left to the discretion of the Court; but it does not appear that any change of prac-

[2] This was narrowly construed as applying to civil cases only: 1847, R. *v.* Upton St. Leonards, 10 C. B. 834.

[3] The relevant English Rules of 1883 and later statutes, are as follows:

Rules of the Supreme Court, 1883 (under 38 & 39 Vict. c. 77, § 17). *Order XXXVII:* I. *Evidence Generally:* Rule 1. "In the absence of any agreement between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages shall be examined 'viva voce' and in open court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party 'bona fide' desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit." (This first appeared in the Rules of 1873.) *Order XXXVII:* II. *Examination of Witnesses.* . . . Rule 5. "The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct." (This first appeared in the Rules of 1875.) Rule 6. "An order for a commission to examine witnesses shall be in the Form No. 36 in Appendix K." (The form provides fully for notice and cross-examination.) Rule 6 A. "If in any case the Court or a Judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission." (This is the mode usually employed for foreign countries and sometimes for India and the Colonies; the form provides for notice and cross-examination.) Rules 10, 11. "Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, . . . the examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination." (The provisions of 6, 6 A, 10, and 11 first appear in the Rules of 1883; though they may be considered as an adaptation of the provisions of the Chancery Practice Act of 1852, St. 15 & 16 Vict. c. 86.) Rule 201. "Any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound, on being served with such subpœna [from the opposite party], to attend before such officer or person [appointed by the Court] for cross-examination." (This first appears in the Rules of 1883.) *Order XXXVIII: Affidavits and Depositions:* Rule 1. "Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit." (This was contained in substance in the Rules of 1873.)

Later Statutes: 1904, St. 4 Edw. VII, c. 15, § 14 (Prevention of Cruelty to Children Act; for depositions of children, notice and opportunity of cross-examination are required); St. 1908, 8 Edw. VII, c. 67, §§ 28, 29 (Children Act: notice for deposition of child or young person); 1917, Gayer *v.* Gayer, Prob. 64 (divorce for adultery in New York; conditions examined on which affidavits will be allowed to be used, instead of a commission to take evidence).

tice actually ensued. Under the final Rules of 1883, the essential requirement of an opportunity for cross-examination was safeguarded, while at the same time a certain just amount of flexibility was provided for; so that the English system now represents a thoroughly practical and successful regulation of the subject. In brief, it deals with the requirement of an opportunity of cross-examination as follows: (*a*) Depositions must be taken subject to notice and opportunity for cross-examination before the officer appointed; (*b*) within certain limits the Court has a discretion to accept 'ex parte' sworn statements; but even in these cases the opponent is entitled to a subsequent cross-examination of the deponent before decision rendered.

In *Canada*, these Rules have been adopted in substance, either by statute or by rule of court.[4]

The practice of English Courts since the adoption of these rules indicates a disposition to preserve the principle of cross-examination so far as possible, and to use the discretionary powers of dispensation as little as possible.[5]

[4] CANADA: *Dominion:* Rev. St. 1906, c. 139, § 99, c. 140, § 67 (Exchequer and Supreme Courts); c. 146, Crim. Code § 997 (commissions out of Canada; rules to conform to those of civil trials, "as nearly as practicable"); § 998 (depositions of sick persons; reasonable notice and a full opportunity of cross-examination is required); § 999 (deposition at a preliminary investigation, if it is proved that it was "taken in the presence of the accused, and that he, his counsel, or solicitor, if present, had a full opportunity of cross-examining the witness"); *Alberta:* Rules of Court 1914, No. 382 (a person who has made an affidavit may be cross-examined thereon); No. 393 (similar, with details): Nos. 395–412 (depositions); 1920, R. *v.* Macdonald, 51 D. L. R. 539, Alta (whether the depositions at the preliminary hearing must be read over to the accused, under Crim. C. § 684); *British Columbia:* Rev. St. 1911, c. 58, § 57 (all witnesses before any judge, etc., "shall give their testimony 'viva voce' on oath, and be subject to examination by counsel in the presence of the Court", etc., "unless it is otherwise ordered by the Court or a judge on special grounds, or with the consent of the parties", etc.); § 59 (nothing herein shall "affect the mode of giving evidence by the oral examination of witnesses in trials by jury or before a judge without a jury", "save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read"); c. 78, § 15 (examination of an aboriginal, etc., on preliminary inquiry, taken by a magistrate, etc., is admissible like a deposition); Rules of Court 1912, No. 483 (like Eng. Ord. 37, R. 1); Nos. 487–507 (depositions); No. 548 (requiring cross-examination of affiants); *Manitoba:* Rev. St. 1913, c. 46, Rule 478 (depositions admissible on terms); R. 483 (cross-examination of affiants); R. 501, 507 (testimony taken on commission); *New Brunswick:* Consol. St. 1903, c. 111, §§ 262, 265 (provisions for notice); c. 112, §§ 84, 85 (Supreme Court in equity); *Newfoundland:* Con. St. 1916, c. 83, Ord. 33; (provisions for notice); *Nova Scotia:* Rev. St. 1900, c. 159, § 41 (municipal Courts); Rules of Court 1900, Ord. 35, R. 3 B, R. 10 (provisions for notice); *North West Territory:* Consol. Ord. 1898, c. 21, Rule 263 (like Ont. Rules, § 483); Rules 271, 272 (opportunity of cross-examination provided); 1904, R. *v.* Thompson, 7 N. W. Terr. 188 (deposition taken for the prosecution; Dom. Crim. Code § 687, applied); *Ontario:* Rev. St. 1914, c. 63, § 118 (provisions for notice); Rules of Court 1914, R. 269 (the Court may authorize testimony by affidavit or before an examiner; "but where the other party 'bona fide' desires the production of a witness for cross-examination, and such witness can be produced", no affidavit shall be authorized); R. 271 (depositions); R. 279–281 (rules for commissions); *Prince Edward Island:* St. 1887, c. 4, §§ 2–4 (rules for notice); St. 1910, c. 8, § 48 (chancery proceedings); St. 1910, c. 3, § 45 (election trials); *Quebec:* 1919, Guillemette *v.* The King, 61 D. L. R. 345, — Que. — (depositions excluded for lack of adequate opportunity to cross-examine); *Saskatchewan:* Rev. St. 1920, c. 41, § 27 (surrogate's court); *Yukon:* Consol. Ord. 1914, c. 48, R. 273 (like Ont. Rules of Court, R. 269); R. 303 (like Eng. Ord. 38).

Compare the statutes admitting *affidavits* (*post*, § 1710).

[5] On applications for the issuance of an order to take a deposition, the question whether it shall issue is entirely different from that of the admissibility of a deposition when taken, as pointed out *post*, § 1401. But sometimes a

§ 1381. **Same: U. S. Federal Statutes.** In the two types of ordinary deposition dealt with in the Federal statutes and Court rules (deposition 'de bene esse', *i.e.* on an order for conditional taking, and 'dedimus potestatem', *i.e.* a special commission), the principle is preserved that there must have been an opportunity of cross-examination.[1] By the original act of 1789 (c. 20, § 30), regulating the former class, the notice and opportunity to cross-examine was not necessary if the opponent or his attorney was not within one hundred miles of the place; but this defect was remedied (R. S. § 863, Code § 1364) in the later statute. The statute authorizing the latter class of depositions (R. S. § 866, Code § 1367) has also been construed to require notice and opportunity for cross-examination;[2] but the terms of the statute are so complicated with local State usage that it is not possible to say that all depositions offered in Federal Courts must be tested by that requirement.[3]

ruling on such an application may involve a ruling that such a deposition, even if taken, would be inadmissible; such a ruling was the following, in which the requirement of cross-examination is insisted upon as indispensable: 1882, Crofton *v.* Crofton, L. R. 20 Ch. D. 760 (Fry, J., refused to issue a commission to examine a witness in France, because the mode of examination there, which would control, left the putting of questions to the judge's discretion: "He is a witness who ought to be subjected to the most drastic cross-examination, and . . . I decline to delegate my discretion to any other tribunal. If under the commission, the witness would have been subject to cross-examination in the ordinary way, I should have thought it desirable to issue it").

§ 1381. [1] STATUTES: U. S. Rev. St. 1878, § 863, Code § 1364 (for depositions 'de bene esse', "reasonable notice must first be given in writing"; and "whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct"); § 866, Code § 1367 (for depositions by 'dedimus potestatem' "to prevent a failure or delay of justice", the provisions of the above section "shall not apply", and they may be taken "according to common usage"); Code § 148 (rule for contested congressional elections). St. 1909, Feb. 16, c. 130, § 16, Code § 3116 (rules for depositions in naval courts); St. 1911, Mar. 3, c. 231, Judicial Code, § 169, Code § 1138 (testimony for Court of Claims; superseding Rev. St. § 1083); St. June 4, 1920, ch. V, subchapter II, Articles of War, Art. 25 ("reasonable notice" required for depositions in military courts, ect.;

RULES OF COURT: Supreme Court, No. 13, Rules 1912, No. 12 (for new evidence in maritime cases before the Supreme Court, no commission shall issue except on notice and a copy of interrogatories); Equity Rules, No. 67, Rules 1912, Nos. 47, 53 (rules prescribed for notice and cross-examination in taking testimony by deposition); No. 48 (expert's affidavits are subject to the witness' production for cross-examination, in patent and trademark cases); No. 54 (superseding old Rules 68 and 70; depositions may be taken as provided by law; but "if in any case no notice has been given", the opponent on application is "entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the Court or judge under all the circumstances shall order"); C. C. A. Rules in Admiralty, No. 9 (requires "reasonable notice in writing given to the opposite party", or his attorney).

[2] For the manner and time of the notice under these statutes, see the following: 1897, American E. N. Bank *v.* First N. Bank, 27 C. C. A. 274, 82 Fed. 961 (reasonableness depends on the circumstances of the case); 1900, U. S. Life Ins. Co. *v.* Ross, 42 C. C. A. 691, 102 Fed. 722 (notice to a corporate agent to accept service after the revocation of his authority but before appointment of another, held good).

[3] The situation is as follows:

(1) The 'dedimus potestatem' section (§ 866) prescribes that "common usage" shall control the mode. This "common usage" was for some time construed to permit the adoption of local statutory and common-law modes: U. S. *v.* Cameron, 15 Fed. 797 (McCrary, J., 1883); Warren *v.* Younger, 18 Fed. 859 (McCormick, J., 1884). *Contra*, Randall *v.* Venable, 17 id. 162 (Turner, J., 1884).

(2) Then in 'Ex parte' Fisk, 113 U. S. 725, 5 Sup. 724 (1884), the Supreme Court refused to recognize such a construction for the purpose of enforcing an order to take under a peculiar State law, and intimated, though expressly reserving the point, that the deposition, had it been already taken and were it

§ 1382. **Same: State Statutes.** The requirement of notice and opportunity to cross-examine has been generally preserved in all the various State statutes. Only a few deviations are found here and there.[1]

offered in evidence, would be rejected on the same grounds.

(3) By St. 1892, c. 14, Code § 1372 the Federal lower Courts were authorized to take (and presumably to admit in evidence) depositions according to the mode allowable in the State of the trial; thus apparently annulling the effect of 'Ex parte' Fisk, *supra*. The doubt thus remained whether the new statute, going beyond the 'dedimus potestatem' section (§ 866), operates also to relax the detailed requirements of § 863 (concerning 'de bene' depositions). The pronouncements under this statute are as follows: 1903, Hanks Dental Ass'n *v.* Tooth Crown Co., 194 U. S. 303, 24 Sup. 700 (U. S. St. 1892, c. 14, Mar. 9, "does not purport to repeal in any part, or to modify, § 861, or to create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions"; here applied to forbid following New York law as to depositions of a party for discovery before trial; collecting the intervening rulings of the Federal intermediate courts on St. 1892); 1904, Zych *v.* American Car & F. Co., 127 Fed. 723, 728, C. C. (Thayer, J.: "It will not be out of place to observe, because the question has been to some extent discussed, that the law as declared in 'Ex parte' Fisk has not been altered by the act of Congress of Mar. 9, 1892, *supra*; . . . there seems to be a general consensus of judicial opinion that the act relates merely to the mode of taking testimony, adopting in that respect the provisions of the laws of the various States relative to the method of taking depositions, without altering the conditions prescribed by §§ 863 and 866 of the Revised Statutes of the U. S. under which depositions for use in the Federal courts may be taken"); 1905, Carrara P. A. Co. *v.* Carrara P. Co., 137 Fed. 319, C. C. (the statute of 1892 does not "add to the classes of witnesses" but "provides an additional mode" for taking depositions).

(4) Finally, by St. 1906, June 29, Code § 1356, amending Rev. St. 1878, § 856, the "competency of a witness to testify" is to be determined by "the laws of the State or Territory in which the court is held."

Compare the citations *ante*, § 6 (applicability of State law in Federal courts).

§ 1382. [1] In the following list a few of the judicial rulings in regard to the requirement of notice have been placed after the respective statutes; where the requirement is not merely of "reasonable notice", but of notice in a specific way, the result depends almost entirely upon the wording of the local statute; where not otherwise stated, the statute requires notice and prescribes details; compare here the statutes cited *post*, § 1413 (former testimony) and § 1710 (affidavits);

Alabama: Code 1907, §§ 4031–4033, 4043, 4047, 7887, 7890 (criminal cases); 1895, Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13 (no notice necessary in proceedings under § 2803); 1905, Edwards *v.* Edwards, 142 Ala. 267, 39 So. 82 (Chancery statute applied);

Alaska: Comp. L. 1913, § 1478, 1482, 1484, 1489 (like Or. Laws 1920, §§ 840, 844, 846, 851); 1888, Dunbar *v.* DeGroff, 2 Alsk. 25 (expounding Oregon Gen. L. 1843–1872, § 806, as representing the law in force, in Alaska, by virtue of U. S. St. 1884, May 17);

Arizona: Rev. St. 1913, P. C. § 1239, 1250 (depositions taken by accused); Civ. C. §§ 169, 1693, 1701 (civil cases);

Arkansas: Dig. 1919, §§ 4215–4230, § 3112 (rule applied to depositions taken for accused in criminal case); § 10517 (no notice required of attesting witness' deposition for will-probate unless contested);

California: P. C. 1872, §§ 1335–1340 (depositions in criminal cases, both for accused and, except in homicide, for prosecution, pursuant to Const. 1879, Art. I, § 13); § 882, as amended in 1878 (prosecution's depositions); C. C. P. 1872, §§ 2004, 2023, 2024, 2025½, 2029, 2031 (civil cases);

Colorado: Const. 1876, art. II, § 17, Comp. L. 1921, § 7085 ("reasonable notice" required in criminal cases); C. C. P. §§ 377, 384, 389 (in general);

Columbia (Dist.): Code 1919, § 922 (deposition taken by defendant in a criminal case); Code 1919, § 132 (notice of commission to take testimony of attesting witnesses to a will need not be given, unless the probate is opposed); §§ 1058, 1060 (in general); 1913, Hutchins *v.* Hutchins, 41 D. C. App. 367 (this Court cannot order a deposition by commission on oral examination of a witness in a foreign country; only letters rogatory can be used, with the questions prepared beforehand); § 6637 (depositions for accused);

Connecticut: Gen. St. 1919, § 5707 (in general); §§ 5712, 5714 (commission to take deposition of one in military or naval service);

Florida: Rev. G. S. 1919, §§ 2743, 2757 (in general); § 6086 ff. (deposition for accused person); § 2736 (on motions heard on affidavits, the Court may order "such witnesses as it may think necessary to appear and be examined 'viva voce'");

Georgia: Rev. C. 1910, §§ 5889–5902 (commissions on interrogatories); §§ 5903, 5905–5917 (depositions without commission);

Hawaii: Rev. L. 1915, §§ 2574–2577 (domestic depositions); § 2566 (by commission, in foreign country);

There is also an *apparent* exception, under the statutes of numerous jurisdictions, which permit a party to file an affidavit, with notice, and await the

Idaho: Comp. St. 1919, §§ 8002, 8005, 8025, 8786, 9143, 9158 (in general); § 86 (legislative election contest); § 6778 (injunction proceedings; affiants may be required to appear for cross-examination);
Illinois: Rev. St. 1874, c. 51, §§ 24–28, c. 148, § 4 (in general); 1903, Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77 (*semble*, under R. S. c. 148, § 4, providing for depositions in probate cases by commission, the failure of the opponent to receive notice of the taking does not prevent the use of the deposition);
Indiana: Burns' Ann. St. 1914, §§ 435–437, 465 (in general); § 3142 (probate proceedings); § 451 (commission to foreign country); § 2118 (defendant in criminal case);
Iowa: Code 1897, §§ 4687–4689, 4693–4699, Comp. Code, §§ 7395–7397, §§ 7401–7407 (in general); § 5222, Comp. Code, §§ 9176, 9462, 9463 (accused's depositions); 1905, State *v.* Mosher, 128 Ia. 82, 103 N. W. 105 (Code, § 4688, as to deposition by Court order, construed);
Kansas: Gen. St. 1915, §§ 7247, 7255 (in general); § 7254 (affidavits may be filed with court and 10 days' notice given; if opponent within 5 days gives notice of desire to cross-examine or of denial of truth of affidavit, it is not admissible on the trial); 1893, Peterson *v.* Albach, 51 Kan. 150, 32 Pac. 917 (time of notice);
Kentucky: 1915 Stats. § 4855 (for depositions of attesting will-witnesses, notice required only to the party contestant); C. Cr. P. 1895, § 153 (defendant's depositions in criminal cases); C. C. P. 1895, §§ 566–569 (in general); § 1009 (depositions in equity); 1915, Fireman's Ins. Co. *v.* McGill, 164 Ky. 621, 176 S. W. 27 (C. C. P. § 571 applied);
Louisiana: Ann. Rev. St. 1915, §§ 615, 621, C. Pr. 1900, §§ 425–430, 438 (in general); St. 1896, No. 124, Wolff's Rev. L. 278 (prosecution in criminal cases); R. S. 1870, §§ 938, 3485 (prosecutions; deposition of master or officer of vessel or of any "transient person" deemed to be necessary); St. 1910, No. 176, p. 261, July 6 (witnesses residing out of the parish; reasonable notice required); 1903, State *v.* Jackson, 111 La. 343, 35 So. 596 (depositions taken for the prosecution under St. 1896, No. 124, admitted; the statute construed); 1904, Thibodeaux *v.* Thibodeaux, 112 La. 906, 36 So. 800 (deposition excluded for lack of proper notice); 1905, Honor Co. *v.* Stevedores' & L. B. Ass'n, 114 La. 361, 38 So. 271 (notice required); 1905, De Renzes *v.* His Wife, 115 La. 675, 39 So. 865 (under Rev. St. § 611, for a foreign commission, no notice of time and place is required when interrogatories are annexed and notice thereof given);
Maine: Rev. St. 1916, c. 112, §§ 5–9 (in general);
Maryland: Ann. Code 1914, Art. 35, § 16–31 (in general); art. 84, § 9 (depositions in shipping cases); 1800, Gittings *v.* Hall, 1 H. & J. 14, 18 (notice necessary for depositions under the act of 1723, c. 8, for land commissions);
Massachusetts: Gen. L. 1920, c. 233, §§ 26, 44 (notice required; unless notice was impossible under the circumstances); c. 233, § 42 (where the adverse party does not appear to defend, no notice is required); c. 276, § 50 (criminal cases; magistrate may take depositions, on notice as in civil actions, "with the consent of the defendant"); c. 277, § 76 (court may issue commission, on defendant's application, for witness out of the State; prosecution may join and name material witnesses for the Commonwealth); 1918, Re Derinza, 229 Mass. 435, 118 N. E. 942 (St. 1915, c. 275, § 1, applied to a deposition taken in Italy for a claim before the State industrial accident board);
Michigan: Comp. L. 1915, § 12494 (in general); 1897, Drosdowski *v.* Chosen Friends, 114 Mich. 178, 72 N. W. 169 (reasonable notice; trial Court's discretion approved);
Minnesota: Gen. St. 1913, §§ 8382–8386 (civil cases); § 8514 (accused);
Mississippi: Code 1906, §§ 1927–1937, Hem. §§ 1587–1597 (in general);
Missouri: Rev. St. 1919, §§ 5440–5465 (in general); 1894, Glenn *v.* Hunt, 120 Mo. 333, 336, 25 S. W. 181 (notice not necessary under R. S. 1889, § 4435, for an opponent out of the State); 1903, Re Wogan, 103 Mo. App. 146, 77 S. W. 490 (time of notice);
Montana: Rev. C. 1921, §§ 10646, 10650, 10651, 10653 (like Cal. C. C. P. §§ 2024, etc.); §§ 12190, 12203, 12205 (like Cal. P. C. §§ 1338, 1353, 1355); § 11795 (deposition before a magistrate of a witness not giving recognizance);
Nebraska: Rev. St. 1922, §§ 8881, 8887, 10127 (in general); § 5017 (county surveyor's inquiry as to lines, etc.; testimony "shall never be used as evidence in any action involving corners or boundary lines except for the purpose of impeachment");
Nevada: Rev. L. 1912, §§ 5455, 5459, 7370 (in general); §§ 6855, 6997 (deposition of a witness for the people, admissible if it is taken in the defendant's presence, and the defendant has had "an opportunity to cross-examine");
New Hampshire: Pub. St. 1891, c. 225, §§ 4, 5, 14 (in general);
New Jersey: Comp. St. 1910, Evidence, § 31 (in general); § 38 (notice of eight days required for a commission out of the State, unless by consent or by judge's order); § 45 (for depositions before a judge, commissioner, etc., out of the State, terms of notice prescribed); § 44 (same, deposition in foreign State); Evidence, § 56*a* (in a proceeding for divorce or annulment, where no appearance is

opponent's counter-notice either disputing the affidavit or demanding cross-examination of the affiant; in the absence of such counter-notice, the affida-

entered, a deposition in another State or Territory may be taken and used "'ex parte' and without notice"); District Courts, § 65 (rules for taking depositions in district courts); St. 1913, Mar. 12, c. 69 (party's deposition taken on his own behalf 'in perpetuam'); St. 1917, Mar. 26, c. 121 (amending C. S., Evidence, § 38); St. 1917, Mar. 26, c. 122 (amending ib. § 31); 1904, Stokes *v.* Hardy, 71 N. J. L. 116, 58 Atl. 650 (proof of notice);

New Mexico: Annot. St. 1915, §§ 2128-2135 (in general); St. 1919, Mar. 10, c. 29, § 2 (civil causes; oral interrogatories);

New York: C. Cr. P. 1881, § 219 (in depositions for the prosecution, two days' notice must be given); § 632 (in depositions for accused, notice as specified by the judge); C. P. A. 1920, § 290, J. C. A. § 204 (notice prescribed); S. C. A. 1920, § 74 (surrogate proceedings);

North Carolina: Con. St. 1919, §§ 1809, 1815 (in general); § 1812 (depositions taken by accused); 1896, State *v.* Finley, 118 N. C. 1161, 24 S. E. 495 (under c. 522, St. 1891, a co-defendant need not be notified);

North Dakota: Comp. L. 1913, §§ 7891–7905 (civil cases); §§ 11043, 11053 (criminal cases); § 1073 (contested elections to legislative assembly);

Ohio: Gen. Code Ann. 1921, §§ 11534, 11535, 11536 (in general); § 13668 (in criminal cases, the judge's order may prescribe terms of notice); § 64 (impeachment before the Legislature); Const. 1851, Art. I, § 10, amended 1912 (depositions for the State or the accused; quoted *post*, § 1397);

Oklahoma: Comp. St. 1921, §§ 618, 619, 2491, 2772, 2845, 2856;

Oregon: Laws 1920, §§ 840, 844, 846, 851 (in general); §§ 1514–1516 (criminal cases);

Pennsylvania: St. 1895, June 25, Dig. 1920, § 10292; St. 1909, Apr. 27, § 2, Dig. § 8175, Crim. Procedure (accused's witnesses out of the State but in the U. S., in criminal cases); St. 1911, June 8, Dig. § 10295;

Philippine Islands: C. C. P. 1901, §§ 356, 361;

Porto Rico: Rev. St. & C. 1911, §§ 6462, 6475 (accused in criminal cases); §§ 1506, 1511 (civil cases);

Rhode Island: Gen. Laws, 1909, c. 292, § 23, 26, 32; 1851, Hazard *v.* R. Co., 2 R. I. 62 (no notice required under statute, for an opponent more than 100 miles distant); 1917, Stern & Sons Inc. *v.* Chagnon, 39 R. I. 567, 99 Atl. 592 (whether the notice must give the witness' name; authorities collected); 1917, Fales *v.* Musicians' Protective Union, 40 R. I. 34, 99 Atl. 823 (failure to notify of continuance of adjourned hearing, held error);

South Carolina: C. C. P. 1922, §§ 686, 695 (ten days' notice required for depositions on commission or before a court clerk); § 698 ("reasonable notice, not less than ten days", unless notice is impracticable, required for certain depositions); the statutes are applied in the following cases: 1900, Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; 1901, Wallingford *v.* Tel. Co., 60 S. C. 201, 38 S. E. 443; C. Cr. P. § 976 (deposition of the female in rape cases); Crim. L. 1922, § 714 (harboring deserting seamen; deposition of a master of vessel "or other transient person", may be taken on 5 days' notice);

South Dakota: Rev. C. 1919, §§ 2762–2763 (civil cases); §§ 5010, 5022 (criminal cases); § 7351 (legislative election contest); St. 1921, c. 411 (depositions for defendant in criminal cases);

Tennessee: Shannon's Code 1916, §§ 5627, 5640–5647 (notice to be as the Court may order, or according to detailed rules provided); § 5632 (if cross-examination is omitted, it may be had afterwards); § 7356 (rules for civil cases made applicable to defendant's depositions in criminal cases); § 3210 (special rule for notary's deposition);

Texas: Rev. Civ. St. 1911, §§ 3650–3652, 3664 (in general); Rev. C. Cr. P. 1911, §§ 817, 825, 828 (criminal cases); § 3234 (rules for notice in probate proceedings);

Utah: Comp. L. 1917, §§ 7164, 7169, 7179, 7183, 7184, 9301, 9314 (in general); § 8767 (testimony of witnesses before committing magistrate);

Vermont: Gen. L. 1917, §§ 1917, 1918, 2564 (reasonable notice is to be given; for non-residents having no attorney in the State, no notice is necessary); §§ 252, 254 (notice required in election contests); 1868, Kimpton *v.* Glover, 41 Vt. 284 (time of notice); 1916, Gilman *v.* Hoosac Tunnel & W. R. Co., 90 Vt. 451, 98 Atl. 982 (deposition taken in Italy; statutory rules for notice, interpreted);

Virginia: Code 1919, §§ 6228–6229 (in general); § 5252 (will-witness in probate proceedings; if uncontested, no notice need be given);

Washington: R. & B. Code 1909, §§ 1233, 1234, 1240, 1241, 1962 (in general);

West Virginia: Code 1914, c. 130, § 35 (in general); c. 50, § 106 (depositions before justices); c. 121, § 3 (specific rules for service of notice on non-residents); c. 77, § 27 (deposition of subscribing witness to will; notice necessary only to a party opposing probate); c. 159, § 1 (depositions for the accused); c. 71, § 23 (suit against infant or lunatic); 1922, Woodrum H. O. Co. *v.* Adams Exp. Co., — W. Va. —, 110 S. E. 549 (service of notice);

Wisconsin: Stats. 1919, §§ 4086, 4096, 4102, 4114, 4115 (in general);

Wyoming: Comp. St. 1920, §§ 5839, 5840 (in general); §§ 7514, 7518 (criminal cases).

vit may be used at trial. This use rests upon a virtual waiver by the opponent of his right of cross-examination.

§ 1383. **Same: Depositions in Perpetuam Memoriam; Depositions for use Without the State; Sovereign's or Ambassador's Testimony.** (1) The principle requiring notice and opportunity of cross-examination applies equally to depositions taken in view of future litigation, 'in perpetuam memoriam'; and it is preserved in the statutes as well as enforced in the judicial rulings.[1] Where a

§ 1383. [1] ENGLAND: Rules of Court 1883, Ord. 37, r. 5 (quoted *ante*, § 1380; presumably suffices for this purpose); CANADA: Compare the statutes cited *ante*, § 1380, and *post*, § 1388; UNITED STATES: Notice is prescribed, except as otherwise stated; compare also the statutes cited *post*, § 1388, as to identity of parties and issues: *Federal:* Rev. St. 1878, § 867, Code § 1368 (quoted *post*, § 1388); §§ 866, 1367 (provisions of R. S. § 863, Code § 1364, as to depositions 'de bene' do not here apply); 1897, Green *v.* Compagnia, 82 Fed. 490, 495 (excluded, if taken without notice; here, a corporation in a foreign country, witnesses being sailors about to leave this country); 1909, Ohio Copper M. Co. *v.* Hutchings, 8th C. C. A., 172 Fed. 201 (under Utah Rev. St. 1898, § 3467, the deposition of a person corporally injured may be taken at the instance of his wife and may be used on his death, clause (1) of the statute permitting this); *Ala.* Code 1907, §§ 4064, 4065, 4071, 4074; *Alaska:* Comp. L. 1913, § 1517; *Ariz.* Rev. St. 1913, Civ. C. § 1722; *Ark.* Dig. 1919, §§ 4240–4245 (notice required; if the adverse party is an infant, nonresident, unknown, or for four months absent from the State, the Court may appoint a cross-examiner); *Cal.* C. C. P. 1872, § 2084; *Colo.* Comp. L. 1921, C. C. P. § 401; *Conn.* Gen. St. 1918, § 5717; *Del.* Rev. St. 1915, § 3617 (boundary cases; notice to owners and tenants required); *Fla.* Rev. G. S. 1919, § 2761; *Ga.* Rev. C. 1910, § 4560 (the Court is to provide for "the most effectual notice"); *Haw.* Rev. L. 1915, § 2585; *Ida.* Comp. St. 1919, §§ 8051–8063; *Ill.* Rev. St. 1874, c. 51, §§ 39–44 (notice required, and details prescribed; if the ordinary requirements seem to the Court insufficient, "the Court may order such reasonable notice to be given as it shall deem proper"); *Ind.* Burns' Ann. St. 1914, §§ 457, 458 (in general); §§ 1306, 1313 (testimony to perpetuate a lost deed, record, etc., before the recorder, etc.; no notice apparently required); *Ia.* Code 1897, §§ 4718–4720, Comp. Code, §§ 7426–7428 (notice required; if personal notice is impossible, the Court is to appoint a cross-examiner); Comp. Code, §§ 7382–7390 (perpetuation of testimony by taking affidavit on notice to parties interested); *Kan.* Gen. St. 1915, § 7292 (Court to prescribe time and manner of notice); *Ky.* C. C. P. 1895, § 611 (notice to the "expected adverse party", required); *La.* C. Pr. 1900, § 440; St. 1914, No. 112 (mode of taking, amended); *Me.* Rev. St. 1916, c. 112, §§ 22, 27; *Md.* Ann. Code 1914, Art. 35, § 33 (land-boundaries; notice is to be posted in "the most public places in the county" 20 days before, and where all persons interested are known and any one lives out of the county, by newspaper advertisement 40 days before); *Mass.* Gen. L. 1920, c. 233, §§ 46–58 (mode of notice to specific persons named as interested, within or without the State, for use only against those persons or their privies); §§ 59–63 (mode of notice by additional publication, "so that the depositions may be evidence against all persons"); *Mich.* Comp. L. 1915, § 12498; *Minn.* Gen. St. 1913, §§ 8401, 8407; *Miss.* Code 1906, §§ 1943–1953, Hem. §§ 1603–1613; *Mo.* Rev. St. 1919, §§ 5479, 5482, 5503; 1866, Patterson *v.* Fagan, 38 Mo. 70 80 (notice necessary); *Mont.* Rev. C. 1921, § 10687; *Nebr.* Rev. St. 1922, §§ 8929, 8930 (notice prescribed as the judge directs; if personal notice is impossible, the judge is to appoint a cross-examiner); *Nev.* Rev. L. 1912, §§ 5464–5468; *N. H.* Pub. St. 1891, c. 226, §§ 3–5; *N. M.* Annot. St. 1905, §§ 2144–2147; *N. Y.* C. P. A. 1920, § 317; *N. D.* Comp. L. 1913, §§ 7927–7930; St. 1917, Mar. 8, c. 110 (depositions 'in perpetuam' in personal injury cases); *Oh.* Gen. Code Ann. 1921, §§ 12216–12219 (in general); §§ 2795, 2808, 2813 (county surveyor may take and return testimony to marks, etc., on notice to the adverse party); *Okl.* Comp. St. 1921, §§ 657, 658 (notice required; the Court to prescribe details, and to appoint an attorney to cross-interrogate in case no personal notice can be given); *Or.* Laws 1920, §§ 883, 888 (notice required, and details prescribed; the officer himself to cross-examine, if no opponent appears); *P. I.* C. C. P. 1901, § 371; *R. I.* Gen. L. 1909, c. 292, §§ 33, 35; *S. C.* C. C. P. 1922, §§ 722–726 (for lost documents); *S. D.* Rev. C. 1919, § 2777 (the judge to prescribe terms of notice; and to appoint a cross-examining attorney where the parties cannot be notified); *Tenn.* Shannon's Code 1916, §§ 5671, 5672; *Tex.* Rev. Civ. St. 1911, § 3653; *Utah:* Comp. L. 1917, §§ 7194–7199; *Vt.* Gen. L. 1919, §§ 1927, 1928; *Va.* Code 1917, § 6235 (reasonable notice required to "the persons who may be so affected"); *Wash.* R. & B. Code 1909, § 1250; *W. Va.* Code 1914, c. 130, § 39 (reasonable notice to be given to "the persons who may be so affected"); *Wis.* Stats. 1919, §§ 4118, 4125, 4128, 4131; *Wyo.* Comp.

deposition is offered against one who has not been notified and could not have been, even by due diligence (as is likely to occur in cases where the parties to the future litigation are still unknown), it may be thought that a case of necessity exists, dispensing with the requirements; the statutes sometimes provide expressly that a deposition may be or shall not be used against such a party.[2]

In some jurisdictions, the statute requires that this kind of deposition shall be *publicly recorded*, the object being to secure as wide a notice of it as possible, so that counter-testimony may be availed of if desired; an object analogous to that of the requirement of notice for cross-examination.[3] Under such a statute an unrecorded deposition would be inadmissible.[4]

(2) For litigation taking place *in a foreign jurisdiction*, the Legislature in earlier practice did not provide, at the time of framing the statutes authorizing depositions to be taken. Obviously, also, a person within this jurisdiction cannot be compelled by any foreign authority to attend and testify either in the foreign Court or before an officer taking his deposition in the State of his residence. Hence occurred, in modern times of easy transit and copious interstate commerce, numerous failures of justice for lack of needed testimony.

Statutes of comity now authorize the domestic Court to require the deposition of any resident, for use in extra-State litigation. The rules for notice to the opponent are sometimes specially framed, sometimes the same as for depositions as ordinarily taken.[5]

(3) At common law, in England, the *king's* testimony as an individual seems to have been receivable without attendance for cross-examination, thus forming an exception to the Hearsay rule.[6] On the same principle it would seem that the testimony of a visiting *sovereign* or an *ambassador* (privileged from attendance under the principle of § 2372, *post*) should be receivable; nevertheless, no exception is recognized, *i.e.* the ambassador's testimony must be taken, if at all, in the form of a deposition subjected to cross-examination, — in criminal cases at least.[7]

§ 1384. **Affidavits.** Upon the principles already examined, it is perfectly clear that a mere affidavit — *i.e.* a statement made upon oath before an officer — is inadmissible:

St. 1920, §§ 6308–6309 (notice required; the Court to appoint a cross-examiner, where personal notice cannot be given).

[2] See the statutes in § 1388, *post*.

[3] Mass. Gen. L. 1920, c. 233, §§ 50, 62; and other States, *supra*, n. 1; 1840, Thacher, J., in Com. *v.* Stone, Thacher Cr. C. 604, 607 ("Why does the statute require that a deposition 'in perpetuam' should be recorded? It is to preserve its purity and integrity, as well as the testimony itself. The record is a publication and serves to make it known as well as remembered. If it should contain errors or falsehoods, the parties in interest will have an opportunity to guard against them in season, either by taking the deposition 'de novo', or by putting on record the deposition of others to contradict or explain its contents").

[4] 1814, Bradstreet *v.* Baldwin, 11 Mass. 229, 233; 1822, Braintree *v.* Hingham, 1 Pick. Mass. 245, 247; 1840, Com. *v.* Stone, Thacher Cr. C. Mass. 604, 607.

[5] The statutes have been placed *post*, § 2195 (power to compel attendance).

[6] The cases are collected *post*, § 1674.

[7] The cases are collected *post*, § 1407.

1767, BULLER, J., Trials at Nisi Prius, 241: "From what has been said, it is evident that, as there can be no cross-examination, a voluntary affidavit is no evidence between strangers."

1853, *Common-Law Practice Commissioners*, Second Report, p. 31: "All applications to the Courts for their summary intervention in what may be termed incidental matters are founded on testimony contained in affidavits. If resisted, the evidence in opposition is brought before the Court in the same manner. Now it must be admitted that this species of evidence is of all others the most unsatisfactory. All the circumstances which give to the system of English procedure its peculiar and characteristic merits—'viva voce' interrogation, cross-examination, publicity, examination in the presence of the tribunal, whereby an opportunity is afforded of observing the demeanor of the witness — are here wanting; and not only this, but the testimony is often not the spontaneous statement of the witness; the affidavit is prepared for and sworn to by the deponent, often without the sense of responsibility which would be felt by a witness when delivering a statement in his own words. Another very serious objection to affidavit-evidence is that there is no effectual mode of ascertaining the means of knowledge or the grounds on which general conclusions sworn to have been arrived at."

1851, GRIER, J., in *Walsh* v. *Rogers*, 13 How. 287 (referring to 'ex parte' depositions): "Testimony thus taken is liable to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have just so much or so little of the truth, or such a version of it, as will suit his case."

1870, THORNTON, J., in *Becker* v. *Quigg*, 54 Ill. 390, 394 (rejecting an affidavit to prove loss of a document): "One serious objection to the admission of 'ex parte' affidavits is that the opposite party is denied the privilege of cross-examination. This is a most efficacious test for the discovery of truth, and should never be departed from, except from necessity. A witness subjected to this test cannot easily impose on the Court or fabricate falsehood."

This principle has been constantly recognized and enforced judicially.[1]

There are, however, a number of instances (*post*, §§ 1709–1711) which form special *exceptions* to the Hearsay rule. They are briefly these: (1) a common-law exception for disqualified parties (when that form of incompetency prevailed), admitting the affidavit of the loss of a document proved by copy; this has been perpetuated in some statutes; (2) a common-law

§ **1384.** [1] 1893, Allen *v.* U. S., 28 Ct. Cl. 141, 145; 1691, R. *v.* Taylor, Skinner 403; 1898, Pickering *v.* Townsend, 118 Ala. 351, 23 So. 703; 1883, Smith *v.* Feltz, 42 Ark. 355, 357; 1899, People *v.* Plyer, 126 Cal. 379, 58 Pac. 904 (affidavit not admissible to prove death of former witness in order to use his testimony); 1908, Fender *v.* Ramsey, 131 Ga. 440, 62 S. E. 527; 1889, Shreve *v.* Cicero, 129 Ill. 226, 228, 21 N. E. 815 (affidavit of inspection of registry of deeds, excluded); 1871, State *v.* Felter, 32 Ia. 49, 51; 1893, Hudson *v.* Appleton, 87 Ia. 605, 607, 54 N. W. 462 (even where the affiant has become ill and mentally incompetent); 1894, Democrat P. Co. *v.* Lewis, 90 Ia. 304, 57 N. W. 869 (affidavits usable before a certain board, here excluded); 1866, Patterson *v.* Fagan, 38 Mo. 70, 82; 1909, McCabe *v.* State, 85 Nebr. 278, 122 N. W. 893 (illegal sale of liquor; the search-warrant and return, including the sworn complaint before the county court by L. who did not testify on the trial, was admitted; held erroneous); 1898, Supreme Lodge *v.* Jaggers, 62 N. J. L. 96, 40 Atl. 783; 1845, Harper *v.* Burrow, 6 Ired. N. C. 33; 1906, People *v.* Wolf, 183 N. Y. 464, 76 N. E. 592 (affidavits forming a criminal information against the defendant); 1913, U. S. *v.* Escondo, 25 P. I. 579 (municipal official's affidavit as to a tax being unpaid, excluded); 1901, People *v.* Fernandez, 14 P. R. 611, 621, 1909, State *v.* Weil, 83 S. C. 478, 65 S. E. 634 (illegal liquor-selling; record of an injunction-case against the defendant, containing affidavits, held improperly admitted).

Distinguish the following: 1889, Graham *v.* McReynolds, 88 Tenn. 240, 247, 12 S. W. 547 (affidavit by plaintiff, offered as ratifying attorney's action in prosecuting suit; admitted).

Distinguish also the use of the *opponent's* affidavit as an *admission* (*ante*, § 1075).

exception in Pennsylvania for an affidavit of a copy of a foreign register, in certain cases; (3) a statutory exception, widely in favor, for an affidavit of publication of a newspaper notice; (4) statutory exceptions in sundry unrelated cases. The use of affidavits in interlocutory and 'ex parte' proceedings is (*ante* § 4) not within the present purview, which is confined to adversary proceedings in the nature of common-law trials.

Statutes providing for the *right to cross-examine affiants*, thus making them the equivalent of depositions, are considered *ante*, § 1382.

§ 1385. **Preliminary Rulings on 'Voir Dire'; Testimony by an Opponent; Ex Parte Expert Investigations; Expert Reading his Prepared Report.** (1) In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply (*ante*, § 4). Hence there is no absolute right to cross-examination.[1] Nevertheless, it is customary and proper to hear evidence on both sides before the ruling is made. Some Courts, however, are inclined erroneously to apply the specific right of cross-examination to that situation.[2]

(2) The interrogation of an *opponent*, by way of discovery (*post*, § 1856), is in itself in the nature of a cross-examination, and secures all the benefits of it. But the manner and subject of the interrogatories may be limited by the rule against impeaching one's own witness (*ante*, § 916), when the opponent is examined by deposition or on the stand like other witnesses. By the same rule, the interrogation of even an ordinary witness may be restricted (*ante*, §§ 910-915); and this question is sometimes loosely and improperly referred to as involving the general "right to cross-examine", as if that right were not recognized. So, also, the same improper phrase is sometimes applied to the rule forbidding to deal with the subject of one's own case on cross-examination (*post*, § 1885).[3]

(3) Of late years, the fallacious suggestion has sometimes been made by unreflecting counsel that the rule requiring an opportunity of cross-examination applies to forbid the use of a diagram or model or map, or of a chemical analysis or other *expert investigation*, prepared or *made out of court without notice* to the other party. The suggestion is erroneous, for the reason that there *is* afforded in such cases the required opportunity of cross-examination, namely, when the witness who has made the model or the analysis takes the stand at the trial to testify to the results of his work. No more can be demanded. The map or model or analysis is not in itself testimony (*ante*, § 793); it is nothing until adopted by a competent witness as a part of his testimony and a mode of communication. One might as well demand that an opportunity of cross-examination be had at the time of the occurrence of

§ 1385. [1] 1868, Com. *v.* Morrell, 99 Mass. 542, 543; 1895, Com. *v.* Hall, 164 Mass. 152, 14 N. E. 133.

[2] Compare the citations *ante*, § 487 (qualifications of witnesses), § 861 (confessions), § 1258 (documentary originals), *post*, § 1451 (dying declarations), § 2550 (judge and jury).

[3] Distinguish also the question whether there is a right of cross-examination on an *affidavit denying common source of title* in ejectment; here the affidavit is really only a sworn pleading: 1884, Thatcher *v.* Olmstead, 110 Ill. 26 ("an oath of this character is not evidence").

an affray, or at the time that a witness is collecting his thoughts in the anteroom, or doing any other act in preparation for testimony. The suggestion in question has been universally and properly repudiated by the Courts:[4]

1886, HENRY, C. J., in *State* v. *Leabo*, 89 Mo. 274, 253, 1 S. W. 288 (examination of corpse by experts): "There is but a slight, if any, analogy between the examination by an expert or any one else of physical objects with a view of testifying to the result of his observations, and the deposition of a witness, as regards notice; the notice in the latter case is required in order that the opposite side may have an opportunity to cross-examine the deponent upon the facts testified to by him; the expert, when he comes to testify, is subject to that cross-examination."

1894, *Burg* v. *R. Co.*, 90 Ia. 106, 118, 57 N. W. 680: "It is not the law that in making such tests, measurements, etc., the opposite party is entitled to notice in order that he may be present. It is the right of each party, in the preparation for trial, to take all legal steps in the way of being able to meet the issues of fact by proofs; and in preparing for the presentation of his evidence, no notice to the adverse party is required."

No doubt a part of the notion leading to the making of such an objection is the distrust which must be felt for testimony coming from one who has been employed as a partisan and must therefore have been interested to reach results of a certain tenor. But this element in the objection is in truth directed, not against the absence of notice and cross-examination, but against the competency of a hired and partisan expert witness.[5] Since to-day no in-

[4] *Federal:* 1898, Day *v.* U. S., 30 C. C. A. 572, 87 Fed. 125 (witnesses who had examined certain horses, though not for the express purpose of determining their satisfaction of a contract, admitted); *Colo.* 1891, Graves' Trial, Colo., 13 Amer. St. Tr. 256, 320 (murder by poisoned whisky sent in the mails); *Georgia:* 1881, Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 234 (model prepared 'ex parte', admissible); *Iowa:* 1894, Burg *v.* R. Co., 90 Ia. 106, 118 (quoted *supra*); *Mississippi:* 1906, Lenoir *v.* People's Bank, 87 Miss. 559, 40 So. 5 (maps and surveys testified to by the surveyor, taken in a survey made with the notice provided in Code 1892, § 1653, admitted); *Missouri:* 1886, State *v.* Leabo, 89 Mo. 247, 253, 1 S. W. 288 (quoted *supra*); 1887, State *v.* Brooks, 92 Mo. 542, 579, 5 S. W. 257, 330 (similar); *North Carolina:* 1881, State *v.* Morris, 84 N. C. 756, 760 (notice to a defendant, not necessary; here, a witness who had examined boot-tracks; to admit the opposite contention "is to put an end to all inquiry into the commission of offences depending upon the introduction of circumstantial evidence"); 1887, State *v.* Whitacre, 98 N. C. 753, 3 S. E. 488 (diagrams made 'ex parte', received); *Rhode Island:* 1903, State *v.* Nagle, 25 R. I. 105, 54 Atl. 1063 (expert's experiments with a pistol); *Tennessee:* 1885, Lipes *v.* State, 15 Lea 125 (testimony from witnesses who examined the defendant's feet for the express purpose of seeing whether they fitted tracks, admissible); 1886, Mississippi & T. R. Co. *v.* Ayres, 16 Lea 725, 727 (expert examination 'ex parte' of an injured person, made 'pendente lite', admissible; that "the evidence of an expert is rendered incompetent because based upon an 'ex parte' examination", repudiated); 1894, Byers *v.* Railroad, 94 Tenn. 345, 352, 29 S. W. 128 (test made 'ex parte' as to the time required for stopping a train, admitted; preceding cases approved); 1896, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046 (examination of the deceased by two physicians called to him just after the affray; that this was done without notice to defendant, is no objection); *Washington:* 1902, Moran Bros. Co. *v.* Snoqualmie F. P. Co., 29 Wash. 292, 69 Pac. 759 (model of a regulator-box for a power-plant); *Wisconsin:* 1901, Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816 (X-ray photograph); 1902, Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076 (exhumation and post-mortem examination).

Contra: 1903, Wood *v.* LeBlanc, 35 N. Br. 47, 56, by two judges among seven (a witness using a plan to illustrate his testimony should prepare it in court, not before trial; this is unsound).

For the use of an 'ex parte' *surveyor's return*, under statute, see *post*, § 1665.

[5] It is this consideration which was had in mind by Messrs. Wharton & Stillé, Medical Jurisprudence, § 1246, in a passage which was probably the original source of the objection in question. The influence of the Wharton passage can be seen in counsel's argument in Graves' Trial, *supra*, n. 1.

terest can disqualify, the objection fails in this aspect also.[6] How best to obtain impartial experts is another question (*ante*, § 563).

But note that where the *abolition of a privilege* or the *prevention of unfair surprise* is involved, by permitting one party to *inspect the opponent's documents, premises, or person*, it may in such case be a fair requirement that the inspection shall not be 'ex parte', *i.e.* that the other party shall have notice and an opportunity to secure the presence of witnesses (*post*, §§ 1845, 2220, 2221).

(4) *Reading a report prepared beforehand.* So long as the witness is at the trial subject to cross-examination, there can be no possible objection, on the present principle, to the form of delivering his testimony. In particular, he may *read a report prepared beforehand*.[7] The report's statements themselves were indeed not subjected to cross-examination at the time of their competition; but they are *now* subject to it, and that is enough. The case is the same as though the witness should give an uninterrupted oral narrative for his direct examination, being afterwards subjected to cross-examination. Whether a witness delivers his direct testimony with or without interrogation by the party calling him, is merely a matter of the mode of narration (*ante*, § 787), and does not affect the present principle.

In view of the speed, lucidity, and general satisfaction, which is often to be obtained, especially with expert witnesses, on matters of science, this form of testimony should be encouraged.[8]

[6] 1898, Sanborn, J., in Day *v.* U. S., 30 U. S. App. 572, 87 Fed. 125: "The measure of the competency of a witness is not the view or purpose with which he obtained his information but the extent and character of the knowledge he obtained. The question is not why he obtained his knowledge, but what amount of knowledge he acquired."

For a consideration of the propriety of *reform in the system* of expert witnesses, see *ante*, § 563. For the rule of *notice to the opponent* for evidence in general, see *post*, § 1845.

Compare *ante*, § 4*a* (applicability of the rules of Evidence to administrative tribunals).

[7] 1920, Butler *v.* State, 17 Ala. App. 511, 85 So. 864 (embezzlement; under Code 1907, § 547, amended St. 1911, p. 492, providing that "Reports of examiners of public accounts shall be 'prima facie' evidence of what they charge", the report of the examiner was introduced in evidence, the examiner himself being also called; held that the constitutional provision entitling to confrontation by witnesses was satisfied, "for the reason that the author and writer of the report in question did appear and testify as a witness, and the report, if not otherwise objectionable, could properly be admitted in evidence in connection with the testimony of the examiner"); 1872, Townsend *v.* Radcliffe, 63 Ill. 1 (survey to fix a boundary by a commission, under St. 1869, § 2; the statute provided that the commission of surveyors should report its survey and plot to the Court, and should incorporate testimony taken by them; the report was objected to for violation of the due process principle by the statute; Lawrence, C. J., for the Court, held that the report was not conclusive, but was "simply a piece of evidence", and that a trial of the issue by jury must be had; but that by the correct construction of the Act, no more than this was meant; incidentally the Court assumes it perfectly sound that "the surveyors can be appointed . . . and make their report", and that "the survey could be received in evidence only in connection with and as a part of the testimony given by one or all of the commissioners as witnesses").

[8] Compare the following uses of it, sanctioned by statute in other connections:

Admitting a *certificate of analysis*, etc., by a State chemist, etc., and calling him for cross-examination if desired (*post*, § 1671);

Designating a physician to examine physically a *claimant for workman's compensation*, and receiving his report, subject to the right to call him for examination upon it (*post*, § 2220).

The judge calling a disinterested *expert* on *insanity*, and directing his report to be read (*ante*, § 563).

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

§ 1386. **General Principle: Issue and Parties must have been Substantially the Same.** A testimonial statement may still not satisfy the Hearsay rule even where it has been made before a tribunal or officer at which there was cross-examination, or the opportunity, for the then opponent; because the cross-examination, for which there must have been an opportunity, must have been an adequate one. Unless the *issues were then the same* as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. Unless, furthermore, the parties were the same in motive and interest, there is a similar inadequacy of opportunity, for the present opponent cannot be fairly required to abide by the possible omissions, negligence, or collusion of a different party, whose proper utilization of the opportunity he has no means of ascertaining:[1]

1726, Chief Baron GILBERT, Evidence, 68: "When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine."

1767, BULLER, J., Trials at Nisi Prius, 239: "A Deposition cannot be given in Evidence against any Person that was not a Party to the Suit; and the Reason is because he had not Liberty to cross-examine the Witness, and it is against natural Justice that a Man should be concluded by Proofs in a Cause to which he was not a Party."

1777, MANSFIELD, L. C. J., in *Goodright* v. *Moss*, Cowper, 592: "[As to] offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done, for this reason, because such person has it not in his power to cross-examine."

1845, GILCHRIST, J., in *Bailey* v. *Woods*, 17 N. H. 372: "We do not understand that the admissibility of such evidence depends so much upon the particular character of the tribunal as upon other matters. If the testimony be given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had a right to cross-examine and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting, the testimony so given is admitted in any subsequent suit between the parties. It seems to depend rather upon the right to cross-examine than upon the precise nominal identity of the parties."

1856, BARTLEY, C. J., in *Summons* v. *State*, 5 Oh. St. 343: "The main reason for the exclusion of hearsay evidence is to be found in the want of the sanction of an oath, of legal authority requiring the statement, and an opportunity for cross-examination. Where these important tests of truth are not wanting, and the testimony of the statements of the deceased witness is offered on a subsequent trial between the same parties, touching the same subject-matter, and open to all the means of impeachment and objection to incompetency which might be taken if the deceased person could be present as a witness, there would not appear to be any sound and satisfactory ground for its exclusion."

1862, HINMAN, C. J., in *Lane* v. *Brainerd*, 30 Conn. 579: "As that was a trial between different parties, having different rights and with whom the plaintiff had no privity, and as he had no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion."

§ 1386. [1] For the *mode of proving* former testimony, by *stenographers' notes*, *judges' reports*, etc., see *post*, §§ 1666–1669.

For the rule that only the *substance* or a *part* need be proved, see *post*, §§ 2098, 2103, 2115.

§ 1387. **Issue the Same.** The *issue* on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point now in issue. Conversely, it is sufficient if the issue was the same, or substantially so for the purpose.

The general rule in this shape is nowhere disputed. But there is naturally much variance shown in the strictness of its application in specific cases.[1]

§ 1387. [1] In the following list, those rulings which rest on complicated facts peculiar to the special case, or which merely apply the general rule to facts not stated, are noted without any detailed statement of the ruling:

ENGLAND: 1817, R. *v.* Smith, R. & R. 339 (testimony on charge of assault and robbery, admitted on a subsequent charge of murder for same act); 1834, Alderson, B., in Doe *v.* Foster, 1 A. & E. 791, note (ejectment for one piece of land, then for another, but the issue in both being the same, viz., who was A. B.'s heir; admissible); 1850, R. *v.* Ledbetter, 3 C. & K. 108 (testimony on a charge of assault, not received on a trial for felonious wounding, the act being the same; the ruling is in effect repudiated by later cases); 1852, R. *v.* Dilmore, 6 Cox Cr. 52 (testimony on a charge of felonious wounding, admitted on a charge of manslaughter for the same act); 1854, R. *v.* Beeston, 6 Cox Cr. 425, Dears. Cr. C. 405 (deposition on a charge of felonious wounding with intent to do bodily harm, admitted on a trial for murder, the act being the same; Jervis, C. J.: "The presiding judge must determine in each case whether the prisoner has had full opportunity of cross-examination; and if the charges were entirely different, he would not decide that there had been that opportunity; but where it is the same case, and only some technical difference in the charge, the accused generally has had full opportunity of cross-examining"; Alderson, B.: "The question really is whether the deposition was taken under such circumstances that the accused had full opportunity of cross-examination"); 1864, R. *v.* Lee, 4 F. & F. 63 (testimony on a charge of robbery, admitted on a charge of murder, the assault being the same); 1874, R. *v.* Castro (Tichborne Case), Charge of Cockburn, C. J., II, 305 (testimony in a civil case admitted at the trial of the then claimant for perjury at the former trial); 1876, Brown *v.* White, 24 W. Rep. 456, Jessel, M. R.; 1909, Edmunds' Case, 2 Cr. App. 257 (like R. *v.* Beeston, *supra*).

CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 999 (testimony "at any former trial upon the same charge", admissible); *Man.* 1898, R. *v.* Hamilton, 12 Man. 354 (abortion: deposiposition taken "on another charge of the same purport and in connection with the same unlawful purpose", admitted); *N. Br.* 1862, Bennett *v.* Jones, 5 All. 342 (the issue being substantially the same, for board of the plaintiff's wife, her former testimony was admitted); 1896, Hovey *v.* Long, 33 N. Br. 462, 467 (testimony at a former trial between the same parties on the same issues, admitted).

UNITED STATES: *Federal:* 1896, Seeley *v.* K. C. Star Co., 71 Fed. 554 (a deposition taken in a suit in a State court, not admissible after voluntary withdrawal of the suit and re-institution for the same cause of action and against the same party in the Federal court; going upon R. S. § 861, limiting the *taking of* depositions to causes "pending in a district or circuit court"; the Federal court here being bound to proceed under the Federal statute not sound; compare § 1381, *ante*); 1900, Metropolitan St. R. Co. *v.* Gumby, 39 C. C. A. 455, 99 Fed. 192 (loss of services of plaintiff's son; testimony of deceased witness for the son in his former action by a guardian for his own injury, not admitted for the plaintiff here, the parties and issues being different); 1900, U. S. Life Ins. Co. *v.* Ross, 42 C. C. A. 601, 102 Fed. 722 (admitting a deposition lawfully taken in Texas, before removal of the cause, of a witness residing out of the county, though not under the Federal statute more than 100 miles distant; in the Federal court the witness' death afterwards made it admissible);
Alabama: 1850, Davis *v.* State, 17 Ala. 357 (testimony on a charge of larceny by stealing a mule, excluded on a charge of stealing a buggy; the act of taking being the same); 1851, Long *v.* Davis, 18 Ala. 801, 802 (former issue, plea in abatement in an action on a note; present issue, a plea to merits; admitted); 1905, Nordan *v.* State, 143 Ala. 13, 39 So. 406 (murder by abortion; testimony of the deceased, in a prior criminal prosecution against the defendant for the seduction, as to the handwriting of certain letters there and here offered, admitted, the particular issue being identical);
Arkansas: 1895, Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102; 1912, Fox *v.* State, 102 Ark. 393, 144 S. W. 516 (robbery of C. W., defendant being charged as accessory; on a former indictment of defendant as accessory to the murder of C. W., the robbery and the murder being parts of the same transaction by the same persons, the testimony of a now deceased witness was taken; admitted; sensible opinion by Hart, J.);
California: 1873, Pico *v.* Cuyas, 47 Cal. 174, 179; for the peculiar rule in this State as to testimony before the committing magistrate, see *post*, § 1398;

The situation is one that calls for common sense and liberality in the application of the rule, and not a narrow and pedantic illiberality. On the whole,

Colorado: 1902, Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. 705 (testimony in replevin suit against a sheriff, held admissible in a subsequent action of trover for the same goods against the creditor jointly liable);
Connecticut: 1864, Spear *v.* Coon, 32 Conn. 292 (deposition used on petition for new trial, admissible on the new trail; the two are "parts of the same proceedings"); 1902, Mechanics' Bank *v.* Woodward, 74 Conn. 689, 51 Atl. 1084 (action for money paid to the defendant's use on notes forged by his wife; testimony at the prior trial of an action, founded on the same transaction, after which an amended complaint had been substituted for the present suit, held admissible); 1913, Atwood *v.* Atwood, 86 Conn. 579, 86 Atl. 29 (issues held substantially the same, on the facts);
Delaware: 1838, Rash *v.* Purnel, 2 Harringt. 448, 456 (issue out of probate 'devisavit vel non'; deposition taken on an application for review of a former issue on the same will, admitted);
Georgia: 1849, Crawford *v.* Word, 7 Ga. 445, 456; 1872, Gavan *v.* Ellsworth, 45 Ga. 283, 288 (former trial a criminal complaint for the same assault as the present civil action; admitted); 1881, Atlanta & W. P. R. Co. *v.* Venable, 45 Ga. 697, 699 (former action, by a mother for personal injuries; present action, by a child for her death from those injuries; admitted); 1900, Whitaker *v.* Arnold, 110 Ga. 857, 36 S. E. 231; 1900. Hooper *v.* R. Co., 112 Ga. 96, 37 S. E. 165 (testimony in a suit for personal injury by a minor through his father as next friend, not admitted in a suit by the father for loss of service caused by the same injury); 1901, Radford *v.* R. Co. 113 Ga. 627, 39 S. E. 108 (answers to interrogatories in a former suit between the same parties for the same claim, but dismissed and now renewed, admitted);
Illinois: 1854, Doyle *v.* Wiley, 15 Ill. 576, 578 (depositions taken before amendment and filing of new bill, admitted); 1910, McInturff *v.* Insurance Co., 248 Ill. 92, 93 N. E. 369 (plaintiff's house was burned in March, 1908; later in 1908 the plaintiff and his wife were indicted for fraudulent arson, and B. at that trial testified for the prosecution; the accused were acquitted; the now plaintiff then shot and killed B.; afterwards the present suit was brought, and the testimony of B. formerly given on the criminal trial was offered for the defendant, on its plea of fraudulent arson; excluded; the decision is erroneous on principle because the issue in the two trials was precisely the same, and the parties were substantially the same; perhaps no precedent has gone as far as to admit in such a case; but the artificial application of the principle as in the present case would reduce the principle to dead wood; see an able critique of the case by Professor Henry C. Hall in the Illinois Law Review, VI. 136); 1914, Stephens *v.* Hoffman, 263 Ill. 197, 203, 104 N. E. 1090 (ejectment by successors of a testator; testimony of an absent witness in "one of the earlier ejectment suits between G. and the appellees herein", admitted); 1915, Hoffman *v.* Stephens, 269 Ill. 376, 109 N. E. 994 (similar);
Kansas: 1880, State *v.* Wilson, 24 Kan. 189, 194 (testimony on charge of assault with intent to kill B., admitted on trial for murder of B.);
Kentucky: 1820, Brooks *v.* Cannon, 2 A. K. Marsh. 525 (successive bills for the same cause; admitted); 1850, Heth *v.* Young, 11 B. Monr. 278, 280;
Maryland: 1808, Hopkins *v.* Stump, 2 H. & J. 301, 303 (depositions on a former dismissed bill for same cause and same parties, admitted); 1821, Bowie *v.* O'Neale, 5 H. & J. 226, 231; 1900, Baltimore Consol. R. Co. *v.* State, 91 Md. 506, 46 Atl. 1000 (the deponent being present and testifying at the first trial, the deposition was not used; when offered at the second trial, the deponent being absent, it was excluded, because "his deposition should be retaken for use at that trial, so that the opposing party may have the opportunity, at the execution of the second commission, to avail of the witness' antecedent admissions and contradictions [at the first trial]"; this is unpractical and over-refined reasoning; the opponent in such case can obtain the same benefit by proving the witness' testimony given at the first trial, or if that would be forbidden by the rule of § 1032, *ante*, he could himself have taken a second deposition to put the question);
Massachusetts: 1828, Melvin *v.* Whiting, 7 Pick. 81 (fishery controversy in both suits, but in the former a claim of free fishery, in the latter a claim of several fishery; excluded); 1871, Weatherby *v.* Brown, 106 Mass. 338 (deposition before amendment of declaration, admitted); 1908, McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405;
Minnesota: 1899, Watson *v.* R. Co., 76 Minn. 358, 79 N. W. 308 (death by wrongful act; issues after amendment held substantially the same);
Mississippi: 1902, Dukes *v.* State, 80 Miss. 353, 31 So. 744 (murder; testimony of the deceased at a prior trial for the robbery which resulted in the death, excluded; this ruling is over-strict);
Missouri: 1865, Jaccard *v.* Anderson, 37 Mo. 91, 95; 1920, Lampe *v.* St. Louis Brewing Co., 204 Mo. App. 373, 221 S. W. 447 (personal injury and death; same cause of action, but widow succeeding injured man as plaintiff; deposition admitted);
Nebraska: 1897, Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964 (testimony at any one of two or more prior trials, admissible);
New Hampshire: 1863, Leviston *v.* French, 45 N. H. 21;

the judicial rulings show a liberal inclination to receive testimony already adequately tested; but there is yet room for much improvement.

A *statute* sometimes attempts to provide for the admission, under the present rule, of *testimony at a former trial*,[2] as well as of ordinary *deposi-*

New York: 1848, Osborn *v.* Bell, 5 Denio 370, 377 (implied assumpsit for goods tortiously seized and sold; testimony in a former action of trover by plaintiff's intestate for the same taking, admitted); 1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (a former trial, in which the case had been rested but no formal termination reached, owing to the referee's death, held sufficient under C. C. P. § 830); 1907, Shaw *v.* N. Y. Elev. R. Co., 187 N. Y. 186, 79 N. E. 984 (action to enjoin the operation of an elevated railroad; a deceased witness' testimony for the plaintiff at the first trial, admitted at the second trial against a party becoming a lessee after the first trial and brought in by stipulation as a defendant on the second trial; St. 1899, c. 352, p. 762, and St. 1893, c. 595, p. 1375, amending C. C. P. 1877, § 830, held not to affect this result, the testimony being admissible on common-law principles);
North Carolina: 1839, M'Morine *v.* Storey, 4 Dev. & B. 189 (testimony in D.'s action to recover slaves transferred to J., not admitted in an action by D.'s creditor against J.'s administrator as executor 'de son tort'); 1898, Mabe *v.* Mabe, 122 N. C. 552, 29 S. E. 843 (ejectment; deposition in another State between the same parties in a suit on a note for the price of the same land, the matters being "connected", received); 1917, Mechanics' Bank & T. Co. *v.* Whilden, 175 N. C. 52, 94 S. E. 723 (title to land);
North Dakota: 1919, Fosston Mfg. Co. *v.* Lemke, 44 N. D. 343, 175 N. W. 723 (deposition in another suit, having different issues and additional parties, excluded);
Oklahoma: 1897, Watkins *v.* U. S., 5 Okl. 729, 50 Pac. 88 (perjury; testimony in the civil cause in which the perjury was charged, excluded);
Oregon: 1914, State *v.* Von Klein, 71 Or. 159, 142 Pac. 549 (polygamy; the defendant, already married, then married N. and took her to a hotel, and after two days left her, taking her jewelry; the theft of the jewelry was alleged by the State as a motive for the fraudulent marriage; the defendant had already been tried for the larceny, and two witnesses who had testified to the facts of the larceny were now without the State; admissible; an enlightened decision);
Pennsylvania: 1851, Jones *v.* Wood, 16 Pa. 25, 43 (suits involving different land but the same boundaries; admitted); 1853, Wertz *v.* May, 21 Pa. 274, 279 (previous action terminated by a non-suit; admissible); 1860, Haupt *v.* Henninger, 37 Pa. 138, 140 (depositions taken for application to a judge in chancery, admissible in a feigned issue before jury on same point);
South Carolina: 1850, Bishop *v.* Tucker, 4 Rich. L. 178, 182; 1902, Oliver *v.* R. Co., 65 S. C. 1, 43 S. E. 307 (deposition at a first trial, admitted at the second; re-taking not required);
Texas: 1880, Dunlap *v.* State, 9 Tex. App. 179, 188 (testimony on charge of assault with intent to murder, admitted on trial for murder); 1901, People's N. Bank *v.* Mulkey, 94 Tex. 395, 60 S. W. 753 (depositions taken between the same parties, except one, in a prior suit on the same issue begun in a justice's court but dismissed for lack of jurisdiction, excluded, because the statute merely allowed their use "in any suit in which they are taken"; unsound);
Vermont: 1912, Lynch's Adm'r *v.* Murray, 86 Vt. 1, 83 Atl. 746 (fraudulent conveyance; issues held substantially the same, approving the text above);
Virginia: 1903, Reed & McCormick *v.* Gold, 102 Va. 307, 45 S. E. 868 (action by a receiver against delinquent stockholders of the corporation; testimony of a now deceased person in the prior chancery proceedings against the corporation, excluded, because the issues were not substantially the same);
Wisconsin: 1864, Charlesworth *v.* Tinker, 18 Wis. 633, 635 (testimony on a criminal complaint for assault, admitted against plaintiff in a civil action for same cause).

[2] Compare also the statutes cited *post*, §§ 1413, 1416, 1417, particularly for testimony in issues of wills and bastardy:

ENGLAND: 1883, Rules of Supreme Court, Order 37, Rule 25 ("All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter").

CANADA: *Dom.* R. S. 1906, Cr. C. § 1000 (depositions are admissible in a prosecution "for any other offence" by the same person in all respects as they might be "according to law" on the trial of the charge for which they were taken); *Alta.* Rules of Court 1914, No. 394 ("all evidence taken at the trial may be used in any subsequent proceedings in the same cause"); *B. C.* Rules of Court 1912, No. 506 ("all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter"); *N. Br.* Consol. St. 1903, c. 127, § 26 (former testimony, admissible "between the same parties or those claiming under them"); *Newf.* Consol. St. 1916, c. 83, Ord. 33, R. 25 (former testimony may be used "in any subsequent proceedings in the same cause or matter"); *N. W. Terr.* Consol. Ord. 1898, c. 21, R. 287 (like N. Sc.

Ord. 35, R. 24); *N. Sc.* Rules of Court 1900, Ord. 35, R. 24 (all testimony may be used "in any subsequent proceedings in the same cause or matter"); *Yukon:* Consol. Ord. 1914, c. 48, Rule 297 (like N. Sc. Ord. 35, R. 24).

UNITED STATES: *Federal:* St. 1920, June 4, amending Rev. St. § 1342 (Articles of War; Art. 25 permits the "record of the proceedings of a court of inquiry" to be read, with the consent of the accused, before a court-martial etc. "in any case not capital nor extending to the dismissal of an officer", but the exception does not apply to the defence);
Arizona: Rev. St. 1913, P. C. § 881, par. 7 (testimony at the preliminary hearing before a magistrate is admissible "upon any subsequent trial of such defendant for the offence for which he is held"); P. C. § 1052 (testimony of deceased, etc. witness at former criminal trial, reported by official stenographer, admissible "in any subsequent trial or proceeding had in the same cause"); P. C. § 753 (testimony before committing magistrate or deposition for the State; like Cal. P. C. § 686); Civ. C. § 1679 (former testimony receivable "in any subsequent trial of or proceeding had in the same cause"; quoted *post*, § 1413);
California: C. C. P. 1872, § 1870 (8) (testimony in a "former action between the same parties relating to the same matter", admissible); § 1316 (testimony at a probate is admissible "in any subsequent contests concerning the validity of the will or the sufficiency of the proof thereof"); P. C. 1872, § 686 ("In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him in the presence of the Court, except that, where the charge has been preliminary examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witnesses, or where the testimony of a witness on the part of the People, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence", etc. as above, "the deposition of such a witness may be read" if dead, etc.; added in 1911, after constitutional amendment: "and except also that . . . the testimony on behalf of the People or the defendant of a witness deceased, insane, out of the jurisdiction, or who cannot with due diligence be found within the State, given on a former trial of the action in the presence of the defendant, who has either in person or by counsel cross-examined or had an opportunity to cross-examine the witness, may be admitted"; for the history of this section, and the decisions interpreting its interim text before the amendment of 1911, see *post*, § 1398); St. 1905, c. 540, P. C. 1872, § 882 (admits depositions for the prosecution taken before a committing magistrate; quoted *post*, § 1411, n. 1);
Colorado: Comp. L. 1921, § 1772 (irrigation; testimony taken "before any former referee", admissible on hearing before the referee for a decree of appropriation of water);
Columbia (Dist.): Code 1919, § 1065 (on the death, etc. of a party, his testimony given at a trial may be used "in any trial or hearing in relation to the same subject-matter between the same parties or their legal representatives");
Connecticut: Gen. St. 1918, § 5735 ("in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of said trustee or receiver, shall be received in evidence"); § 5723 (testimony "upon a former trial of said action", admissible);
Florida: Rev. G. S. 1919, § 2723, as amended by St. 1921, c. 8572, No. 177 (bill of exceptions in a civil case may be used to show former testimony "upon any subsequent trial or hearing of the case, or in any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing"; otherwise, a stenographic report may be used if the opponent "or his privy was a party on the former trial", and "the issue is substantially the same");
Georgia: Rev. C. 1910, § 5773, P. C. § 1027 (former testimony, admissible if "upon substantially the same issue and between substantially the same parties");
Illinois: Rev. St. 1874, c. 148, § 7 (testimony at a preliminary probate; see *post*, § 1413; for decisions construing it, see *post*, § 1417); St. 1921, June 29, § 23, par. j (workmen's compensation; if the employee dies after a finding by the board, the testimony may be used, "in any subsequent proceeding" by his successor);
Indiana: Burns' Ann. St. 1914, §§ 1019, 1023 (written examination of complainant in bastardy before the justice may be used on the trial in Circuit Court); § 3168 (recorded testimony at probate of a will, admissible "upon any controversy concerning any lands devised by such will");
Iowa: St. 1898, p. 16, c. 9, § 1, Code Suppl. 1902, § 245*a*, Comp. Code § 7391 (quoted more fully *post*, § 1669, n. 2; notes of testimony are admissible "on any re-trial of the case or proceeding in which the same were taken", and "shall have the same force and effect as a deposition");
Kentucky: Stats. 1915, §§ 1019*a*, 4643 (former testimony admissible, in trial Court's discretion, "in any subsequent trial of the same [civil] case between the same parties"); § 1649*a* (real estate controversies; elaborate provisions for notice; the deposition to be evidence in any court having jurisdiction);
Maine: Rev. St. 1916, c. 87, § 135 (former testimony as to execution or acknowledgment

tions, taken in the same or other proceedings,[3] and of depositions taken in

of a deed, admissible in another civil cause, "involving the same question", if the parties are the same, or if one is the same and the present opponent was agent for the opponent in the former suit);
Montana: Rev. C. 1921, § 10531, par. 8 (like Cal. C. C. P. § 1870 (8));
Nevada: § 6855 (committing magistrate; like Cal. P. C. § 686);
New Jersey: Comp. St. 1910, Evidence, § 10 (on new trial in action revived after party's death, his former testimony is admissible); Evidence, § 11 (in a new trial of a civil action, the official stenographic report of the testimony of a witness who has since died is admissible);
New Mexico: St. 1919, Mar. 10, c. 29, § 7 (former testimony may be used "in any subsequent trial or hearing of the same issue between the same parties");
New York: C. P. A. 1920, § 348 (testimony of a party or witness, since deceased or insane or incompetent, "taken or read in evidence at the former trial or hearing or at the same trial or hearing may be given or read in evidence upon any subsequent trial or hearing of the same subject-matter in the same or another action or special proceeding between the same parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing", etc., etc.); St. 1912, c. 390, Apr. 15, adding § 221*b* to C. Cr. P. (official stenographic report of testimony before a committing magistrate, admissible);
North Carolina: Con. St. 1919, § 4572 (committing magistrate; quoted *ante,* § 1375);
Oregon: Laws 1920, § 727, par. 8 (like Cal. C. C. P. § 1870 (8));
Pennsylvania: St. 1887, May 23, § 3, Dig. 1920, § 8172, Crim. Procedure (testimony of deceased, etc. witness, taken when defendant was present and had opportunity to cross-examine, admissible on a subsequent trial "of the same criminal issue"); ib. § 9, Dig. § 21859, Witnesses (in a civil proceeding testimony of a deceased, etc. witness is admissible, if the now party opponent had opportunity to cross-examine, "in any civil issue which may exist at the time of his examination, or which may afterwards be formed between the same parties and involving the same subject-matter as that upon which the witness was examined");
Philippine Islands: C. C. P. 1901, § 298, par. 8 (like Cal. C. C. P. § 1870); C. C. P. 1901, § 364 (deposition may be read by either party "in any stage of the same action . . . or in any other action between the same parties about the same subject-matter"); Gen. Order 58 of 1900, § 15 (like Cal. P. C. § 686);
Porto Rico: Rev. St. & C. 1911, § 1403, par. 6 (like Cal. C. C. P. § 1870, par. 8);
Utah: Comp. L. 1917, §§ 7205, 9277 (official stenographer's report may be read "in any subsequent trial of or proceeding had in the same cause"); § 8767 (testimony of witnesses released under bonds, when taken by committing magistrate, may be used at preliminary examination or at the trial "or both", as if the witnesses "were present in court and testifying"); St. 1919, Mar. 13, c. 36, amending Comp. L. § 1885 (city courts; official reporter's transcript of testimony of witness deceased, etc., may be read by either party "in any subsequent trial of or proceeding had in the same cause");
Washington: R. & B. Code 1909, § 1247 (testimony "given in a former action or proceeding, or in a former trial of the same cause or proceeding", if a civil one, "where it is between the same parties and relates to the same matter", is admissible);
Wisconsin: Stats. 1919, § 4141*a* (deceased witness' testimony admissible "in any other action where the party against whom it is offered shall have had the opportunity to cross-examine the deceased witness and where the issue upon which it is offered is substantially the same").

[3] Compare also the statutes cited *post,* §§ 1411, 1416, 1417.

CANADA: *N. Br.* Consol. St. 1903, c. 111, § 263 (depositions taken "when the title to land shall be in question" may be read "in all future causes between the same parties or persons holding under them for the same land").

UNITED STATES: *Alaska:* Comp. L. 1913, § 1490 (like Or. Laws 1920, § 852);
Arizona: Rev. St. 1913, Civ. C. §§ 1718, 1719 (depositions usable after discontinuance in another action for the same cause "between the same parties or their representatives", or on an appeal); P. C. § 753 (like Cal. P. C. § 686);
California: P. C. 1872, § 686 (quoted *supra,* note 2); C. C. P. 1872, § 2022 (deposition "in any other action between the same parties upon the same subject", admissible; amended in 1907 by inserting after "same parties", the words "or their privies or successors in interest");
Colorado: Comp. L. 1921, C. C. P. § 379 (a deposition may be read "in any stage of the same action or proceeding");
Connecticut: Gen. St. 1918, § 5722 (any deposition in a civil action "may be used in another civil action between the same parties or their executors or administrators and upon the same cause of action");
Florida: G. S. 1919, § 2769 (a deposition is usable, after discontinuance or non-suit, in another suit "for the same cause between the same parties or their respective representatives", if it has remained on file);

perpetuam memoriam.[4] But it is worth noting that usually the effect of the

Hawaii: Rev. L. 1915, § 2583 (deposition is admissible, after non-suit or discontinuance, in another suit "for the same cause between the same parties or their representatives"); § 3821 ("depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of the same or any other offence whatever, upon the like proof" as in the prosecution in which they were taken);
Idaho: Comp. St. 1919, § 8022 (deposition duly filed may be used in another action, after dismissal, for the same cause, "between the parties or their assignees or representatives");
Illinois: Rev. St. 1874, c. 51, § 48 (all testimony taken by commissions of surveyors to establish corners "may be read in evidence in all suits in reference to said corners hereafter");
Indiana: Burns' Ann. St. 1914, § 456 (when another action is "commenced for the same cause" after dismissal of the first, a deposition is usable "in the second or any other action between the parties, or their assignees or representatives, for the same cause");
Kansas: Gen. St. 1915, § 7259 (usable "in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties");
Maine: Rev. St. 1916, c. 112, § 19 (after non-suit or discontinuance, depositions are usable in an action for the same cause between the same parties or their representatives);
Massachusetts: Gen. L. 1920, c. 233, § 37 (after discontinuance or non-suit, depositions are usable in a later action "for the same cause between the same parties or their respective representatives");
Michigan: Comp. L. 1915, § 12500 (depositions are usable "on appeals and re-trials of the same cause of action");
Minnesota: Gen. St. 1913, § 8396 (a filed deposition is usable when an action is discontinued or dismissed and another action for the same cause is afterward commenced between the same parties, or their respective representatives");
Montana: Rev. C. 1921, § 10654 (like Cal. C. C. P. § 2034);
Nebraska: Rev. St. 1922, § 8891 (a deposition is usable "in any stage of the same action or proceeding, or in any other action or proceeding, upon the same matter between the same parties");
Nevada: Rev. L. 1912, § 5457 (usable "in any stage of the same action or proceeding");
New York: C. P. A. 1921, § 303 (deposition may be used in any subsequent action "between the same parties or between any parties claiming under them or either of them in an individual or representative capacity, involving the same subject matter", with further details);
North Dakota: Comp. L. 1913, § 7901 (like Okl. Stats. § 623);
Ohio: Gen. Code Ann. 1921, § 11540 (a deposition is usable "in any stage" of the action, "or in any other action or proceeding upon the same matter between the same parties"); St. 1913, Apr. 23, Gen. Code 1921, § 11540–1 (depositions taken by plaintiff in action for "damages by personal injuries may be read by the administrator", etc. "in any action for damages or wrongfully caused death resulting from the same personal injuries");
Oklahoma: Comp. St. 1921, § 623 (admissible "in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties");
Oregon: Laws 1920, § 852 (deposition may be read "in the same action or proceeding or in any other action or proceeding between the same parties or their representatives upon the same subject");
Pennsylvania: St. 1814, Mar. 28, Dig. 1920, § 10287, Evidence (a deposition is usable in "any subsequent cause in which the same matter shall be in dispute between the same parties, their heirs", etc.);
South Dakota: Rev. C. 1919, § 2766 (like N. D. Comp. L. § 7901);
Utah: Comp. L. 1917, § 7182 (deposition may be read "in every stage of the same action or proceeding, or in any other action between the same parties, upon the same subject");
Vermont: Gen. L. 1917, § 1926 (on discontinuance by reason of death, depositions, not of parties, may be used in a subsequent suit between the same parties or their representatives involving the same subject-matter);
Virginia: Code 1919, § 2628 (for actions pending in the same court between the same parties "depending upon the same facts, or involving the same matter of controversy, in whole or in part", a deposition taken in one may be read in all);
Washington: R. & B. Code 1909, § 1246 (depositions are usable, after discontinuance or dismissal, in another action "for the same cause between the same parties, or their respective representatives"); § 1248 (depositions are usable on new trial on appeal and on change of venue);
West Virginia: Code 1914, c. 130, § 38 (provision for future trials, after appeal, etc.);
Wisconsin: Stats. 1919, § 4093 (a deposition is usable "in any trial, inquiry, or assessment" in the action, and "in any other action between the same parties, including their respective legal representatives, involving the same controversy", if filed, etc.);
Wyoming: Comp. St. 1920, § 5844 (like Oh. Gen. Code Ann. § 11540).

[4] Compare the statutes cited *post*, § 1412, and the following:

common-law principle would be even broader than the statutes' terms, and would suffice to admit even where the case is not covered by the phraseology

CANADA: *N. Sc.* Rules of Court 1900, Ord. 35, R. 35 (in proceedings in which the Attorney-General is made a party for the Crown, depositions 'in perpetuam' are admissible though the Crown was not a party to the action in which it was taken); *Ont.* Rev. St. 1914, c. 56, § 134 (similar);

UNITED STATES: *Federal:* Code § 1368, Rev. St. 1878, § 867 ("Any court of the U. S. may, in its discretion, admit as evidence in any cause before it any deposition taken 'in perpetuam rei memoriam', which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof");
Alabama: Code 1907, § 4068 (admissible on trial "between the persons described in the affidavit as parties, actual or expectant, or their successors in interest");
Alaska: Comp. L. 1913, § 1522 (like Or. Laws 1920, § 886);
Arizona: Rev. St. 1913, § 1724 (usable "in any suit which may be hereafter instituted by or between any of the parties to the statement [affidavit] or those claiming under them");
Arkansas: Dig. 1919, § 4245 (admissible on a trial "between the persons named on the affidavit as expected parties, or their successors in interest");
California: C. C. P. 1872, § 2088 (usable "between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove");
Colorado: Comp. L. 1921, C. C. P. § 405 (usable "if a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove or tend to prove");
Connecticut: Gen. St. 1918, § 5719 (admissible in the cause for which they were taken and "in all other causes" with same subject-matter and with same parties or between heirs or representatives of petitioner and the other parties);
Delaware: Rev. St. 1915, § 3617 (boundary cases; notice to owners and tenants required; depositions usable "against the parties to the petition and their privies in any suit or controversy in which the bounds which they concern shall come in question");
Florida: Rev. G. S. 1919, § 2763 (usable in suits "between the person at whose request it was taken and the persons named in the said written statement, or any of them, who were notified as aforesaid, or any persons claiming under either of the said parties, respectively, concerning the title, claim, or interest set forth in the statement; or, if notice by advertisement hereinbefore provided for shall have been given, then between the person at whose request it was taken, or any person claiming under him, concerning the claim, title, or interest set forth in the statement, and any other person");
Georgia: Rev. C. 1910, §§ 4558, 4560 (the Court is to provide "for the most effectual notice"; but testimony "may be used against all persons, whether parties to the proceeding or not");
Hawaii: Rev. L. 1915, § 2588 (admissible in a trial "between the parties named in the petition or their privies or successors in interest touching the matter of controversy set forth in the petition");
Idaho: Comp. St. 1919, § 8056 (like Cal. C. C. P. § 2088); § 8063 (depositions may be used "in any cause between the parties named in the affidavit or in any cause between persons claiming under either of said parties");
Illinois: Rev. St. 1874, c. 51, § 46 (admissible "in any case to which the same may relate"; "and parties notified 'as unknown owners' . . . shall be bound to the same extent as other parties");
Indiana: Burns' Ann. St. 1914, § 462 (usable "in any cause between the parties named in the affidavit [for taking], or in any cause between persons claiming under either of said parties");
Iowa: Code 1897, § 4723, Comp. Code, § 7431 (usable on a trial "between the parties named in the petition, or their privies or successors in interest");
Kansas: Gen. S. 1915, § 7239 (usable "if a trial be had between the parties named in the petition, or their privies or successors in interest");
Kentucky: C. C. P. 1895, § 611 (notice to the "expected adverse party" required; testimony usable in trial between the "expected parties or their representatives or successors");
Maine: Rev. St. 1916, c. 112, § 25 (substantially like Minn. Gen. St. § 8404);
Massachusetts: Gen. L. 1920, c. 233, §§ 59, 63 (deposition 'in perpetuam', taken "so that it may be used against all persons", according to the statutory mode, "may be used by the person at whose request it was taken, or by any person who claims under him, against any person whatever, in any action or process, wherein is brought in question the title, claim, or interest set forth in the statement upon which the commission was founded"); c. 233, § 51 (deposition 'in perpetuam' taken on notice to persons interested may be used in an action "between the petitioner and the persons named in his application or any of those who were notified as aforesaid, or any person claiming under any of said persons, relative to the title, claim, or interest set forth in the application");
Minnesota: Gen. St. 1913, § 8404 (deposition

of the statute; *i.e.* the statute merely secures admissibility in certain instances, and is not intended to forbid admission in other instances.

It is to be noted that a deposition or former testimony, *not offered as such*, is not subject to this rule requiring identity of issues. Where the other testimony is offered, not as evidence of the truth of the facts asserted in it, but merely as an utterance having an indirect bearing, it is not hearsay (*post*, § 1789) and the ruling requiring cross-examination and identical issues does not apply.

'in perpetuam' usable "in any action, or proceeding wherein the title, claim, or interest, set forth in the statement under which it was taken is brought in question, by the applicant or any person notified of the taking thereof, or by any person claiming under either or any of them");
Mississippi: Code 1906, § 1952, Hem. § 1612 (admissible "in any suit between the parties described in the written statement for procuring such testimony or their privies in interest");
Missouri: Rev. St. 1919, § 5491 (admissible "in any cause or judicial proceeding to which they relate, in favor of any parties thereto, or any or either of them, or his or their executors or administrators, heirs or assigns, or their legal representatives"); § 5508 (when taken to establish land-corners, admissible "in all cases to which they may relate");
Montana: Rev. C. 1921, § 10691 (like Cal. C. C. P. § 2088);
Nebraska: Rev. St. 1922, § 8933 (admissible on a trial "between the parties named in the petition, or their privies or successors in interest");
Nevada: Rev. L. 1912, § 5470 (like Cal. C. C. P. § 2088);
New Hampshire: Pub. St. 1891, c. 226, § 9 (may be used in any cause where the matters concerned are in question);
New Mexico: Annot. St. 1915, § 2156 (admissible "in any cause or judicial proceeding to which they relate, in favor of any parties thereto, or any or either of them, or their executors or administrators, heirs or assigns, or their legal representatives");
New York: C. P. A. 1920, § 321 (in actions involving title to real property, depositions 'in perpetuam' may be read by any party against the person petitioning, or "each person to whom notice . . . was given", or "all persons claiming from, through, or under them or any of them");
North Dakota: Comp. L. 1913, § 7931 (like Cal. C. C. P. § 2088);
Ohio: Gen. Code Ann. 1921, § 12221 (admissible in a trial "between the parties named in the petition or their privies or successors in interest");
Oklahoma: Comp. St. 1921, § 659 (admissible "if a trial be had between the parties named in the petition, or their privies or successors in interest");
Oregon: Laws 1920, § 886 (usable on a trial "between the persons named in the petition as parties actual, expectant, or possible, or their representatives or successors in interest"; see Hill's Codes for different provisions in an unenacted statute of 1870);
Philippine Islands: C. C. P. 1901, § 375 (like Cal. C. C. P. § 2088, adding, "whose interest was unknown to the party taking the deposition at the time of taking");
South Dakota: Rev. C. 1919, § 2779 (like Okl. Stats. § 659);
Tennessee: Shannon's Code 1916, §§ 5671, 5672, 5682 (notice to the "opposite party" required; admissible, "in any suit between the parties to the petition" or their "privies in interest");
Texas: Rev. Civ. Stats. 1911, § 3653 (usable "in any suit which may be thereafter instituted by or between any of the parties to the statement, or those claiming under them");
Utah: Comp. L. 1917, § 7198 (like Cal. C. C. P. § 2088);
Vermont: Gen. L. 1917, § 1932 ("The deposition so taken and record, or a certified copy thereof, may be used by the person at whose request it was taken, or by any person claiming under him, against any person in an action or process wherein the title, claim or interest set forth in the affidavit is brought in question");
Washington: R. & B. Code 1909, § 1253 (usable on a trial "between the person at whose request the deposition was taken and the person named in the statement, or any of them, or their successors in interest");
Wisconsin: Stats. 1919, § 4121 (usable in an action "between the person at whose request it was taken and the persons named in the said written statement, or any of them, who were notified as aforesaid, or any person claiming under either of the said parties respectively concerning the title, claim, or interest set forth in the statement"); § 4134 (deposition taken by special form of notice as against all persons "may be used by the person at whose request it was taken or by any person claiming under him against any person whatever in any action or proceeding wherein shall be brought in question the title, claim, or interest set forth in the statement");
Wyoming: Comp. St. 1920, § 6311 (admissible on a trial "between the parties named in the petition, or their privies or successors in interest").

(1) Thus, testimony in another cause may be proved in a trial for *perjury* so far as it indicates the materiality in that cause of testimony now charged to be perjured.[5]

(2) In an action for *malicious prosecution*, the testimony on the original prosecution is not admissible from that point of view, because it could not have served as "probable cause" before it was delivered; yet it would be admissible in the ordinary way as testimony at a former trial, provided the witness is deceased or otherwise unavailable, and this principle, so long as parties were disqualified in their own behalf, would always admit the defendant's own testimony given at the original trial.[6] A similar question arises where a surety *or joint-tortfeasor* sues *principal* or *co-tortfeasor* for *contribution* to a claim sued for and paid; here the testimony at the first trial may be received as a part of the record (even without showing the witnesses unavailable) to define the scope of the issue adjudged, but not as testimony to the facts.[7]

(3) Where the deposition or testimony embodies an *admission by the opponent*, it is not subject to the present rule.[8]

§ 1388. **Parties or Privies the Same.** It is commonly said that the *parties* to the litigation in which the testimony was first given *must have been the same* as in the litigation in which it is now offered.[1]

[5] 1893, People *v.* Lem You, 97 Cal. 224, 226, 32 Pac. 11 (because "all that was sought to be proven here was the mere fact that certain testimony had been given").

[6] The cases involve other distinctions, and are collected *post*, § 1417.

[7] 1896, Washington G. Co. *v.* District, 161 U. S. 316, 16 Sup. 564. 1906, Spokane *v.* Costello, 42 Wash. 182, 84 Pac. 652.

[8] Cases cited *ante*, § 1075; 1855, Williams *v.* Cheney, 3 Gray Mass. 215, 217, 220; 1909, State *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114 (procuring an abortion; defendant's testimony in a suit by the woman for bastardy, admitted).

§ 1388. [1] In the following list, rulings of no service as precedents have not been stated in detail; statutes dealing additionally with the subject have been placed in the notes to the preceding section:

ENGLAND: 1664, Terwit *v.* Gresham, Freem. Ch. 184, 1 Eq. Cas. Abr. 227, Cas. Ch. 73 (depositions in former cause on same subject, admitted, though the parties did not claim under the former parties, but "the tertenants were then parties"); 1669, Rushworth *v.* Pembroke, Hardr. 472 (tenant and lord of manor, in respective suits; excluded); 1868, Coke *v.* Fountain, 1 Vern. 413 (depositions in action against father, not read against son not claiming as heir); 1695, Bath *v.* Bathersea, 5 Mod. 9 (depositions in former suit against plaintiff by other parties, admitted "because the defendant shelters himself under the other's title"); 1702, Lord Peterborough *v.* Duchess of Norfolk, 1 Vern. 264, 3 Brown P. C. 539, 545, *semble* (depositions against a tenant for life, not usable against a reversioner or remainder-man); 1703, Nevil *v.* Johnson, 2 Vern. 447 (depositions on bill of testator's creditors to set aside fraudulent conveyance, read upon legatees' bill for same cause against same grantees); 1747, Eade *v.* Lingood, 1 Atk. 203 (see note 4, *infra*); 1810, Banbury Peerage Case, in App. to Le Marchant's Gardner Peerage Case, 410 (issue of legitimacy: testimony under bill to perpetuate, filed in 1640, excluded; inadmissible "in any cause in which the parties were not the same parties as the parties in the cause in Chancery, or did not claim under some or one of them"); 1826, Pratt *v.* Barker, 1 Sim. 1, 5 (depositions not read against parties afterwards joined); 1826, Doe *v.* Passingham, 2 C. & P. 440, 445 (tenant for life and remainder-man as privies; not decided as to this point); 1826, Goodenough *v.* Alway, 2 Sim. & St. 481; 1827, Williams *v.* Broadhead, 1 Sim. 151; 1834, Wright *v.* Tatham, 1 A. & E. 3 (see note 2, *infra*); 1834, Doe *v.* Derby, 1 A. & E. 783, 786; 1836, Atkins *v.* Humphreys, 1 Moo. & Rob. 523 (see note 6, *infra*); 1836, Humphreys *v.* Pensam, 1 Myl. & C. 580, 586 (see note 6, *infra*); 1852, Hulin *v.* Powell, 3 C. & K. 323 (admitting testimony formerly given for the defendant R. in a suit for the same land by the same plaintiff against R., whose expenses were paid by the present defendant, also a claimant; Williams, J., "The admissibility of depositions in cases of this kind does not depend on mere technical grounds; and one question is,

But this limitation suffers in practice many modifications; and properly so, for it is not a strict and necessary deduction from the principle. At

Had the lessor of the plaintiff an opportunity of cross-examining the witness? He certainly had, and I see no fair reason for supposing that the cross-examination would have been to a different effect, whether the lessor of the plaintiff knew or did not know whether Mr. P. was the real defendant"); 1866, Morgan *v.* Nicholl, L. R. 2 C. P. 117 (see note 3, *infra*); 1881, Llanover *v.* Homfray, L. R. 19 Ch. D. 229; 1894, Printing Tel. & C. Co. *v.* Drucker, 2 Q. B. 801 (action for capital-instalments; plea, false representations inducing to become a shareholder; testimony in a similar action by the same plaintiff against another person pleading the same defence, excluded).

CANADA: 1877, Domville *v.* Ferguson, 17 N. Br. 40, *semble* (successive actions against agent and principal for wrongful detention of goods; the principal's testimony in the first suit, held admissible in the second); 1900, Carte *v.* Dennis, 5 N. W. Terr. 32, 40 (an examination of a defendant, on discovery, is admissible against a co-defendant if the latter has had an opportunity of cross-examination; here a rule of Court applied in part); 1894, Walkerton *v.* Erdman, 20 Ont. App. 444, 23 Can. Sup. 352 (action for injuries in a ditch, the defendants being a municipal corporation and H.; the deceased person's deposition was taken, after notice to the former defendant only, and the action was abated by death, and renewed by his representative under the statute; held, by three judges to two, that the deposition was admissible against the former defendant, because the testimony related to an issue of claim the same in substance, and because the judgment might be rendered against the former defendant only; good opinion by King, J.).

UNITED STATES: *Federal:* 1821, Bondereau *v.* Montgomery, 4 Wash. C. C. 186 (five heirs as parties in one action, and all, about one hundred, in the present action; excluded); 1832, Boardman *v.* Reed, 6 Pet. 328, 340; 1851, Philadelphia W. & B. R. Co. *v.* Howard, 13 How. 307, 335 (one co-plaintiff in former suit now lacking; admitted); 1917, Mathieson *v.* Craven, D. C. Del., 247 Fed. 223 (bill to distribute an estate; Mr. & Mrs. B. having intervened as co-complainants, on condition that prior testimony be admissible as against them, held that this addition of parties plaintiff did not prevent the prior testimony from being used as against the defendant); 1918, Anderson *v.* Hultberg, 8th C. C. A., 247 Fed. 273 (testimony at a prior trial before arbitrators concerning the same title, where she was neither party nor privy, excluded); 1918, Virginia & W. Va. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83, 116 (chain of title; various depositions in an ejectment suit of 1878, passed upon);

Alabama: 1847, Holman *v.* Bank, 12 Ala. 369, 408; 1851, Long *v.* Davis, 18 Ala. 801, 802 (former party deceased, represented here by administrator; admitted); 1850, Clealand *v.* Huie, 18 Ala. 347 (similar); 1883, Goodlett *v.* Kelly, 74 Ala. 219 (in the former suit the present parties were reversed, except that a now defendant K., transferee of the others, was not then a party; admitted); 1886, Turnley *v.* Hanna, 82 Ala. 139, 143, 2 So. 483; 1896, Wells *v.* Mge. Co., 109 Ala. 430, 20 So. 136 (defendant administrator succeeded by administrator *d. b. n.*, and a new claimant added as defendant after revivor of the bill; testimony in the preceding stage admitted against them); 1897, Smith *v.* Keyser, 115 Ala. 455, 22 So. 149 (the plaintiff acted in the one suit individually, in the other as executrix; admitted); 1901, Simmons *v.* State, 129 Ala. 41, 29 So. 929 (testimony at a trial of another person for the same offence, excluded); 1919, Julian *v.* Woolbert, 202 Ala. 530, 81 So. 32 (bill for accounting; testimony taken before a revivor by an administrator, held admissible);

California: 1887, Fredericks *v.* Judah, 73 Cal. 604, 608, 15 Pac. 305 (former party executrix, present party heir; admitted); 1889, Marshall *v.* Hancock, 80 Cal. 82, 85, 22 Pac. 61; 1889, Briggs *v.* Briggs, 80 Cal. 253, 22 Pac. 334 (present party claiming under deed of gift of former party; admitted); 1897, Lyons *v.* Marcher, 119 Cal. 382, 51 Pac. 559 (action by L. against F. A. M. and C. A. M.; deposition in former suit by L. against F. A. M., C. A. M., D. L. M., and A. E. M., offered by L., excluded; ruling not sound); 1898, McDonald *v.* Cutter, 120 Cal. 44, 52 Pac. 120; 1899, Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143 (actions consolidated by Court order; depositions in each mutually admissible);

Connecticut: 1907, In re Durant, 80 Conn. 140, 67 Atl. 497 (disbarment; a deceased witness' testimony before a bar association grievance committee on charges against the now respondent, admitted; "the requirement of identity of parties is only a means to an end; . . . the issues were substantially the same, and nothing more is necessary in that regard", per Prentice, J.; approving the above text);

Delaware: 1866, Dawson *v.* Smith, 3 Houst. 335, 340;

Georgia: 1878, Haslam *v.* Campbell, 60 Ga. 650, 654; 1881, Hughes *v.* Clark, 67 Ga. 19, 23; 1881, Atlanta & W. P. R. Co. *v.* Venable, 67 Ga. 697, 699 (former party, a mother suing for personal injuries; present party, her child suing for her death from those injuries; admitted);

Illinois: 1857, Wade *v.* King, 19 Ill. 301, 308 (successors in interest; admitted); 1864,

first sight, indeed, it seems fair enough to argue even that a person against whom former testimony is now offered should have to be satisfied with such

Goodrich *v.* Hanson, 33 Ill. 498, 508 (former party, an agent pleading property in principal, in replevin; present party, the principal suing in trover; admitted); 1871, Hutchings *v.* Corgan, 57 Ill. 71 (intestate and administrator are privies); 1911, London Guarantee & A. Co. *v.* American Cereal Co., 251 Ill. 123, 95 N. E. 1064 ("both actions must involve the same issue between the same parties or their privies", and the fact that the now opponent "was a party to the former action and had full opportunity to cross-examine the witness does not necessarily render the testimony admissible"; thus adhering to the reactionary ruling in McInturff *v.* Ins. Co., *supra*, § 1387; here applied to a suit involving the liability of an independent contractor on the facts, the testimony was emphatically such as would have been admitted by any procedure founded on good sense); 1914, Stephens *v.* Hoffman, 263 Ill. 197, 104 N. E. 1090 (ejectment; former testimony in an ejectment suit between present opponents and offeror's predecessor in title, admitted);

Indiana: 1876, Indianapolis & S. L. R. Co. *v.* Stout, 53 Ind. 158 (deceased and representative on privies); 1912, Lake Erie & W. R. Co. *v.* Huffman, 177 Ind. 126, 97 N. E. 434 (H. sued in a State court for personal injury caused by the defendant; the cause was removed to the Federal court; H. died, and his administratrix was substituted; the cause was dismissed, and a suit for H.'s death was begun in a State court; the deposition of H. at the former trial was admitted as against the defendant; but not as against the defendant's agent, who had not been a party to the former suit);

Iowa: 1869, Shaul *v.* Brown, 28 Ia. 37, 50; 1884, Atkins *v.* Anderson, 63 Ia. 739, 743, 19 N. W. 323 (former party the assignor of present party; admitted); 1897, Krueger *v.* Sylvester, 100 Ia. 647, 69 N. W. 1059 (assault and battery; testimony on a prior criminal charge, of assault with intent to commit bodily injury, for the same act, admitted; "the admissibility of such evidence seems to turn on the right to cross-examine, rather than on the precise identity of the parties"); 1897, Brown *v.* Zachary, 102 Ia. 433, 71 N. W. 413 (deposition taken before opponent's joinder as party, excluded); 1897, State *v.* Smith, 102 Ia. 656, 72 N. W. 279 (former charge of murder against T.; the testimony of a deceased witness there offered by the State, now received from this defendant to prove the circumstances of the same killing); 1905, Hunter *v.* District Court, 126 Ia. 357, 102 N. W. 156 (contempt; testimony in a similar charge against an accomplice, excluded); 1906, Wiltsey's Will, 135 Ia. 430, 109 N. W. 776 (testimony at a former probate proceeding for the same will, with parties slightly different in form, admitted under Code Suppl. 1902, § 245*a*, cited *ante*, § 1387);

Kentucky: 1830, Arderry *v.* Com., 3 J. J. Marsh. 183; 1871, Kerr *v.* Gibson, 8 Bush 129 (new party joined by amendment; deposition not admitted as to him); 1895, Oliver *v.* R. Co., — Ky. —, 32 S. W. 759 (excluding, in an action by a wife, joining husband, for personal injuries, a deposition taken in a former action by the husband for loss of service by the same injuries; Lewis, J.: "While reason for the rule mentioned does not exist to the same extent as if there had been different occurrences or transactions, we can very well see how disregard of it by the Court might have taken defendant by surprise, and deprived it of the advantage of developing, on cross-examination, admissions and confessions of the wife it was not permitted to show in the other suit"); 1905, Andricus' Adm'r *v.* Pineville Coal Co., 121 Ky. 724, 90 S. W. 233 (two fellow-workmen killed at the same time and place by the same cause, and two actions by the same person their administrator against the same defendant; a deposition taken in one, admitted in the other); 1919, Robertson *v.* Robertson's Adm'r, 185 Ky. 503, 214 S. W. 972 (original action dismissed without prejudice and revived in the name of the original plaintiff's administrator; deposition admitted);

Louisiana: 1826, Hennen *v.* Monro, 4 Mart. N. s. 449, 451 (action by a shipper against a vessel owner for general-average contribution; in a prior action for loss of the goods in question charging the defendant as carrier, defendant had succeeded; testimony of deceased and absent witnesses at that trial was now offered and admitted); 1901, State *v.* N. O. Waterworks Co., 107 La. 1, 31 So. 395 (excessive water-rates; testimony at a former suit, brought by private persons on the same contract proceeded upon by the State in the case at bar, and involving the same issues, admitted);

Maryland: 1843, Mitchell *v.* Mitchell, 1 Gill 66, 83 (proponent deceased, and administrator not then made a party; a deposition taken then on behalf of that side, though with notice insufficient under St. 1828, c. 165, the deposition not being taken by "either party");

Massachusetts: 1843, Warren *v.* Nichols, 6 Metc. 261 (general principle stated); 1873, Yale *v.* Comstock, 112 Mass. 268 (transferee and transferor of land are privies);

Michigan: 1902, Waterhouse *v.* Waterhouse, 130 Mich. 89, 89 N. W. 585 (testimony in a former trial, one of the then parties in interest being now only a next friend; excluded); 1912, Ecsley Light & P. Co. *v.* Commonwealth

cross-examination as any other person whatever, in another suit, may have chosen to employ. And it is entirely settled that in some such cases he must

P. Co., 172 Mich. 78, 137 N. W. 663 (water-power dam; testimony about the same river's history, in a suit between different parties, on a different issue, excluded);
Minnesota: 1890, Lougee *v.* Bray, 42 Minn. 323, 44 N. W. 194 (H. and B. coming in by separate pleas as intervenors, but tendering the same issue, a deposition taken by H. was admitted for B.); 1904, Edgerly's Estate, — Minn. —, 99 N. W. 896 (deposition not admitted against one not a party); 1916, Palon *v.* Great Northern R. Co., 135 Minn. 154, 160 N. W. 670 (personal injury of a child by wrongful act; in the father's action as guardian for the boy's injuries, B. testified but since deceased; in the father's own action for loss of the boy's services, B.'s former testimony was received; approving the text above);
Mississippi: 1877, Strickland *v.* Hudson, 55 Miss. 235, 241;
Missouri: 1870, Parsons *v.* Parsons, 45 Mo. 265 (discontinued suit by son against father, revived against latter's widow: admitted); 1872, Coughlin *v.* Hanessler, 50 Mo. 126; 1879, Adams *v.* Raigner, 69 Mo. 363 (successor in title; admitted); 1879, Breeden *v.* Feurt, 70 Mo. 624 (administrator reviving intestate's suit; admitted); 1917, Harrell *v.* Harrell, — Mo. —, 186 S. W. 677 (repudiating the principle of mutuality, and approving the text above, par. (*b*)); 1920, Lampe *v.* St. Louis Brewing Co., 204 Mo. App. 373, 221 S. W. 447 (personal injury; Harrell *v.* Harrell followed);
Montana: 1909, O'Meara *v.* McDermott, 40 Mont. 38, 104 Pac. 1049 (testimony in another suit, involving the same parties, admitted; "precise nominal identity of all the parties is not necessary");
Nebraska: 1870, Holmes *v.* Boydston, 1 Nebr. 346, 354 (depositions taken before amendment by adding former partners as plaintiffs, admitted);
New Hampshire: 1858, Orr *v.* Hadley, 36 N. H. 580; 1917, Morrison *v.* Noone, 78 N. H. 338, 100 Atl. 45 (right of flowage);
New York: 1806, Jackson *v.* Bailey, 2 John. 20 (general principle); 1818, Jackson *v.* Lawson, 15 John. 544; 1829, Jackson *v.* Crissey, 3 Wend. 252 (transferee of land, held not privies); 1880, Wood *v.* Swift, 81 N. Y. 31 (testimony taken before referee before compulsory joining of new party opponent, not admitted against him, even though liberty to re-cross-examine had been allowed; clearly erroneous);
North Carolina: 1884, Bryan *v.* Malloy, 90 N. C. 508, 510; 1891, Stewart *v.* Rossiter, 108 N. C. 588, 591, 13 S. E. 234;
North Dakota: 1903, Persons *v.* Smith, 12 N. D. 403, 97 N. W. 551 (testimony between the same parties on the same issues in the Federal Circuit Court, admitted);
Ohio: 1884, Bryan *v.* O'Connor, 41 Oh. St. 368, 372 (depositions not admissible against parties brought in after the taking); 1891, McClaskey *v.* Barr, 47 Fed. 155, 165 (deposition of life-tenant, taken to show ownership of fee, admitted under Ohio statute in partition-suit to show identity of co-tenants out of possession);
Pennsylvania: 1824, Watson *v.* Gilday, 11 S. & R. 342; 1827, Walker *v.* Walker, 16 S. & R. 379, 381 (depositions in suit against one only of present defendants holding by separate title, not admitted against the other); 1828, M'Cully *v.* Barr, 17 S. & R. 445, 451; 1839, Cooper *v.* Smith, 8 Watts 536, 539 (ejectment against successor in interest; admissible); 1861, Wright *v.* Cumpsty, 41 Pa. 111; 1882, Galbraith *v.* Zimmerman, 100 Pa. 374, 376 (former party represented by heirs; admitted);
Philippine Islands: 1916, U. S. *v.* Remigio, 35 P. I. 719 (testimony at a co-defendant's trial, delivered once, the defendant being present but declining to cross-examine because claiming a separate trial, held improperly admitted); 1915, U. S. Conception, 31 P. I. 183 (opium offence; defendant's husband's testimony in prior trial for the same offence, excluded);
Rhode Island: 1915, Lyon *v.* Rhode Island Co., 38 R. I. 252, 94 Atl. 893 (father and daughter were injured in the same collision; the daughter's suit by next friend was tried, and H. testified therein; then the father sued for his personal injuries; H. having died, his testimony was offered at this trial; the father was the next friend, and the same counsel acted at both trials; admitted, approving the above text and In re Durant, Conn.);
South Carolina: 1847, Mathews *v.* Colburn, 1 Strobh. 269; 1903, State *v.* Milam, 65 S. C. 321, 43 S. E. 677 (trial of M., followed by a second trial of M. & McC., for the same offence; testimony of a deceased witness at the first trial, held admissible, as against M., though not as against McC.); 1905, Martin *v.* Ragsdale, 71 S. C. 67, 50 S. E. 671 (former testimony in 1882 in a suit between the present plaintiffs and a remote assignor of defendants on the same subject, admitted);
South Dakota: 1896, Smith *v.* Hawley, 8 S. D. 363, 66 N. W. 942; 1897, Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570 (deposition taken by the plaintiff; the addition before trial of two nominal plaintiffs, held not to prevent its use against the defendant);
Vermont: 1918, Vermont Fruit Co. *v.* Wilson, 92 Vt. 112, 102 Atl. 1044 (contract, by trustee process, or garnishment proceedings; deposition in prior proceedings, admitted on the facts; liberal opinion by Miles, J.);
Virginia: 1799, Rowe *v.* Smith, 1 Call 487;
West Virginia: 1902, Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451 (deposition taken by

be satisfied, namely, in cases where the other person was a privy in interest with the present party. The reason for such cases is that there the interest to sift the testimony thoroughly was the same for the other person as for the present person. The principle, then, is that where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end. Thus, the requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It ought, then, to be sufficient to inquire *whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has;* and the determination of this ought to be left entirely to the trial judge.

Nevertheless the Courts have not, in name at least, often gone so far as to accept so broad a principle.

(1) It is well settled that the former testimony is receivable if the difference of parties consists merely in a difference of *nominal parties* only, or in an addition or subtraction on either side of parties not now concerned with the testimony.[2]

(2) It is well settled that the former testimony is receivable if the then party-opponent, though a different person, had the *same property-interest* that the present opponent has.

The application of this doctrine is usually thought to involve a resort to the technicalities of the substantive law determining privity in interest. It is, of course, often necessary to consider to some extent the rules of substantive law

defendant in a creditor's suit to avoid a conveyance, not usable against another creditor in a suit to avoid the same conveyance); 1916, Pfeiffer *v.* Chicago & M. El. R. Co., 163 Wis. 317, 156 N. W. 952 (W. and P. while riding together were respectively injured and killed at a railroad crossing; W. brought suit and testified; P.'s administrator now sues, and offers W.'s testimony given at the trial of the other case, W. being apparently deceased; held not admissible under Stats. § 4141 *a*; unsound); 1916, Illinois Steel Co. *v.* Muza, 164 Wis. 325, 159 N. W. 908 (title to land, and adverse possession; testimony of M. and others, received, in an action against the same defendant for other land, held admissible against the now plaintiffs, the issue being substantially the same, and the party having had the same interest and motive and opportunity to cross-examine fully; "we are now convinced that we erred in construing this statute in the Pfeiffer Case, and . . . it is overruled").

The statute making *survivors incompetent* to testify against *deceased opponents* may have bearing here; see Speyerer *v.* Bennett, 79 Pa. 445; for the effect of such disqualification on the use of the survivor's former testimony, see *post*, § 1409.

How far the use of a *judgment* between other parties is allowable (particularly, a conviction of a *principal* against an *accessory*) is not a question of evidence (as noted *ante*, § 1347).

[2] For example: 1834, Wright *v.* Tatham, 1 A. & E. 3 (T. claimed against W. as heir of J. M., while W. claimed under a will of J. M. T. first filed a bill in Chancery against W. and three others, and evidence was taken on an issue framed at law in which W. was plaintiff. Then T. brought an ejectment action against W., in which John Doe was the nominal plaintiff. It was held, when the testimony of a deceased witness B. at the former trial was offered in the second action, that (1) the nominal difference in the parties on T.'s side, and (2) the addition of three new parties on W.'s side, could not prevent the use of the testimony as between T. and W.; Tindal, C. J.: "Mr. T., the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of B., the same right of cross-examination, and of calling witnesses to discredit or contradict his testimony, on the former trial, as he would have had if Mr. W. had been the sole plaintiff in that suit or as he would have had now if B. had been alive and subpœnaed as a witness").

that may be pertinent to show the interest of the prior party; for example, where the prior opponent was the present opponent's intestate or grantor, one cannot determine that the interests are sufficiently the same without considering the law of Property. But it does not follow that the rules of Property should be resorted to as affording mechanically a solution of the question in Evidence. That question is merely whether a thorough and adequate cross-examination has been had. It is conceivable that, by an excessively strict application of the rule, only a prior cross-examination by the very same party, with the same counsel, might have been deemed sufficient (*ante*, § 1371). So pedantic a strictness could not be maintained; but such relaxation as is conceded must be made with a sole view to the substantial fulfilment of the principle involved, and not with a view to any extrinsic and unrelated rules. Whether the test of the Evidence-principle would or would not in a given instance lead to the same result as the Property-rule is immaterial. There is no necessary dependence of the former upon the latter. The latter should be kept in its place, and should be the servant, not the master, of the principle of Evidence. In spite of all this, there is an unfortunate judicial inclination to reverse the true relations of the rules, and to ignore the living principle of evidence while resorting to the doctrines of substantive law to obtain a merely mechanical rule for solution. Two aspects of this tendency may be noticed:

(*a*) It is sometimes said, for example, that "the same rule applies as in cases of *res judicata and estoppel*";[3] it is asked whether the present opponent is "bound" by the former proceeding;[4] and the niceties of property-law are frequently investigated in order to ascertain whether the prior opponent held by a title precisely coincident with the present opponent's. Now, this resort to extraneous rules is, for the reasons above suggested, fallacious in theory and misleading in practice. In Morgan *v.* Nicholl,[5] for example, it is perfectly apparent that the son in the prior suit was a person having precisely the same interest to litigate as the present father, and therefore that the son's cross-examination would have been an adequate one; although the judgment against the son could not, by the rules of 'res judicata,' bind the father. Again, in litigation by a tenant for life, involving only the validity of a will or of a prior grant, it is clear that nothing will turn on the precise quantity of his estate, and that his cross-examination to the points in dispute will be adequate to justify the use of the testimony against the remainderman in his subsequent litigation involving the same issue; yet the judgment

[3] 1866, Morgan *v.* Nicholl, L. R. 2 C. P. 117 (the plaintiff's son, supposing the plaintiff dead and claiming as heir, had brought an action of ejectment for the same property against the defendant's father, now dead; testimony at the former trial was rejected; Erle, C. J.: "The present plaintiff is for this purpose as distinct a person from his son as a perfect stranger; he does not in any way claim through him, and he cannot be injured by anything his son may have done at a former trial").

[4] 1747, Eade *v.* Lingood, 1 Atk. 203 (bill by creditors against T. L. and his daughter M. L., charging fraud in pretending that an estate in his daughter M. L.'s name was bought with her money, not his; the examination of the daughter M. L., as a witness in bankruptcy proceedings against T. L. shortly before was rejected because "M. L. is not at all bound by the proceedings in a commission of bankruptcy against T. L.").

[5] Note 3, *supra*.

against one would not bind the other because the one does not claim under the other. Again, there is no privity between the parties to a criminal prosecution and a civil action for the same injury; yet testimony given at the former ought to be admitted in the latter. It is thus apparent that the proper application of the principle of evidence cannot be mechanically restricted by the rules of judgments and land-titles.

(*b*) Again, proceeding upon the same fallacious notion, it is sometimes said that there must be "reciprocity" or "*mutuality*", *i.e.* that former testimony, already cross-examined by B, cannot now be offered by A against B unless B could now have offered it against A.[6] But for this there is not a shadow of justification. The sole question is whether B has had an adequate opportunity by cross-examination to sift this testimony; this, by hypothesis, he has had; and so the rule is satisfied. It is quite immaterial whether A would have been able to object (for example, because he came afterwards into the suit) to its use against him; the testimony is not offered against A, but by A; and the whole object of the present rule is to protect the opponent against whom the testimony is offered, *i.e.* B, and B has already been thus protected. To exclude the testimony against B, who has been protected, because A, who does not need or want protection, has not been protected, is as absurd as it would be to forbid A to use against B a witness disqualified for B by interest, on the ground that A could have objected to B's production of the witness on B's behalf, — which no one ever thought of maintaining. The fallacious doctrines of the foregoing limitations have been properly criticised in the following passage:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. VI, c. XII (Bowring's ed. vol. VII, p. 171): "Another curious rule is, that, as a judgment is not evidence *against* a stranger, the contrary judgment shall not be evidence *for* him. If the rule itself is a curious one, the reason given for it is still more so: 'Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary': a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another; but that the consequence should hold when applied to justice, is not equally clear."

The rulings in the different jurisdictions exhibit varying degrees of liberality; and naturally the result depends much on the facts of the particular case.

[6] 1836, Atkins *v.* Humphreys, 1 Moo. & Rob. 523 (whether a conveyance to A. S. or partner was 'bone fide' as against the defendants interested in the grantor's estate; in a suit by A. S. against these defendants to set aside the conveyance, depositions taken by A. S. had been used by these defendants; held, that the now plaintiffs, assignees of A. S.'s firm, could not use them, because "there is no reciprocity"); 1836, Humphreys *v.* Pensam, 1 Myl. & C. 580, 586 (same litigation; same ruling by L. C. Cottenham, but here the plaintiffs are said to be the assignees of only one A. C., one of the partners of A. S.); 1835, Norris *v.* Monen, 3 Watts Pa. 470 (Huston, J.: "Certain other heirs of J. N. had brought a former ejectment against the present defendant to recover their respective shares. . . . The present defendant could not use depositions taken in that cause against the present plaintiffs, for they had no oportunity to cross-examine, and it must be reciprocal"); 1821, Bourdereau *v.* Montgomery, 4 Wash. C. C. 186.

This doctrine goes back a long distance: 1669, Rushworth *v.* Pembroke, Hardr. 472.

§ 1389. **Deposition used by Either Party; Opponent's Use of a Deposition taken but not read.** It has sometimes been thought — perhaps under the influence of the preceding fallacies — that where the party taking a deposition has not chosen to put it in as evidence, the opponent, against whom it was taken, is not at liberty to do so.[1] So far as the present principle is concerned, there is no support for this prohibition.

The chief reliance of the few Courts that enforce it seems to be an opinion weighted with the great name of Chief Justice Shaw:

1837, SHAW, C. J., in *Dana* v. *Underwood*, 19 Pick. 99, 104: "Where one party takes a deposition, it is at his option to use it or not, as he thinks fit; and it has been held that, where a deposition taken by one party is returned and filed, and the party taking it does not think proper to use it, it cannot be read by the other party without consent. One reason for this, among others, is obvious: the parties are under very different rules in the mode of putting their questions to a deponent. The taker is restrained from asking leading questions; the adverse party may put a leading question. A party may try the experiment of taking the deposition of a person known to be a willing witness for the other side, or, believing that he is favorable to his own side, finds the contrary in the progress of the examination; the adverse party, finding him a willing witness on his side, puts leading questions and gets out answers which he could not do if he were his own witness; now if this deposition, instead of being used at the option of a taker, may be used by the adverse party without and against his [the taker's] consent, it would be wholly reversing the rules of examination and going counter to the reasons on which those rules were established. . . . The strong, and in our judgment the decisive objection, is, the party would be allowed to introduce a deponent as his own witness whom he has had the right to cross-examine and the adverse party has not."

The answers to this argument are not difficult to discover: (1) The vital assumption of the above opinion is incorrect, namely, that leading questions would have been forbidden to the taker of the deposition; for it is well settled (*ante*, §§ 773, 774) that, if the deponent had proved to be an unwilling or hostile witness, the taker could have put leading questions. (2) The objection stated in the opinion, even if it were correctly stated, would apply equally to one calling a hostile witness to the stand; yet no one supposes that in such a case the calling party, on discovering the witness' hostility, could withdraw him and compel the opponent to call him; so that, on the theory of the above opinion, a party taking a deposition would be given a peculiar advantage in suppressing testimony, which he would not have if he called the same witness to the stand. (3) Finally, the whole notion of cross-

§ 1389. [1] *Accord:* 1889, Anderson *v.* State, 89 Ala. 12, 7 So. 429 (in criminal cases, against the accused; here the deposition had been taken but not used by him); 1854, Sexton *v.* Brock, 15 Ark. 345, 351 (opponent's deposition not usable because "he may be taken at a disadvantage, because he was restrained from putting leading questions on his examination in chief, and . . . could not impeach or discredit them"); 1908, Western Union T. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168 (rule of Sexton *v.* Brock not applicable to deposition taken by agreement of parties); 1908, Ong Chair Co. *v.* Cook, 85 Ark. 390, 108 S. W. 203 (following Sexton *v.* Brock); 1912, McDonald *v.* Brown, 90 Nebr. 676, 134 N. W. 263 (examination of bastardy complainant); 1854, Norvell *v.* Oury, 13 Tex. 31 (excluded, where no cross-interrogatories had been filed, under a statute allowing either party to use "all depositions where cross-interrogatories have been filed and answered"); 1856, Harris *v.* Leavitt, 16 Tex. 340, 343 (similar).

examination refers to one's right to probe the statements of an opponent's witness, not one's own witness; thus, if A has taken X's deposition or called X to the stand, and B has cross-examined, it is not for A to object that he has not had the benefit of cross-examination; that benefit was not intended for him nor needed by him; it was intended only to protect against an opponent's witness, who would be otherwise unexamined by A; and if A has had the benefit of examining a witness called on his own behalf, he has had all that he needs, and the right to probe by cross-examination is B's, not A's.

In the following passages the correct doctrine is vindicated:[2]

[2] Such is the result now practically everywhere accepted; in most jurisdictions a statute expressly so provides:

ENGLAND: 1825, M'Intyre *v.* Layard, Ry. & Moo. 203 (plaintiff allowed to use answers to interrogatories on a commission, given by defendant's witnesses but not put in by defendant; but the ruling was apparently with hesitation); 1836, Procter *v.* Lainson, 7 C. & P. 629 (Abinger, L. C. B.: "Under a judge's order, they are examined as much for one side as the other").

CANADA: *Man.* 1908, Richardson *v.* McMillan, 18 Man. 359 (and the taker need not put it in).

UNITED STATES: *Federal:* 1809, Yeaton *v.* Fry, 5 Cr. 335, 343 (defendant objected to plaintiff using defendant's deposition because defendant had not given plaintiff proper notice; Marshall, C. J.: "The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary"); *Alabama:* Code 1907, §§ 4068, 4072 (for depositions 'in perp. mem.'); 1846, Stewart *v.* Hood, 10 Ala. 600, 607 (see quotation *supra*); 1903, Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; *Alaska:* Comp. L. 1913, § 1488 (like Or. Laws, § 850); *Arizona:* Rev. St. 1913, P. C. §§ 1249, 1261 (in criminal cases, for depositions taken by accused); Civ. C. § 1712 (in civil cases); P. C. § 881, par. 7 (testimony before committing magistrate); *California:* P. C. 1872, §§ 1345, 1362; C. C. P. 1872, §§ 2022, 2038, 2088; *Colorado:* Comp. L. 1921, C. C. P. § 378 (usable by either party "against any party giving or receiving the notice"); § 405 (depositions 'in perpetuam', usable by either party); *Hawaii:* Civil Rev. L. 1915, § 2588 (depositions 'in perpetuam'); *Idaho:* Comp. St. 1919, §§ 8056, 9150, 9165; *Illinois:* 1877, Adams *v.* Russell, 85 Ill. 284, 287 ("unless he obtains leave before the trial and withdraws it"); *Indiana:* 1872, Woodruff *v.* Garner, 39 Ind. 246, *semble* (the non-taker, after reading the deposition, allowed to introduce another taken by himself from the same witness); *Iowa:* Code 1897, § 4723 Comp. Code, § 7431 (for 'in perpetuam memoriam' depositions); 1849, Nash *v.* State, 2 Greene 286, 298 (accused's depositions allowed to be used by the prosecution; here prescribed by statute, but also independently decided as a constitutional question); 1854, Crick *v.* McClintic, 4 Greene 290; 1859, Pelamourges *v.* Clark, 9 Ia. 1, 21; 1862, Wheeler *v.* Smith, 13 Ia. 564; 1876, Hale *v.* Gibbs, 43 Ia. 380, 382; 1884, Brown *v.* Byam, 65 Ia. 374, 21 N. W. 684; 1885, Citizens' Bank *v.* Rhutasel, 67 Ia. 316, 319, 25 N. W. 261; *Kansas:* Gen. St. 1915, § 7295 (depositions 'in perp. mem.'); 1887, Rucker *v.* Reid, 36 Kan. 468, 13 Pac. 741; *Kentucky:* 1817, Rogers *v.* Barnett, 4 Bibb 480 (objection that a deposition was taken at the instance of the appellant, the party not using it, overruled); 1850, Young *v.* Wood, 11 B. Monr. 123, 134 (same ruling); 1861, Musick *v.* Ray, 3 Metc. 427, 431; 1869 Weil *v.* Silverstone, 6 Bush 698, 700; 1871, Sullivan *v.* Norris, 8 Bush 519, 520; 1903, St. Bernard Coal Co. *v.* Southard, — Ky. —, 76 S. W. 167; 1907, Chesapeake Stone Co. *v.* Fossett, — Ky. —, 100 S. W. 825; *Louisiana:* Rev. Civ. C. 1920, § 617 (civil cases); *Maine:* 1837, Polleys *v.* Ins. Co., 14 Me. 141, 147, 153 (by a majority; a deposition left on file after the first term may be read by the opponent); *Massachusetts:* 1852, Linfield *v.* O. C. R. Co., 10 Cush. 562, 570 (the non-taker may compel the reading of the answers to a deposition taken but not used by the opponent; unless, the deposition having been taken for the purpose of meeting the testimony of an opposing witness who is after all not introduced, the taker has given prior notice of his conditional purpose); *Michigan:* 1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668 (by Circuit Court Rule 41 *a*); *Minnesota:* 1886, Smith *v.* Capital Bank, 34 Minn. 436, 26 N. W. 234 (even under a stipulation "to be introduced . . . on behalf of said" party taking it); *Missouri:* Rev. L. 1919, § 5491 (depositions 'in perpetuam'); 1846, Greene *v.* Chickering, 10 Mo. 109, 111 (deposition filed may be read by the opponent); 1862, McClintock *v.* Curd, 32 Mo. 411, 417 (nor is notice required); *Montana:* Rev. C. 1921, § 10650, 10653, 10691 (like Cal. C. C. P. §§ 2022, 2038, 2088); §§ 12197, 12212 (like Cal. P. C. §§ 1345, 1362); *Nebraska:* 1883, Converse *v.* Meyer, 13 Nebr. 190, 15 N. W. 340; 1901, Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150; 1901, Hamilton B. S. Co. *v.* Milliken, 62 Nebr. 116, 86 N. W. 913; *Ne-*

1822, TILGHMAN, C. J., in *Gordon* v. *Little*, 8 S. & R. 532, 548: "I do not perceive the force of this distinction between plaintiff and defendant. When the deposition is taken it ought to be filed; it is not the property of the party on whose behalf it was taken; nor has he any right to withhold it. But it often happens that the party at whose instance it was taken finds himself mistaken and the testimony proves to be unfavorable to him; in such case the adverse party has a right to make use of it [subject only to the condition of showing the witness personally unavailable]."

1846, GOLDTHWAITE, J., in *Stewart* v. *Hood*, 10 Ala. 600, 607: "The question, then, comes to this: Can the adverse party, who has cross-examined, use the deposition taken at the instance of the other party? We do not well see what reasonable objection there is to such a course. If the witness was examined in open court, it is very certain we should never hear the objection of interest from the party offering him; and there certainly is no good to result from a practice which will permit a party first to ascertain by actual examination what a witness will swear, and then admit or exclude him at pleasure."

1849, WILLIAMS, C. J., in *Nash* v. *State*, 2 Greene Ia. 286, 298: "Has he [the accused] been denied the benefit of this right [of confrontation of the witness]? The testimony was of his own procurement. The witnesses were selected by himself, and he propounded the questions which were answered by them. At his instance the depositions were returned and filed in the court, as a part of the case for hearing and in order to sustain his defence on the issue joined. The evidence, if relevant and material, was in possession of the Court by his own act. . . . When filed, it was in the custody of the Court as evidence in the case. We cannot see under the circumstances how a moral wrong or injustice in fact was done to the prisoner."

1895, TORRANCE, J., in *Ansonia* v. *Cooper*, 66 Conn. 184, 33 Atl. 905: "In most cases, depositions are taken for the purpose of being used by the party taking them. The cases where they are not so used are comparatively few in number; but in such cases, if the right to use the depositions be denied to the adverse party, it may work a great hardship

vada: Rev. L. 1912, §§ 5456, 5457, 5463, 5470, 6977; *New Hampshire:* 1914, Taylor *v.* Thomas, 77 N. H. 410, 92 Atl. 740 (overruling George *v.* Fisk, 32 N. H. 32); 1921, Highland *v.* Hines, — N. H. —, 116 Atl. 347 (death by wrongful act; depositions of defendant's employees, taken but not used by plaintiff, allowed to be used by defendant; statutory provisions examined); *New Jersey:* 1903, Wallace M. & Co. *v.* Leber, 60 N. J. L. 312, 55 Atl. 475; *New Mexico:* Annot. St. 1915, § 2140; *New York:* C. P. A. 1920, § 348 (testimony at a former trial may be read "by either party"); C. Cr. P. 1881, §§ 631, 657; *North Carolina:* 1805, Collier *v.* Jeffreys, 2 Hayw. 400; 1880, Strudwick *v.* Broadnax, 83 N. C. 401, 404; *North Dakota:* Comp. L. 1913, § 7931 ('in perpetuam'); §§ 11048, 11062 (criminal cases); St. 1917, Mar. 8, c. 110 (personal injury cases, 'in perpetuam'); 1902, First Nat'l Bank *v.* Minneapolis & N. E. Co., 11 N. D. 280, 91 N. W. 436 (statute applied); *Oklahoma:* Comp. St. 1921, §§ 2851, 2865 (depositions taken for accused); *Oregon:* Laws 1920, §§ 850, 886; 1902, Tobin *v.* Portland F. M. Co., 41 Or. 269, 68 Pac. 743; *Pennsylvania:* 1822, Gordon *v.* Little, 8 S. & R. 532, 548; 1867, O'Connor *v.* American I. M. Co. 56 Pa. 234, 238; *Philippine Islands:* C. C. P. 1901, § 360 (depositions), § 375 ('in perp. mem.'); *Porto Rico:* Rev. St. & C. 1911, §§ 6469, 6484 (like Cal. P. C. §§ 1345, 1362); § 1504, 1512 (civil cases); *Rhode Island:* Gen. L. 1909, c. 292, § 29; *South Dakota:* Rev. C. 1919, §§ 2779, 5015, 5029 ('in perpetuam'); §§ 8818, 8832 (criminal cases); *Tennessee:* 1872, Brandon *v.* Mullenix, 11 Heisk. 446, 449; 1897, Saunders *v.* R. Co., 99 Tenn. 130, 41 S. W. 1031; *Texas:* Rev. Civ. St. 1911, §§ 817, 818 (accused's depositions, taken not on the ground of non-residence or age or infirmity, cannot be used by him except after giving his consent "that the entire evidence or statement of the witness may be used against him by the State on the trial"); § 3675 ("When cross-interrogatories have been filed and answered", either party may use the depositions); compare the earlier Texas citations, *supra*, note 1; *Utah:* Comp. L. 1917, §§ 7168, 7182, 7198, 9307; so also for former testimony: §§ 7205, 9277; St. 1919, Mar. 13, c. 36, amending Comp. L. § 1885 (city courts, former testimony); *Virginia:* Code 1919, § 6233; 1826, M'Mahon *v.* Spangler, 4 Rand. 51, 56, *semble; Washington:* R. & B. Code 1909, § 1244; *West Virginia:* Code 1914, 1891, c. 130, § 37; 1869, Echols *v.* Staunton, 3 W. Va. 574, 578; *Wisconsin:* 1862, Juneau Bank *v.* McSpedon, 15 Wis. 696 (good opinion by Paine, J.); 1873, Hazelton *v.* Union Bank, 32 Wis. 34, 44; *Wyoming:* Comp. St. 1920, § 6311 (depositions 'in perpetuam').

and injustice. It will seldom be known in advance of the actual trial whether the party taking the depositions does or does not intend to use them, and, when it is known that he will not use them, it will usually be too late for the adverse party to avail himself of the testimony of the deponents in any way, although he may have relied on that testimony in support of his case. If this right be denied to the adverse party, it will in very many cases necessitate the taking of two sets of depositions of the same witnesses, involving a useless expenditure of time and money. We see no good reason why this should be done at least, not in cases like the present, where the depositions were filed with the clerk, in whose custody they must, by statute, remain, unless suppressed by the Court, until final judgment in the cause."

But the propriety of allowing the non-taker's use of the deposition, so far as the present principle is concerned, must be distinguished from the propriety of allowing its use with reference to wholly distinct rules of Evidence. The contrariety of rulings on the subject is chiefly due to the circumstance that different results may be reached according as one or another rule of Evidence is being invoked. There are, besides the present rule, three others which may have to be considered:

(*a*) The rule of Confrontation (*post*, § 1395) requires the deponent to be produced in person, if he can be, and this rule applies as well to the non-taker as to the taker of the deposition; so that, before using it, *the non-taker must show that the deponent is deceased or otherwise unavailable.*[3]

(*b*) The deponent may be disqualified by interest as a witness for the non-taker; in that case, it is necessary to inquire *whether the taker*, by the mere taking without using, *has so made the deponent his own witness* that he is barred from objecting to the deponent's disqualification for the non-taker; this involves the whole doctrine of impeaching one's own witness, and has been already dealt with elsewhere (*ante*, §§ 909, 913).

(*c*) The non-taker may offer the deposition, not as the testimony of the deponent (*i.e.* from the present point of view), but as an assertion adopted by the taker and made his own by using it on a former occasion, *i.e.* as *an admission by the party taking it and then using it;* in this view the limitations of the present subject — as to parties, issues, cross-examination — disappear entirely, and the only question is whether the taker's former use of the deposition has been such that he can fairly be said to have adopted its statements as his own. This is a question of Admissions, dealt with elsewhere (*ante*, § 1075).[4]

(*d*) Where a party's deposition is taken by the opponent, and the *party has now deceased*, the present opponent has of course had the benefit of a cross-examination; hence, if the party's successor (the non-taker) desires to use the

[3] The authorities are collected in § 1416, *post*.

[4] Moreover, such use of a deposition by the non-taker does not authorize the use of *testimony* contained in the deposition but *not in itself admissible:* 1832, Wilson *v.* Calvert, 5 Sim. 194 (deposition taken by the plaintiff but not used by him, not admitted for the defendant, because it concerned a conversation of the defendant which was usable as an admission against him but not in his favor); 1880, Forbes *v.* Snyder, 94 Ill. 374, 378.

For the prohibition against the opponent's using a *cross-examination* when the direct examination has been excluded, see *post*, § 1893.

For the rule about putting in the *whole of a deposition*, see *post*, §§ 2103, 2115.

deposition, he has only to satisfy the principle of Confrontation, and the party's death excuses him from this; hence he may use the deposition, though it is that of his own predecessor.[5]

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

§ 1390. **Failure of Cross-examination: (1) Through the Witness' Death or Illness.** There may have been an adequate opportunity of cross-examination (*ante*, § 1371), so far as depends upon the nature of the tribunal or the state of the issues and parties; yet the required opportunity may nevertheless practically have failed, through circumstances connected with the conduct of the examination.

These circumstances may be distinguished under six heads: (1) the witness' death or illness intervening to prevent or curtail cross-examination; (2) the witness' refusal to answer on cross-examination or the party's prevention of his answer; (3) the witness' answering the direct examination "non-responsively", *i.e.* without dealing with the subject of the question; (4) the framing of the direct examination so as to prevent adequate cross-examination; (5) the lack of interpretation of testimony of an alien, etc.; (6) sundry circumstances preventing adequate cross-examination.

(1) Where the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out.[1] Upon the same principle, the same result

[5] *Accord:* 1896, Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142, *semble* (cited *post*, § 1416). *Contra:* 1910, Johnson *v.* Birket, 21 Ont. L. R. 319 (the plaintiff in an action for money paid was examined on discovery by defendant before trial; she died ten months later; her executor on the trial offered her examination; held inadmissible; unsound; the opinion does not appreciate that the plaintiff's answers were testimony, and therefore inevitably fall within the present principle); 1913, Cartwright *v.* Toronto, 29 Ont. L. R. 73, 13 D. L. R. 604 (like Johnson *v.* Birket, 21 Ont. L. R. 319; plaintiff's predecessor in title died, having been examined on discovery by defendant; held, that plaintiff could not offer his answers as a deposition, unless defendant had used some portion; opinion shows the same unsound theory as to discovery-answers); 1914, Cartwright *v.* Toronto, 20 D. L. R. 189, Can. Sup. (same case on appeal; same decision; "these rules are statutory and must be restricted to the provisions of the statute"; unsound).

In *Louisiana*, however, the party-opponent's answers to interrogatories of discovery are treated as part of the pleadings, like an answer in chancery, and hence are admissible for himself on the trial, even though not offered by the party interrogating: 1921, Wilkin-Hale State Bank *v.* Tucker, 148 La. 980, 88 So. 239 (citing precedents).

§ 1390. [1] 1918, Kemble *v.* Lyons, 184 Ia. 804, 169 N. W. 117 (direct examination being had on Saturday, Oct. 21, and cross-examination having just begun at the time of adjournment to Monday, the party calling the witness applied on Monday for a continuance; no further examination was had, and the witness died in the interval; former testimony held not admissible for the party calling); 1880, Sperry *v.* Moore's Estate, 42 Mich. 361, 4 N. W. 13 (at the former trial, the examination of the witness had been stopped just before cross-examination, in order that the party offering might put on another witness; but the former witness died shortly after and before an opportunity for cross-examination was had; Graves, J.: "There was here no such opportunity [to cross-examine], and the want of it was caused by the claimant [the party offering], and the estate was in no way answerable for it", and the testimony was excluded); 1844, Forrest *v.* Kissam, 7 Hill N. Y. 470.

should follow where the illness is but temporary and the offering party might have reproduced the witness for cross-examination before the end of the trial.[2] But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Nevertheless, principle requires in strictness nothing less. The true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss.[3] Courts differ in their treatment of this difficult situation;[4]

[2] 1815, Clements *v.* Benjamin, 12 Johns. N. Y. 299.

[3] As in Scott *v.* McCann, Md., *infra*.

[4] ENGLAND: 1828, Jones *v.* Fort, 1 M. & M. 196 (defendant's examination in bankruptcy was offered by plaintiff; the cross-examination had been postponed at the commissioners' request, and in the meantime the deponent was stricken with apoplexy; yet the examination was received, probably as containing admissions, and not as being strictly a mere witness' deposition); 1837, R. *v.* Hagan, 1 Jebb Cr. C. 127, Ire. (a witness fainted shortly after his cross-examination began; held, by a vote of 7 to 5 judges, that the direct examination should be received, the case standing "upon the same principle [as death], fatality or the act of God"; the leading case, with good opinions on both sides); 1892, R. *v.* Mitchell, 17 Cox Cr. 503 (dying woman examined, and after the cross-examination "had continued for about ten minutes", the magistrate stopped it on account of her condition; she died a few minutes later; held inadmissible, unless the cross-examination was being continued merely as a pretext); IRELAND: 1804, O'Callaghan *v.* Murphy, 2 Sch. & Lefr. 158, Ire. (where a witness in chancery died after direct examination but before any cross-examination, the testimony was read, on the facts of the case); CANADA: 1899, Randall *v.* Atkinson, 30 Ont. 242 (deposition of defendant, who had died pending adjournment and before cross-examination, without fault on either side admitted; exhaustive opinion by Rose, J.; but the analogies of chancery practice and of the statutory affidavit practice are emphasized); UNITED STATES: *Alabama:* 1908, Wray *v.* State, 154 Ala. 36, 45 So. 697 (the witness was brought into court, but his physician stated that an examination might be fatal; the Court declined to allow an examination; but finally consented to allow the State to ask one vital question, which was asked, and then the Court gave liberty to cross-examine, which was not availed of; held, that the right of cross-examination was not adequately had); *Georgia:* 1910, Gale *v.* State, 135 Ga. 351, 69 S. E. 537 (the witness collapsed physically and mentally pending cross-examination; after adjournment and at a later session, the witness' inability continuing, opponent's counsel declined to accept the judge's offer of a mistrial; held that the trial judge's admission of the testimony was not improper; careful opinion by Lumpkin, J., quoting the text above); *Maryland:* 1892, Scott *v.* McCann, 76 Md. 47, 24 Atl. 536 (the deponent-party died during adjournment and before cross-examination; admitted, partly because of chancery precedents, partly because the surviving opponent had testified, and partly because the cross-examination was not "likely to modify his testimony in chief"; a sensible ruling); *Massachusetts:* 1855, Fuller *v.* Rice, 4 Gray 343 (a witness fell ill at the 19th cross-interrogatory; testimony received; Shaw, C. J.: "No general rule can be laid down in respect to unfinished testimony. If substantially complete, . . . it ought not to be rejected"); 1858, Lewis *v.* Ins. Co., 10 Gray 511 (failure of memory through illness; testimony admitted); *Michigan:* 1879, Heath *v.* Waters, 40 Mich. 471 (Campbell, C. J.: "There are cases in which a failure to respond on cross-examination will justify the exclusion of at least so much of the direct testimony as it might have qualified"); 1894, People *v.* Kindra, 102 Mich. 147, 151, 60 N. W. 458 (witness dismissed by the judge after cross-examination at length; admitted, though the cross-examiner for unspecified reasons had asked for further cross-examination); *New York:* 1844, Forrest *v.* Kissam, 7 Hill 470, overruling Kissam *v.* Forrest, 25 Wend. 652 (the witness died after direct examination, pending adjournment by consent; though it was otherwise inadmissible, the judges differed as to the sufficiency of the present ground); 1871, People *v.* Cole, 43 N. Y. 513 (the witness fainted at the end of the direct examination and became too ill to permit of cross-examination; Grover, J.: "The common-law rule . . . should be adhered to, although in some cases there may be an apparent hardship. No injustice is done to the party seeking to avail himself of the evidence to require that before its admission its truth shall be subjected to such tests as the experience of ages has shown

except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished. Where, however, the failure to obtain cross-examination is in any sense attributable to the *cross-examiner's own consent or fault*, the lack of cross-examination is of course no objection,[5] — according to the general principle (*ante*, § 1371) that an opportunity, though waived, suffices.

§ 1391. **Same: (2) Through the Witness' Refusal to Answer or the Fault of the Party offering him.** (2) Where the witness, after his examination in chief on the stand, has *refused* to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed, and his direct testimony should be struck out.[1] On the circumstances of the case, the refusal or evasion of answers to one or more questions only need not lead to this result.[2] When such a refusal, however, occurs in answer to the *written*

were necessary to render reliance thereon at all safe; and where this has been prevented without any fault of the adverse party, to exclude the evidence"; Forrest *v.* Kissam declared to be no authority, because the decision was rested on different grounds by different judges); 1875, Sturm *v.* Ins. Co., 63 N. Y. 87 (Folger, J.: "It may be taken as the rule that, where a party is deprived of the benefit of the cross-examination of a witness by the act of the opposite party or by the refusal to testify or other misconduct of the witness, or by any means other than the act of God, the act of the party himself, or some cause to which he assented, the testimony given on the examination-in-chief may not be read"); 1876, Hewlett *v.* Wood, 67 N. Y. 396 (the witness was ill and after repeated adjournments no cross-examination could be had; *semble*, that the fault of the witness or his party, or "any matter of substance", would exclude a deposition; People *v.* Cole and Sturm *v.* Ins. Co., not mentioned); *Missouri:* 1918, St. Charles S. Bank *v.* Denker, 275 Mo. 607, 205 S. W. 208 (deposition not completed on account of the deponent's illness; ruling obscure); *Pennsylvania:* 1868, Pringle *v.* Pringle, 59 Pa. 290, *semble* (inadmissible, if cross-examination is prevented by act of God).

[5] 1848, R. *v.* Hyde, 3 Cox Cr. 90 (the witness, a child, was very ill, and after the substance of the story had been obtained for the prosecution in taking the deposition, further questioning was abandoned; the counsel for the defendant declined to cross-examine, "as the child is evidently not in a fit state to answer", but did not ask for a postponement; the witness signed the deposition, and died shortly afterwards; Platt, B., conceded that "an attorney cannot shut out a deposition by abstaining from cross-examination"; but the argument that the condition of the child had precluded a satisfactory examination left him in doubt on the whole case); 1888, Parnell Commission's Proceedings, 7th day, Times Rep. pt. 2, p. 66; 1896, People *v.* Pope, 108 Mich. 361, 66 N. W. 213, *semble* (here the witness fainted; but the opponent failed to move to strike out the direct testimony; held, admissible); 1921, State *v.* Harris, 181 N. C. 600, 107 S. E. 466 (an expert witness after partial cross-examination asked leave to depart, so as to catch a train and attend to a case of mortal illness; counsel for defendant said he was not finished, but assented; held a waiver); 1879, Hay's Appeal, 91 Pa. 265, 268 (the plaintiff witness became disqualified, by the death of the opponent, after the direct examination and during adjournment, the opposing counsel having declined cross-examination before adjournment, on account of his client's absence; direct examination admitted, on the ground of waiver).

§ **1391.** [1] 1885, Rieger's Succession, 37 La. An. 104 (note 2, *infra*); 1842, Smith *v.* Griffith, 3 Hill N. Y. 333; 1879, State *v.* McNinch, 12 S. C. 95; 1896, Millikan *v.* Booth, 4 Okl. 713, 46 Pac. 489; so also the cases cited *ante*, § 1390. *Contra:* 1826, Courtenay *v.* Hoskins, 2 Russ. 253 (the refusal of the witness to be cross-examined is no reason for later suppressing the direct examination; because the cross-examiner should insist at the time on the enforcement of his right).

[2] *Ala.* 1845, Gibson *v.* Goldthwaite, 7 Ala. 281, 294 (failure to answer a question not material; deposition admitted); 1846, Spence *v.* Mitchell, 9 Ala. 744, 749 (failure to answer two questions directly, held not fatal, on the facts); 1857, Harris *v.* Miller, 30 Ala. 221, 224 (deposition suppressed, one answer being "evasive and incomplete"); 1861, Black *v.* Black, 38 Ala. 111, 112 (answer held not evasive, merely for referring to former direct answers); 1902, Electric Lighting Co. *v.* Rust, 131 Ala. 484, 31 So. 486 (deposition suppressed for evasive answers on material points); *D. C.* 1896, Clark *v.* Harmer, 9 D. C. App. 1, 5, 7 (the witness was partly cross-examined, and then upon adjournment was requested by counsel

interrogatories of a deposition (taken on the Chancery model), the situation may require more strictness, for the deponent is not in a position to be coerced by the Court's summary process, and the opportunity of further probing the witness and of investigating the motive of the refusal and the materiality of the loss of evidence is not so abundant:

1838, SHAW, C. J., in *Savage* v. *Blanchard*, 20 Pick. 167, 172: "So far as the objection goes upon the assumption that a deposition must be rejected because some of the questions of the adverse party are not answered, as a general rule it is untenable. . . . [But] cases may be supposed where, if a witness is manifestly favorable to the party taking the deposition and declines answering pertinent and material questions to facts apparently within his knowledge, it would be a good ground for excluding the deposition altogether. It would show that the witness had violated his duty and his oath in not telling the whole truth, and the deposition would in effect be taken 'ex parte.'

1846, NISBET, J., in *McCloskey* v. *Leadbetter*, 1 Ga. 551, 555: "This rule does not mean that a party shall be deprived of the benefits of his witness' testimony by failure of the other party to exercise the privilege of cross-examination, or by the dereliction of the commissioners, or by the contumacy of the witness. But it does mean that a party seeking the privilege of cross-examination shall not be forced to trial without it. It certainly does mean that interrogatories ought not to be read where cross-questions are filed and unanswered (provided they are such as by law ought to be answered), until the processes of the Court are exhausted to compel the witness to answer."

Courts treat this situation with varying degrees of strictness.[3] It should be

to return on the next Court day, but no notice was given of this to the Court; the witness not re-appearing at all, the Court refused to strike out his testimony); *Ga.* 1849, Williams *v.* Turner, 7 Ga. 348, 350 (deposition suppressed, for failure to answer one question; "it will not do to permit a witness to judge what questions he shall answer and what not"); 1850, Thomas *v.* Kinsey, 8 Ga. 421, 425 (answer held sufficient on the facts); 1858, Heard *v.* McKee, 26 Ga. 332, 342 (similar); 1895, Senior *v.* State, 97 Ga. 185, 22 S. E. 404 (the complainant in a rape case refused to point out which of two persons was the assaulter, and her testimony was excluded); *Ky.* 1899, Flannery *v.* Com., — Ky. —, 51 S. W. 572 (child's refusal to answer one question, not sufficient to justify exclusion); *La.* 1885, Rieger's Succession, 37 La. An. 104 (witness excused after direct examination, on the ground of illness, but repeatedly failing, when apparently able, to re-appear for cross-examination; excluded); 1888, Townsend's Succession, 40 La. An. 67, 73, 3 So. 488 (witness ordered to appear for further cross-examination, but failing to do so; admissible in trial Court's discretion); *Wis.* 1882, Trowbridge *v.* Sickler, 54 Wis. 306, 309, 11 N. W. 581 (oral interrogatories; evasive answers held not to justify suppression of the deposition, on the facts; the cross-examiner "can repeat the questions or put others until the witness is forced to answer the precise point required, or fairly refuse; of course, refusal or evasion might be so gross as to indicate corruption and authorize a suppression of the whole deposition").

But a refusal to answer on a *privileged subject* cannot justify suppressing the direct examination; for the latter is equally liable with cross-examination to be balked by the privilege, and it is a mere accident on which side the privileged topic occurs: 1800, Barber *v.* Gingell, 3 Esp. 60, 62 (a witness' direct examination is not to be forbidden, because his cross-examination will probably include questions which he may be privileged not to answer). *Contra:* 1896, McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501 (on the facts of the case, the witness claiming on cross-examination his privilege on material points, the testimony was struck out).

Distinguish the controversy whether the *question can be put* (or read, in a deposition) even though the answer claims privilege (*post*, § 2268).

[3] *Federal:* 1816, Nelson *v.* U. S., Pet. C. C. 235 (letters rogatory; deposition not suppressed, where the interrogatories were "substantially, though not formally" all answered); 1837, Gass *v.* Stinson, 3 Sumn. 98 (where the Chancery authorities are elaborately examined by Story, J.); 1898, Bird *v.* Halsey, 87 Fed. 671, 674 (refusal to answer a question suffices to exclude; but here admitted for the opponent's failure to compel answer or otherwise to make proper objection); *Ga.* 1846, McCloskey *v.* Leadbetter, 1 Ga. 551, 555 (deposition to impeach another witness, excluded because a single material question was left

left to the determination of the trial judge, regard being had chiefly to the motive of the witness and the materiality of the answer.

§ 1392. **Same: (3) Non-Responsive Answers; (4) General or "Sweeping" Interrogatories.** (3) When a deposition is taken on *written interrogatories* filed beforehand, and the witness in an answer to a *direct* interrogatory departs from the subject of the question, the cross-examiner may be virtually deprived of cross-examination, because by not anticipating this answer he will not have framed his cross-interrogatories to probe the witness on that subject. This objection is obviously applicable to written interrogatories only;[1] but to that extent it has a just foundation:

1876, HALLETT, C. J., in *Marr* v. *Wetzel*, 3 Colo. 2, 6: "In taking evidence upon interrogatories attached to the 'dedimus' or commission, the rule which requires that the witness shall answer the question put, without more, should be somewhat strictly applied. In such case the party against whom the deposition is to be used has no opportunity to cross-examine, except that which is afforded by filing cross-interrogatories to be attached to the commission. In drawing them he must often be governed entirely by the direct interrogatories filed by his adversary; and if these last give no light as to the subject upon which the witness is to be examined, he will be unable to cross-examine. Of this the deposition in the record affords an illustration. In the direct interrogatories there is nothing calling for the witness' knowledge as to the service of the process on the defendant in the State of Missouri, and yet such evidence was elicited. As to this the defendant had no opportunity to cross-examine."

Nevertheless, whether there has been a substantial failure of cross-examination will depend much on the materiality of the answer, the facts of the

unanswered; quoted *supra*); 1880, Schaefer *v.* R. Co., 66 Ga. 39, 43 (substantial answering of cross-interrogatories, sufficient); *Ill.* 1922, Ward Pump Co. *v.* Ind. Com., 302 Ill. 199, 134 N. E. 127 (deposition suppressed because of officer's failure to require answers to certain cross-interrogatories); *Ia.* 1917, State *v.* Powers, 181 Ia. 452, 164 N. W. 856 (taking testimony through an interpreter is not receiving hearsay); *La.* 1859, Nicholson *v.* Desobry, 14 La. An. 81, 83 (in the trial Court's discretion, the failure to answer a material interrogatory is ground for exclusion); *Mass.* 1838, Savage *v.* Blanchard, 20 Pick. 167 (quoted *supra*); 1863, Robinson *v.* B. & W. R. Co., 7 All. 393, 395 (deposition suppressed, for a single evasive answer); 1864, Stratford *v.* Ames, 8 All. 577 (failure to answer one question does not exclude all, "unless his answer is so imperfect or evasive as to induce the Court to believe that he wilfully kept back material facts within his knowledge"); *Minn.* 1867, McMahon *v.* Davidson, 12 Minn. 357, 367 (answers must appear "fully and fairly given, without the suppression of any fact material to the case"); *Pa.* 1821, Withers *v.* Gillespy, 7 S. & R. 10, 16 (incomplete answers; rejected on the facts); 1867, Crossgrove *v.* Himmelrich, 54 Pa. 203, 208 (refusal to answer an irrelevant question, held no ground for suppression); *R. I.* 1917, State *v.* Deslovers, 40 R. I. 89, 100 Atl. 64 (interpreter must translate the whole of the witness' answer; the Court may not rule upon a part only translated); *Tex.* 1922, Hartford Fire Ins. Co. *v.* Galveston H. & S. A. R. Co., — Tex. —, 239 S. W. 919 (out of 56 cross-interrogatories, 44 were left unanswered by misunderstanding; held on the facts that the deposition should be suppressed); *Ut.* 1894, Hadra *v.* Bank, 9 Utah 412, 414, 35 Pac. 508 (refusal to answer a question affecting the admissibility of the entire testimony; deposition excluded); *Wash.* 1811, Richardson *v.* Golden, 3 Wash. C. C. 109 (there was "no answer given to or notice taken of the general interrogatory"; excluded); *Wis.* 1882, Trowbridge *v.* Sickler, 54 Wis. 306 (cited *supra*, note 2).

§ **1392.** [1] 1876, Marr *v.* Wetzel, 3 Colo. 2, 6 (see quotation *supra*); 1872, Greenman *v.* O'Connor, 25 Mich. 30 (for a non-responsive answer on a material point, the testimony was held improperly admitted; "the right of cross-examination would be thereby defeated entirely, because no cross-interrogatories can be expected to enter upon subjects not opened by the direct ones"); 1874, Hamilton *v.* People, 29 Mich. 173, 185 (the rule is confined to "settled written interrogatories"; "no such difficulty can arise where the witness is examined openly and orally").

case as known to the cross-examiner, and the tenor of the cross-interrogatories; so that no fixed rule can be laid down.

Apart from the present ground, there is no inherent objection to a non-responsive answer; in particular, the direct examiner cannot object to it, nor can the cross-examiner object to it when it is evoked by his own interrogatory.[2]

(4) A direct interrogatory may be so *general* or "*sweeping*" as to enable the witness, while responsively answering, to range over a variety of topics whose tenor the cross-examiner cannot by possibility have anticipated. In this way, for the same reason just noted, he may be substantially deprived of his right. Such a general question, to be sure, is often useful and has been traditionally employed to close a deposition taken by written interrogatories.[3] Nevertheless, its capability of abuse is well understood; and the trial judge should have discretion to strike out the answer to it if a substantial injustice would result:[4]

1897, FISH, J., in *McBride* v. *Macon T. P. Co.*, 102 Ga. 422, 30 S. E. 999: "Strictly speaking, this was not an interrogatory at all, but a mere request or demand for general information in addition to that sought to be elicited by the preceding specific questions propounded to the witness. We cannot approve of this method of examination, as applied to a witness whose testimony is taken by interrogatories, notwithstanding it may be in accord with a practice commonly pursued by counsel in this State. Every interrogatory addressed to a witness should be sufficiently explicit to indicate to the opposite party the nature of the testimony expected. Obviously, a full and intelligent cross-examination of the witness is not possible, unless the questions propounded to him on his direct examination indicate with reasonable certainty the particular points as to which his testimony is desired. As strict matter of right, therefore, a party suing out a set of interrogatories cannot claim that the response of the witness to such a sweeping interrogation (if it may be called such) as that above quoted has been legitimately drawn forth, and is in consequence admissible in evidence. On the other hand, if the reply of the witness does not include matter not suggested by the preceding interrogatories put to him, the opposite party will not have been prejudiced by an abridgment of his right to a full opportunity to cross-

[2] Cases cited *ante*, § 785.

[3] Federal Equity Rules, No. 71 (the last written interrogatory shall be, in substance: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cas , or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer").

[4] The rulings have naturally varied: *Fed.* 1827, Rhoades *v.* Selin, 4 Wash. C. C. 722 (answer to a general interrogatory, admitted); *Ala.* 1848, Yarborough *v.* Hood, 13 Ala. 176, 180 (answer to a general interrogatory, held improperly excluded), 1877, Blunt *v.* Strong, 60 Ala. 572, 577 ("To such interrogatory no answer should be allowed of matter that is not germane to the subject of some special inquiry, and in a measure the complement of testimony previously given"); *Ga.* 1898, McBride *v.* Macon T. P. Co., 102 Ga. 422, 30 S. E. 999 ("State all the facts that will inure to the benefit of the plaintiff or the defendant in this case", held not a proper interrogatory in a deposition; quoted *supra*); 1906, Taylor *v.* Globe Ref. Co., 127 Ga. 138, 56 S. E. 292; *N. Y.* 1820, Percival *v.* Hickey, 18 Johns. 257, 264, 289 (Spencer, C. J.: "I perceive no abuse likely to follow from allowing the witnesses to state every material fact, under that interrogatory, not before drawn forth by the special interrogatories"); 1854, Commercial Bank *v.* Union Bank, 11 N. Y. 203, 210 (deposition not suppressed, for a general interrogatory with answers "pertinent to the matters in issue"; the opponent should have applied beforehand to remedy any surprise "either by a further examination of the same witnesses or otherwise"); *Tex.* 1903, Sparks *v.* Taylor, 99 Tex. 411, 90 S. W. 485 (further pertinent answers by an opponent in discovery, made by advice of his attorney, admitted).

examine the witness, and accordingly cannot justly complain in the event the Court declines to rule out the testimony thus elicited. Under such circumstances, the trial judge may very properly exercise his discretion in the premises, to the end that complete justice may be done as between the respective parties to the litigation."

So far as the mode of direct interrogation may *in any other way* deprive the opponent of the adequate exercise of his right of cross-examination, through rendering it impossible to anticipate the subject, the trial judge may properly exclude the direct examination, to the extent of its impropriety.[5]

§ 1393. **Same: (5) Through Lack of Interpretation for a Witness Alien, Deaf-and-Dumb, etc.** (*a*) Where the cross-examination is hampered by the *witness' organic defects of speech*, hearing, or the like, the admissibility of the testimony should be left entirely to the trial judge.[1] The same principle applies to an *accused* who is *deaf* or *dumb* or *blind*.[2]

(*b*) Where the witness testifies in a *foreign language*, or when the *opponent is an alien* not well knowing the language of the forum, the opponent is entitled to understand, so as to be able to cross-examine the witness. Hence, the *furnishing of an interpreter* becomes essential to the right of cross-examination; this corollary being as applicable in civil cases as in criminal cases, though usually emphasized in the latter instance only.[3] Injustice is doubtless being done from time to time, in communities thronged with aliens, through failure of the judges to insist on a supply of competent interpreters. The subject

[5] 1902, Wilkinson *v.* Wilkinson, 133 Ala. 381, 32 So. 124 (divorce; on interrogatories propounded by the chancellor 'ex mero motu' to the defendant, the plaintiff was held entitled to notice for purposes of cross-examination); 1848, Stagg *v.* Pomeroy, 3 La. An. 16 ("any further enquiries propounded by the plaintiff's counsel before the commissioner were 'ex parte', and to the disadvantage of the defendants, who had no opportunity of counteracting them by cross-examination"); 1897, Anderson *v.* Bank, 6 N. D. 497, 72 N. W. 916, *semble* (amendment of a declaration after deposition taken; the defendant not allowed to suppress the deposition because of no cross-examination on the amended pleading); 1904, Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643 (an oral answer, stricken out before signing, and therefore not subject to cross-examination, cannot be used); 1884, First National Bank *v.* Wirebach's Ex'r, 106 Pa. 44 (deposition admitted, though new matter came up on the trial, as to which the deponent had not been cross-examined).

For the question whether *more than one counsel on a side* may cross-examine, see *ante*, § 783.

For the question whether a witness who has been *merely subpœnaed* or merely asked one question may be cross-examined, or must be called as his own witness by the cross-examiner, see *post*, § 1892.

§ 1393. [1] 1882, Quinn *v.* Halbert, 55 Vt. 228 (receiving testimony where the witness was dumb and could merely shake his head in assent or dissent, and the opportunity of cross-examination was thus very limited).

[2] 1906, Felts *v.* Murphy, 201 U. S. 123, 26 Sup. 366 (an accused, in a State court, unable by deafness to hear the testimony, which was not repeated to him by his ear-trumpet; this was held not to give ground for complaint as a Federal question under the Fourteenth Amendment); 1905, Ralph *v.* State, 124 Ga. 81, 52 S. E. 299 (the accused being deaf, the Court refused to let the testimony be taken by a stenographer and then typewritten and read by the accused as the trial progressed, but allowed the counsel to write down the testimony and show it to the accused; held sufficient, in the trial Court's discretion); Minn. St. 1905, c. 47, Gen. St. 1913, § 7469 (a person deaf or dumb, charged with insanity, is entitled "as a matter of absolute right" to an interpreter); 1919, Cook *v.* Denike, — Tex. Civ. App. —, 216 S. W. 437.

[3] But in criminal cases it is a part of the constitutionally protected principle (*post*, § 1397); one State constitution explicitly mentions it: N. Mex. Const. 1911, Art. II, § 14 (in all criminal prosecutions the accused is entitled "to have the charge and testimony interpreted to him in a language that he understands").

is one upon which the profession are in general too callous, for no situation is more full of anguish than that of an innocent accused who cannot understand what is being testified against him.

Nevertheless, the varied situations which arise are too numerous to be reducible to any set of rules; and the inflexibility of fixed rules would here be inappropriate. The following enlightened opinion sets forth the modern English practice:

1916, Lord READING, C. J., in *R.* v. *Lee Kun*, 1 K. B. 337, 339: "The appellant, Lee Kun, a Chinese, was convicted of murder of one Clara Thomas. He appeals to this Court to quash the conviction on the ground that, being a foreigner and ignorant of the English language, he did not understand the evidence for the prosecution, which was not translated to him.

"When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence and is undefended, the evidence given at the trial must be translated. . . . If he does not understand the English language, he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law.

"No trial for felony can be had except in the presence of the accused. . . . The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. . . . If the accused is fit to plead, it may yet be that no communication can be made in the ordinary way; it may be that he is deaf and can only be approached by writing or signs; or dumb and can only make his views known by writing or signs; or a foreigner who cannot speak English and requires the assistance of an interpreter to understand the proceedings and make answer to them. In such cases the judge must see that proper means are taken to communicate to the accused the case made against him and to enable him to make his answer to it. In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter.

"The more difficult question arises when an accused foreigner, ignorant of the English language, is defended by counsel and no application is made to the Court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and as a result of inquiry which we have made since the argument, it has become clear that the practice of the Courts in this respect has varied considerably during the last fifty years.

"We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him, except when he or counsel on his behalf expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission. The judge should not permit it unless he is of opinion that because of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of

the interests of the accused which has distinguished the administration of justice in our criminal Courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned.

"If there should be a substantial departure from the evidence recorded in the depositions the judge would take care, even if counsel omitted to ask it, that the variation or addition should be translated to the accused, so that he might throw any further light upon the case. The importance of the translation of any new or additional evidence cannot be doubted; such evidence may have a special significance to the accused and may enable him to recollect facts till then forgotten or to give additional information to his counsel for cross-examination. Further, he may wish to make a statement dealing with the evidence against him instead of himself giving evidence, and he should have all information for that purpose; or, again, the variation from or addition to the evidence originally given at the police court may have a bearing upon the sentence. We think, therefore, that any substantial variation from the story originally told in the depositions or any additional evidence should be translated to the accused, even though he may be indifferent upon the matter or may not wish it."

The right to interpretation being conceded, this right is satisfied if somehow an understanding is attained, either by his own or his counsel's knowledge of the language or by the help of an interpreting third person; and the precise mode of attaining it is immaterial.[4]

Moreover, the opponent is also entitled to *cross-examine the interpreter* so as to test the correctness of the translation,[5] and to call *other witnesses* to verify the interpretation.[6]

[4] ENGLAND: 1916, R. *v.* Lee Kun, 1 K. B. 337 (Chinese accused ignorant of English; at the magistrate's hearing, an interpreter translated all the testimony; at the trial the testimony was the same, and no request for an interpreter was made by defendants' counsel; held, that the testimony should always be interpreted, whether counsel asks for it or not, but that in this case the error was not harmful; excellent opinion by Reading, L. C. J.); CANADA: *N. Sc.* 1912, The King *v.* Sylvester, 45 N. Sc. 525, 1 D. L. R. 186 (the accused were Italians from Calabria; the interpreter for one important witness gave only the purport of the witness' direct testimony delivered in English, and none of his cross-examination, but the counsel cross-examined in English: held no substantial error; Graham, E. J., dissenting, in a sound opinion; prior English and Canadian cases collected; the dissent deserves support, for a common official abuse in this country is to supply inadequate interpretation; if the judges could be sent to a foreign country and there haled into court for crime, and made to feel the plight of an alien accused, some improvement might take place); UNITED STATES: *Haw.* 1888, R. *v.* Ah Har, 7 Haw. 319 (the constitutional right "is not complied with unless the accused is in some way made to understand their evidence", in order to avail himself of the right of cross-examination; but "if the accused has counsel who understands the evidence, whether directly from the witnesses or through an interpreter, the constitutional requirement is complied with, though the accused himself may not understand it"; yet the Court may, on request in such a case, order interpretation to the accused of the testimony as given by each witness; a request not made till the close of the prosecution's case is not seasonable); 1899, Republic *v.* Yamane, 12 Haw. 189 (R. *v.* Ah Har followed, and held equally applicable to capital cases); *Pa.* 1903, Com. *v.* Lenousky, 206 Pa. 277, 55 Atl. 977 (testimony of an absent witness, given originally at a preliminary hearing, in the presence of the accused, a foreigner who understood the witness' language, held inadmissible, because he had no counsel to tell him that he had the right to cross-examine; unsound).

Compare § 811, *ante*, § 1810, *post* (interpreters).

[5] 1911, Terr. *v.* Kawano, 20 Haw. 469 (interpreter may be required to repeat in the foreign language the words used by him); 1859, Schnier *v.* People, 23 Ill. 1, 22 (interpreter may be required to give the primary meaning, etc., of words used).

[6] 1859, Schnier *v.* People, 23 Ill. 1, 22; 1878, Ulrich *v.* People, 39 Mich. 245, 251 (to correct a witness' account of a conversation heard in a foreign language, other interpreting witnesses may be called to render the conversation as reported).

§ 1394. **Same: (6) Sundry Insufficiencies of Cross-examination (Party Absent; Opponent Present, etc.).** (*a*) The *party's own absence from the court-room* during cross-examination can hardly be deemed to injure his opportunity of cross-examination; for his appearance by counsel gains him the benefit of the right. Nevertheless, some Courts have thought it improper (partly from the present point of view) to compel the party to retire from the room during the trial, or to refuse him permission to attend at the taking of a deposition.[1]

(*b*) Whether there has been a substantially adequate cross-examination where a deposition *written down in the accused's absence* has been *afterwards read over to him* by the magistrate in the witness' presence with liberty then to cross-examine, is a question that has been several times discussed in England. It would seem that, under the circumstances of a given case, such an opportunity might be adequate.[2]

(*c*) Whether the trial judge's *limitation of the time* for cross-examination (*ante*, § 783) has in effect deprived the opponent of its benefits may involve the present principle.

(*d*) When a deposition is admitted although the *deponent* is *present in court*, under the anomalous rule recognized in some States (*post*, § 1415), the opponent is not entitled to a duplicate cross-examination then and there, in addition to the one already afforded in the deposition. But undoubtedly the trial Court has power to permit such cross-examination if the circumstances show that it would assist in reaching the truth.

§ 1394. [1] Cases cited *post*, § 1399 (confrontation), § 1841 (sequestration of witnesses), and the following: 1876, Crowe *v.* Peters, 63 Mo. 429, 433 (on a suggestion that the defendant was by gestures and looks intimidating a witness, he was ordered from the room; held, erroneous, because it prevented his aid in the cross-examination; but a change of position, etc., might have been required; this is unsound, because it was the party's own fault); 1917, Anderson *v.* Snyder, 91 Conn. 404, 99 Atl. 1032 (fraud of an agent; the plaintiff being aged and infirm, her deposition was to be taken at her home; the defendant demanding to be present personally, this was refused by the plaintiff's attorneys because of the mental disturbing effect upon the plaintiff, but whether as witness or as an individual does not appear; deposition excluded, the defendant's claim to be present being sanctioned).

Conversely, *lack of counsel* is not necessarily a defect: 1919, People *v.* Caballero, 41 Cal. App. 146, 182 Pac. 321 (applying P. C. § 686, subd. 3).

For *intimidation by the cross-examiner*, see *ante*, §§ 781, 786.

[2] 1817, R. *v.* Smith, R. & R. 339 (admissible); 1817, R. *v.* Forbes, Holt 599, Chambre, J. (inadmissible); 1845, R. *v.* Hake, 1 Cox Cr. 226 (the witness' deposition was taken and authenticated on the 28th; on the 29th, the defendant and two co-defendants being present for the first time, and the witness also being present, the deposition was read over to all the defendants; it was not re-signed by the magistrates; Erle, J.: "The reading of it in the prisoner's presence is equivalent to a taking of it in his presence. . . . The object is to afford to the party charged an opportunity for cross-examination. Such an opportunity has been held to be afforded by a reading over of the deposition where there is one prisoner only; the object is not the less secured because there are many prisoners"); 1852, R. *v.* Day, 6 Cox Cr. 55, Platt, B. (the mere reading over to the accused a deposition already taken is not enough).

Whether the *loss of a document* whose *genuineness is disputed* should exclude the testimony of an expert who has studied it, by reason of the consequent impossibility of cross-examining him upon its details, is a question involving the principles of handwriting testimony (*ante*, §§ 697, 1185, *post*, § 2015).

SUB-TITLE I (*continued*): THE HEARSAY RULE SATISFIED

TOPIC II: BY CONFRONTATION

CHAPTER XLV.

1. General Principle of Confrontation

2. Circumstances of Necessity making the Witness' Personal Presence Unavailable

1. General Principle of Confrontation

§ 1395. **Purpose and Theory of Confrontation.** In the period when the Hearsay rule is being established, and 'ex parte' depositions are still used against an accused person (*ante*, § 1364), we find him frequently protesting that the witnesses should be "brought face to face", or that he should be "confronted" with the witnesses against him. The final establishment of the Hearsay rule, in the early 1700s, meant that this protest was sanctioned as a just one, — in other words, that Confrontation was required. What was, in principle, the meaning and purpose of this Confrontation? So

far as there is a rule of Confrontation, what is the process that satisfies this rule?

It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and subordinate one:

(1) The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers. That this is the true and essential significance of confrontation is demonstrated by the language of counsel and judges from the beginning of the Hearsay rule to the present day:[1]

1680, L. C. J. HALE, Pleas of the Crown, I, 306 (commenting on St. 5 & 6 Edw. VI, c. 12, § 12 (1552); "which said accusers [of treason] at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that that they have to say to prove him guilty"): "Yet in case of treason, where two witnesses [*i.e.* accusers] are required, such an examination [before a justice of peace] is not allowable, for the statute requires that they be produced upon the arraignment in the presence of the prisoner, to the end that he may cross-examine them."

1696, *Fenwick's Trial*, 13 How. St. Tr. 591, 638, 712 (before the House of Commons). Sergt. *Lovel* (for the prosecution): "We have Mr. Goodman's examination under the hand of Mr. Vernon; we pray it may be read." Sir B. *Shower* (for the accused): "Mr. Speaker, . . . I humbly oppose the reading of this examination, as not agreeable to the rules of practice and evidence, and that which is wholly new. . . . No deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination and might have cross-examined him or examined to his credit, if he thought fit. . . . Our law requires persons to appear and give their testimony 'viva voce'; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances which may lay open the falsity of a well-laid scheme, which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this examination should be admitted to be read. . . . We oppose it at present for that we were not present nor privy nor could have cross-examined him." Sir T. *Powis*, arguing: "How contrary this is to a fundamental rule in our law, that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence; and that is due to every man in justice."

1720, *Duke of Dorset* v. *Girdler*, Finch's Prec. Ch. 531: "The other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering of the truth."

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. III., c. XIX: "Under the head of Confrontation may be found whatever advances (scanty indeed they will be seen to be) have been made in Roman procedure towards the introduction of that universal and equal system of interrogation above delineated and proposed, — consequently whatever part has been covered by the Roman law of the ground covered by the operation called Cross-examination in English law. The operation has two professed objects: one is the establishing the identity of the defendant, viz. that the person thus produced to the deponent is the person of whom he has been speaking; the other is that an opportunity may be afforded to the defendant, in addition to whatever testimony may have been delivered to his dis-

§ 1395. [1] See also Blackstone, Commentaries, III, 373.

advantage, to obtain the extraction of such other part (if any) of the facts within the knowledge of the deponent as may operate in his favor. . . . [It is in Continental law] an imperfect modification of cross-examination, . . . a faint shadow of it."

1856, BARTLEY, C. J., in *Summons* v. *State*, 5 Oh. St. 341: "Evidence of the statements of a deceased witness on a former trial . . . would seem to be now confined to cases where opportunity for cross-examination had been afforded, and therefore to cases where the accused had been confronted by the deceased witness when the testimony was given on the former trial."

1865, WOODWARD, C. J., in *Howser* v. *Com.*, 51 Pa. 337: "Confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused. When the common law of England was transported to these colonies, it gave a person charged with a capital crime no compulsory process to obtain witnesses and entitled him to no examination by himself or his counsel of witnesses brought against him. . . . To remedy this state of the law, our constitutions all declared — what statutes had then provided in England — that the accused should have an impartial trial by jury, should have process for witnesses and be entitled to counsel to examine them, and to cross-examine those for the prosecution in the presence of (*confronting*) the accused."

1876, BOREMAN, J., in *U. S.* v. *Reynolds*, 1 Utah 322: "On the former trial she was under oath, and subject to cross-examination by the defendant, and then he was confronted by the witness. The main objects of producing the witness upon the stand had been attained."

1891, EARL, J., in *People* v. *Fish*, 125 N. Y. 150, 26 N. E. 319: "It is quite a valuable right to a prisoner to be confronted upon his trial with the witnesses against him, so that he may cross-examine them and the jury see them and thus judge of their credibility. . . . The evidence of the witness was taken in his presence where he had the opportunity to cross-examine him, where he did in fact cross-examine him, and thus he had all the protection that the Bill of Rights and the Constitution were intended to secure him."

Thus the main idea in the process of confrontation is that of the opponent's opportunity of cross-examination; the former is merely the dramatic feature, the preliminary measure, appurtenant to the latter.

The following historical incident is a telling illustration of the value of Confrontation as an expedient for subjecting witnesses to cross-examinations:

1789, Col. *George Rogers Clark*, Memoir on The Conquest of the Illinois (ed. Quaife, 1920), p. 42: "During the night I sent for several individuals, from whom I sought to procure information, but obtained very little that was not already known to us. We learned, however, that the conduct of several of the inhabitants indicated them to be inclined to the American cause; that a large number of Indians were in the neighborhood of Cahokia, sixty miles distant; that Mr. Cerré, a leading merchant and one of our most inveterate enemies, had left Kaskaskia with a large quantity of furs a few days before, and that he was then in St. Louis, the Spanish capital, but his wife and family were still in town, together with a considerable quantity of goods which would be useful to our men.

"In addition to Cerré, information was given me about numerous other individuals. I at once suspected that the object of the informers was to make their peace with me at the expense of their neighbors, and my situation demanded of me too much caution to permit giving them much satisfaction. I found Cerré to be one of the most eminent men of the country, with great influence over the people. I had some suspicion that his accusers were probably in debt to him, and hence desired to ruin him. . . . I immediately caused a guard to be stationed at his house and his stores to be sealed along with all the others. I did not doubt that when he should hear of this he would be extremely anxious for an interview. . . . Agreeably to my expectation, upon learning the situation of affairs he resolved to return, but hearing that there was a guard kept at his house alone, and that several persons had attempted to ruin him with their information to me, he was advised not to cross

the river without a safe-conduct. . . . I absolutely refused it, and intimated that I wished to hear no more on the subject; nor would I hear any person who had anything to say in vindication of him. I told them I understood Mr. Cerré to be a sensible man. If he were innocent of the allegation against him, he would not be afraid to surrender himself. I added that his backwardness seemed to prove his guilt, and I felt very little concern about him.

"I suppose rumor immediately carried this information to him, for in a few hours he crossed over the river and, without stopping to visit his family, presented himself before me. I told him that I supposed he was aware of the charges preferred against him, particularly that of inciting the Indians to murder, a crime that ought to be punished by all people who should be fortunate enough to get such culprits into their power; and that his recent backwardness about surrendering himself convinced me of his guilt. He replied that he was merely a merchant, that he never concerned himself about affairs of state further than the interest of his trade required. . . . He defied any man to prove that he had ever incited the Indians to war; many people, on the contrary, had often heard him express his disapproval of the cruelty of such proceedings. He said there were several people in town who were deeply indebted to him, and it might be the object of some of them to extricate themselves from their debts by ruining him. . . .

"Without making any further reply, I told him to withdraw into another room. The whole town was anxious to know his fate. I sent for his accusers, who were followed by a large number of townsmen, and had Mr. Cerré called in. I perceived plainly the confusion into which they were thrown by his appearance. I stated the case to the whole assembly, telling them that I never condemned a man unheard. I said that Cerré was now present, and I was ready to do justice to the world in general by punishing him if he were found guilty of inciting to murder, or by acquitting him if he proved innocent of the charge. I closed by desiring them to submit their information. Cerré undertook to speak to them, but was ordered to desist. His accusers began to whisper among themselves and to retire for private conversation. At length only one out of six or seven was left in the room, and I asked him what he had to say to the point in question. In short, I found that *none of them had anything to say!*

"I gave them a suitable reprimand; and after some general conversation informed Mr. Cerré that I was happy to find he had so honorably acquitted himself of so black a charge. I told him he was now at liberty to dispose of himself and property as he pleased. If he chose to become a citizen of the United States, it would give us pleasure. If he did not, he was at full liberty to do as he wished. He made many acknowledgments and concluded by saying that many doubts he had entertained were now cleared up to his satisfaction, and that he wished to take the oath of allegiance immediately. In short, he became a most valuable man to us. Simple as this transaction may appear, it had great weight with the people, and was of infinite service to us."

(2) There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness.[2] This

[2] In the earlier and more emotional periods, this confrontation was supposed (more often than it now is) to be able to unstring the nerves of a false witness; the following is merely one example: 1678, Atkins' Examination, 6 How. St. Tr. 1473, 1481 (one Captain Atkins was the chief witness against the accused, also named Atkins; the accused tells that at his examination, Lord Shaftesbury said, " 'Pray look one another in the face', so we gazed very earnestly, and my lord Shaftesbury went on, speaking to Captain Atkins, 'Come, Captain Atkins, confess truly and ingenuously, have you belyed Mr. Atkins or no?' . . . After this sort my lord Shaftesbury pressed Captain Atkins very home; and while he was doing so, and we looking steadfastly upon each other, Captain Atkins' countenance changed very white; which I taking notice of, and observing to the lords, my lord marquis of Winchester cried, 'Where, where? I don't see it' ").

The great dramatist alludes to this earlier

subordinate advantage has been expounded in the following passages:[3]

1836, PUTNAM, J., in *Com.* v. *Richards*, 18 Pick. 437: "[Even] if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony."

1857, RYLAND, J., in *State* v. *McO'Blenis*, 24 Mo. 421: "There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition."

1882, CAMPBELL, J., in *People* v. *Sligh*, 48 Mich. 56: "The production of witnesses in open court is one of the best means of trying their credit; and every one knows how difficult it is to judge from written testimony of the demeanor and appearance which strike those who examined them. Still more difficult must it be to have the testimony reproduced."

1860, Chief Justice APPLETON, Evidence, 220: "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control — fear, love, hate, envy, or revenge — are all open to observation, noted and weighed by the jury."

This secondary advantage, however, does not arise from the confrontation of the *opponent* and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the *tribunal* that secures this secondary advantage, — which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination.

§ 1396. **Witness' Presence before Tribunal may be Dispensed with, if not Obtainable.** The question, then, whether there is a right to be confronted with opposing witnesses is essentially a question whether there is a right to cross-examine. If there has been a Cross-examination, there has been a Confrontation. The satisfaction of the right of Cross-examination (under the rules examined *ante*, §§ 1371–1393) disposes of any objection based on the so-called right of Confrontation.

Nevertheless, the secondary advantage, incidentally obtained for the tribunal by the witness' presence before it — the demeanor-evidence — is an

conception, still current in his day: *King Richard:* "Then call them to our presence; face to face, And frowning brow to brow, ourselves will hear The accuser and the accuséd freely speak" (*Richard II*, I, 1).

The French practice still shows this notion of confrontation, in liveliest manner; illustrations will be found in the French trials quoted in the Appendix to Sir J. F. Stephen's History of the Criminal Law, and in those reported in Albert Batailles' "Causes criminelles et mondaines", 1895 and earlier years.

It would be interesting to trace this earlier notion carefully in Howell's State Trials, until its merger in the 1700s with the principle of cross-examination.

[3] So also Blackstone, III, 373.

advantage to be insisted upon wherever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which special value is attached; and just as the original of a document (*ante*, § 1192) or a preferred witness (*ante*, § 1308), may be dispensed with in case of unavailability, so *demeanor-evidence may be dispensed with, in necessity.* Accordingly, supposing that the indispensable requirement of cross-examination has been satisfied, the only remaining inquiry is whether the demeanor-evidence, to be obtained by the witness' production before the tribunal, is available.

This inquiry — the conditions of *unavailability of demeanor-evidence, by reason of death, illness, and the like* — remains now to be made. But first the effect must be considered of the constitutional sanction, in the United States, of the principle of Confrontation; for this has sometimes erroneously affected the judicial attitude towards demeanor-evidence.

§ 1397. **Effect of Constitutional Sanction of Confrontation.** In the United States, almost all Constitutions have given a permanent sanction to the principle of confrontation, by provisions requiring that in *criminal cases the accused shall be "confronted with the witnesses against him"* or "brought face to face" with them.[1] The question thus arises whether these constitutional

§ 1397. [1] Statutes are also here included: UNITED STATES: *Federal:* 1787, Amendment VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *Alabama:* 1901, Art. I, § 6 ("In all criminal prosecutions the accused has a right . . . to be confronted by the witnesses against him"); *Arizona:* Const. 1910, Art. II, § 24 ("In criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face"); P. C. 1913, § 753 (similar); *Arkansas:* 1874, Art. II, § 10 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *California:* 1879, Art. I, § 13 ("The Legislature shall have the power to provide for the taking, in the presence of the accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend the trial"); P. C. § 686 ("In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him, in the presence of the Court"; except as quoted *ante*, § 1387); *Colorado:* 1876, Art. II, § 16 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); § 17 ("Such deposition [of a witness in criminal cases] shall not be used, if, in the opinion of the Court, the personal attendance of the witness might be procured by the prosecution, or is procured by the accused"); *Connecticut:* 1818, Art. I, § 9 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted by the witnesses against him"); *Delaware:* 1897, Art. I, § 7 ("In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face"); Art. VI, § 16 ("In civil causes, when pending, the Superior Court shall have the power, before judgment, . . . of directing the examination of witnesses that are aged, very infirm, or going out of the State, upon interrogatories 'de bene esse', to be read in evidence in case of the death or departure of the witnesses before the trial, or inability by reason of age, sickness, bodily infirmity, or imprisonment, then to attend; and also the power of obtaining evidence from places not within the State"); *Florida:* 1887, Decl. of R., § 11 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); *Georgia:* 1877, Art. I, § 1, par. 5 and Rev. C. 1900, § 6361 ("Every person charged with an offence against the laws of this State . . . shall be confronted with the witnesses testifying against him"); so also P. C. 1910, § 8; *Hawaii:* Rev. L. 1915, § 3687 (accused "shall have a right to meet the witnesses, who are produced against him, face to face", and "to cross-examine those produced against him"); *Illinois:* 1870, Art. II, § 9 ("In all criminal prosecutions the accused shall have the right

provisions affect the common-law requirement of confrontation, otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body.

. . . to meet the witnesses face to face"); *Indiana:* 1851, Art. I, § 13 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face"); *Iowa:* 1857, Art. I, § 10 ("In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right . . . to be confronted with the witnesses against him"); *Kansas:* 1859, Bill of R., § 10 ("In all prosecutions, the accused shall be allowed . . . to meet the witness face to face"); *Kentucky:* 1891, § 11 ("In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face"); *Louisiana:* 1921, Art. I, § 9 ("In all criminal prosecutions the accused in every instance shall have the right . . . to be confronted with the witnesses against him"); *Maine:* 1819, Art. I, § 6 ("In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him"); *Maryland:* 1867, Decl. of R., Art. XXI ("In all criminal prosecutions every man hath a right . . . to be confronted with the witnesses against him, . . . to examine the witnesses for and against him on oath"); *Massachusetts:* 1780, Decl. of R., Art. 12 ("Every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face"); Gen. L. 1920, c. 263, § 5; *Michigan:* 1908, II, § 19 ("In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him"); Comp. L. 1915, § 15623 (to "meet the witnesses who are produced against him face to face"); *Minnesota:* 1857, Art. I, § 6 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *Mississippi:* 1890, Art. III, § 26 ("In all criminal prosecutions the accused shall have a right . . . to be confronted by the witnesses against him"); *Missouri:* 1875, Art. II, § 22 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); *Montana:* 1889, Art. III, § 16 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); § 17 ("[In criminal proceedings, if a witness] cannot give security, his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the State"); Rev. C. 1921, § 1161, (like Const. Art. III, § 16); *Nebraska:* 1875, Art. I, § 11 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); *Nevada:* Rev. L. 1912, § 6855 ("In a criminal action, the defendant is entitled . . . to be confronted with the witnesses against him in the presence of the Court"; but provision is made for use of testimony taken on preliminary hearing); *New Hampshire:* 1793, Part I, Art. 15 ("Every subject shall have a right . . . to meet the witnesses against him face to face); *New Jersey:* 1844, Art. I, § 8 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him"); *New Mexico:* 1911, Art. II, § 14 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him"); *New York:* Cons. L. 1909, Civil Rights § 12; *North Carolina:* 1868, Art. I, § 11 ("In all criminal prosecutions, every man has the right . . . to confront the accusers and witnesses with other testimony"); *North Dakota:* 1889, I, 13 (no provision on this subject); Comp. L. 1913, § 10393 ("In all criminal prosecutions the party accused shall have the right . . . to meet the witnesses against him face to face"); *Ohio:* 1851, Art. I, § 10, as amended 1912 ("In any trial in any court the party accused shall be allowed . . . to meet the witness face to face; . . . but provision may be made by law for the taking of the deposition by the accused or by the State, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and the opportunity to be present and with counsel at the taking of such deposition and to examine the witness face to face as fully and in the same manner as if in court"); *Oklahoma:* 1907, Art. II, § 20, Comp. St. 1921, § 2349 ("In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him in the presence of the Court"); *Oregon:* 1859, Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face"); *Pennsylvania:* 1874, Art. I, § 9 ("In all criminal prosecutions, the accused hath a right . . . to meet the witnesses face to face"); *Philippine Islands:* U. S. St. 1916, Aug. 29, c. 416, § 3, 39 Stats. 546, Code 1919, § 4112 (Bill of Rights); P. I. P. C. 1911, Gen. Order 58 of 1900, § 15 ("to be confronted at the trial by and to cross-examine the witnesses against him"; with a proviso as to using former testimony for the prosecution, like Cal. P. C. § 686, quoted *ante*, § 1387); *Porto Rico:* U. S. St. 1917, Mar. 2, § 2, 39 Stats. 951, Code 1919, §4043 (Bill of Rights); P. R. Rev. St. & C. 1911, § 6022 (quoted *post*, § 1411); 1904, People *v.* Bat-

The only opening for argument lies in the circumstance that these brief provisions are unconditional and absolute in form, *i.e.* they do not say that the accused shall be confronted "except when the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable", but imperatively prescribe that he "shall be confronted." Upon this feature the argument has many times been founded that, although the accused has had the fullest benefit of cross-examining a witness now deceased or otherwise unavailable, nevertheless, since the witness' presence before the tribunal is constitutionally indispensable, his decease or the like is no excuse for now dispensing with his presence.

That this argument is unfounded cannot be doubted; and the answer to it may be put in several forms:

(1) There never was at common law any recognized right to an indispensable thing called Confrontation *as distinguished from Cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. This much is clear enough from the history of the Hearsay rule (*ante*, § 1364), and from the continuous understanding and exposition of the idea of confrontation (*ante*, § 1395). It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.[2]

tistini, 5 P. R. 120 (U. S. Constitution Am. VI, assumed to be applicable); *Rhode Island:* 1842, Art. I, § 10 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *South Carolina:* 1882, Art. I, § 13 ("Every person shall have a right . . . to meet the witnesses against him face to face"); 1895, Art. I, § 18 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); C. Cr. P. 1922, § 951; *South Dakota:* 1889, Art. VI, § 7 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face"); Rev. C. 1919, § 4410 (an accused is entitled "to meet the witnesses against him face to face"); *Tennessee:* 1870, Art. I, § 9 ("In all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face"); so also Shannon's Code 1916, § 7355; *Texas:* 1876, Art. I, § 10, as amended 1910 ("In all criminal prosecutions, the accused . . . shall be confronted with the witnesses against him, . . . except that where the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition"); Rev. C. Cr. P. 1911, § 4 (same, down to the exception); § 24 (defendant shall be confronted, etc., "except in certain cases provided for in this code where depositions have been taken"); *Utah:* 1895, Art. I, § 12 ("In criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him"); Comp. L. 1917, § 8553 (like Cal. P. C. § 686 without the 2d exception); *Vermont:* Ch. I, Art. 10 ("In all prosecutions for criminal offences, a person hath a right . . . to be confronted with the witnesses"); so also Stats. 1894, § 1861; *Virginia:* 1902, Art. I, § 8 ("In all criminal prosecutions, a man hath a right . . . to be confronted with the accusers and witnesses"); *Washington:* 1889, Art. I, § 22 ("In criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face"); *West Virginia:* 1872, Art. III, § 14 ("In all such trials [of crimes and misdemeanors], the accused shall . . . be confronted with the witnesses against him"); *Wisconsin:* 1848, Art. I, § 7 ("In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face"); *Wyoming:* 1889, Art. I, § 10 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him").

[2] This first answer plainly disposes of all objections to the use of cross-examined depositions and former testimony. But the use of dying declarations and other exceptional statements can only be met by the further answers set forth in (2) and (3).

(2) Moreover, this right of cross-examination thus secured was *not a right devoid of exceptions*. The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination (*ante*, § 1362). Now the Hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not care to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended, — just as the brief constitutional sanction for trial by jury, though absolute in form, did not attempt to enumerate the excepted cases to which that form of trial was appropriate nor to describe the precise procedure involved in it, — just as the brief prohibition against "abridging the freedom of speech" was not intended to ignore the exception for defamatory statements, — just as the brief guarantee of the right to have counsel was not intended to prohibit a prosecution where no counsel could be found by the accused, — just as the prohibition against involuntary servitude does not abolish the father's common-law right to the services of his child. The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.

(3) The net result, then, under the constitutional rule, is that, *so far as testimony is required under the Hearsay rule to be taken infra-judicially*, it shall be taken in a certain way, namely, subject to cross-examination,— not secretly or 'ex parte' away from the accused. The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially, — this depends on the law of Evidence for the time being, — but only what mode of procedure shall be followed — *i.e.* a cross-examining procedure — in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.[3]

These answers are represented in the following passages:

1852, LUMPKIN, J., in *Campbell* v. *State*, 11 Ga. 374: "The admission of dying declarations in evidence was never supposed in England to violate the well-established principles of the common law that the witnesses against the accused should be examined in his presence. The two rules have co-existed there certainly since the trial of Ely in 1720, and are considered of equal authority. . . . The right of a party accused of a crime to meet the witnesses against him face to face is no new principle. It is coeval with the common law. Its recognition in the Constitution was intended for the twofold purposes of giving it prominence and permanence."

1852, YERGER, J., in *Lambeth* v. *State*, 23 Miss. 322, 357: "The admission of these [dying] declarations was established as a rule of evidence by the Courts of the common law, almost coeval with the foundations of that law itself. The general principle of the common law

[3] The above text was approved and adopted in the opinion of McCoy, J., for the Court, in State v. Heffernan, 24 S. D. 1, 123 N. W. 87 (1909).

with few exceptions, has always been that 'hearsay evidence' could not be admitted. But simultaneous with the adoption of this rule, an exception was made to it in the case of the 'dying declarations' of the deceased on the trial of a party charged with his murder. . . . When the bill of rights was adopted by the framers of our Constitution, they were aware of this rule of evidence of the common law. They found it adopted into and forming a part of the jurisprudence of the country. The object they had in view, in adopting the clause referred to, was not to introduce a new or abolish an old rule of evidence. Their intention was not to declare or specify the nature, character, or degree of evidence which the Courts of the country should admit. Their aim was simply to re-assert a cherished principle of the common law which had sometimes been violated in the mother country in political prosecutions; leaving to the Courts to decide, according to the rules of law, upon the nature and kind of evidence which a witness, when confronted with the accused, might be permitted to give."

1856, BARTLEY, C. J., in *Summons* v. *State*, 5 Oh. St. 341: "This right . . . has application to the personal presence of the witness on the trial and not to the subject matter or competency of the testimony to be given. . . . If the right secured by the bill of rights applied to the subject matter of the evidence, instead of the witness it would exclude in criminal cases all narration of statements or declarations by other persons heretofore received as competent evidence."

1857, LEONARD, J., in *State* v. *McO'Blenis*, 24 Mo. 416, 435: "The purpose of the people was not, we think to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law. . . . It was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the rule. . . . These exceptions to the general rule were never considered violations of the rule itself; they grew out of the necessity of the case, and are founded in practical wisdom." RYLAND, J.: "The provision . . . does not make a new rule of evidence; it does not declare what may be or may not be proper and lawful evidence on the trial of a criminal prosecution; it relates to the position of the witness in lawfully detailing such facts as may be lawfully submitted to the jury in a criminal prosecution. . . . He must be in court. So must the accused. He shall not detail his knowledge of the facts in a dark or secret chamber, in the absence of the accused, to be afterwards read against the accused before the jury."[4]

1909, McCOY, J., in *State* v. *Hefferman*, 24 S. D. 1, 123 N. W. 87: "It is generally agreed that the process of confrontation has two purposes — the main and essential one, and a secondary one. The main and essential purpose of confrontation is to secure the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon a witness or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is demonstrated by counsel and judges from the beginning of the hearsay rule to the present day. There is, however, a secondary advantage to be obtained from the personal appearance of the witness. The judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. This secondary advantage, however, does not arise from the confrontation of the opponent and the witness. It is not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures this secondary advantage, which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result

[4] 1900, State v. Moore, 156 Mo. 204, 56 S.W. 883 ("The discussion in that case [State v. McO'Blenis] . . . constitutes a chapter in our judicial history which will forever command the admiration of the bench and bar of our State").

accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination. The witness' presence before the tribunal may be dispensed with if not obtainable. The question, then, whether there is a right to be confronted with opposing witnesses, is essentially a question whether there is a right of cross-examination. If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation. Nevertheless, the secondary advantage incidentally obtained for the tribunal by the witness' presence before it — the demeanor-evidence — is an advantage to be insisted upon whenever it can be had. No one has doubted that it is highly desirable if only it is available. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the motion of confrontation. It stands on no better footing than other evidence to which special value is attached, and just as the original of a document, or a preferred witness may be dispensed with in case of unavailability, so demeanor-evidence may be dispensed with in a similar necessity. Accordingly, supposing that the indispensable requirement of cross-examination has been satisfied, the only remaining inquiry is whether the demeanor-evidence, to be obtained by the witness' production before the tribunal, is available.

"This inquiry, the conditions of unavailability of demeanor-evidence by reason of death, illness, and the like, remains now to be made. But first the effect must be considered of the constitutional sanction in the United States of the principle of confrontation; for this has often erroneously affected the judicial attitude towards demeanor-evidence. In the United States most of the Constitutions have given a permanent sanction to the principle of confrontation by provisions requiring that in criminal cases the accused shall 'be confronted with the witnesses against him' or 'brought face to face' with them. The question thus arises whether these constitutional provisions affect the common-law requirement of confrontation otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body. The only opening for argument lies in the circumstance that these brief provisions are unconditional and absolute in form; *i.e.*, they do not say that the accused shall be 'confronted' except where the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable, but imperatively prescribes that he 'shall be confronted.' Upon this feature the argument has many times been founded that, although the accused has had the fullest benefit of cross-examining a witness now deceased or otherwise unavailable, nevertheless, the witness' presence before the tribunal being constitutionally indispensable, his decease or the like is no excuse for dispensing with his presence.

"That this argument is unfounded is doubtless; and the answer to it may be put in several forms: (1) There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examine as indispensable, and that right was involved in and secured by confrontation. It was the same right under different names. This much is clear enough from the history of the hearsay rule, and from the continuous understanding and exposition of the idea of confrontation. It follows that, if the accused has had the right of cross-examination, he has had the very privilege secured to him by the Constitution. (2) Moreover, this right of cross-examination thus secured was not a right devoid of exceptions. The right to subject opposing testimony to cross-examination is the right to have the hearsay rule enforced, for the hearsay rule is the rule requiring cross-examination. Now, the hearsay rule is not a rule without exceptions. There never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest Constitutions, and others might be expected to develop in the future. The rule had always involved the idea of exceptions, and the Constitution makers indorsed the general principle merely as such. They did not care to enumerate exceptions. They merely named and described the principle sufficiently to indicate what was intended. The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may be legitimately found, developed, or created therein. (3) The net result then, under the

constitutional rule, is that, so far as testimony is required under the hearsay rule to be taken infrajudicially (that is, within the presence of the Court), it shall be taken in a certain way, namely, subject to cross-examination, not secretly or 'ex parte' away from the accused. . . .

"The former testimony of a witness who is absent from the State — that is, beyond the jurisdiction of the Court — is one of the well-recognized necessities within the exceptions of the hearsay rule. A party desiring to offer the testimony of a witness who is out of the jurisdiction and beyond the reach of a subpœna or other compulsory process of the trial Court is helpless. This branch of the rule stands upon the same reasoning and basis as the former testimony of a deceased witness."

1915, PELHAM, P. J., in *Todd* v. *State*, 13 Ala. App. 301, 69 So. 325: "There was not at common law any recognized right to an indispensable thing called confrontation as distinguished from the right of cross-examination, and this in effect has been recognized by the Supreme Court as to the provision of our organic law. If this is the proper interpretation of the clause, and we think it is, then a public record declared by law to be evidence that imports verity, furnishes no reason for the application of the rule, as cross-examination can have no application to this class of evidence. The constitutional rule of confrontation is but a sanction or guaranty of the right recognized under the common law, and is subject to the same exceptions as then existed, and those that may be legitimately found to exist, developed or created in the future in consonance with the progress of human affairs through necessity, expediency, or public policy. Other exceptions that may be made are but the necessary application of old rules to the new order of things and new conditions."

It is important to appreciate this, the true interpretation of the constitutional provisions, because the erroneous answer has occasionally been advanced that the "witness" who is to be "brought face to face" is merely the person now reporting another's former testimony or dying declaration, and that thus the constitutional provision is satisfied by the production of the second person.[5] The fallacy here is that the statements of the former witness or dying declarant are equally testimony, since they are offered as assertions offered to prove the truth of the fact asserted (*ante*, § 1361), and the question must therefore still be faced whether these testimonial statements are covered by the constitutional provision.[6] That they are not so covered is a conclusion which can only be reached by the other and safer answers already noticed.

It is well to have the sound theory fully understood and accepted, because, if the other should temporarily prevail, its overthrow and the exposure of its fallacies might be thought to involve the overthrow of the exceptions to the Hearsay rule. The revision and extension of those exceptions is gradually progressing, and it is well to appreciate fully that there is in this progress nothing inconsistent with constitutional sanctions. So bold are nowadays

[5] 1837, Smith, J., in Woodside *v.* State, 2 How. Miss. 665 ("[In dying declarations] the murdered individual is not a witness. . . . His declarations are regarded as facts or circumstances connected with the murder. . . . It is the individual who swears to the statements of the deceased that is the witness, not the deceased").

[6] 1858, Napton, J., in State *v.* Houser, 26 Mo. 437 ("To say that the witness who must meet the accused 'face to face' is he who repeats what the dying man has said, is a mere evasion. . . . [He is not] the witness whose testimony is to affect the life or liberty or property of the accused. It is the dying man who is speaking through him, whose evidence is to have weight and efficacy sufficient, it may be, to take away the prisoner's life. The living witness is but a conduit-pipe, — a mere organ, through whom this evidence is conveyed to the Court and jury").

the attempts to wrest the Constitution in aid of crime, and so complaisant are the Courts in listening to fantastic and unfounded objections to evidence, that the permissibility of such changes should not be left in the slightest doubt.

§ 1398. **Same; State of the Law in the Various Juridictions.** (1) In dealing with *depositions* and *former testimony* of deceased or absent witnesses, our Courts have almost unanimously received them, when offered against the accused in criminal prosecutions, as not being obnoxious to the constitutional provision, if the right of cross-examination had been satisfied. The leading opinions were rendered chiefly between 1840 and 1860. Up to 1886, apparently the only contrary precedent not overruled was an early Virginia case,[1] afterwards often cited; this professed to decide the question merely on English precedent, and not on constitutional grounds, and proceeded on the authority of an earlier English treatise,[2] which in turn went upon the authority of Fenwick's Trial (*ante*, § 1364), a parliamentary decision actually to the opposite effect, and misunderstood by the writer of the treatise. This early Virginia ruling, of so little weight in itself, served however to keep a doubt alive; and in the last generation a few ill-considered rulings in other jurisdictions have followed it.[3] Apart from these rulings, it is well and properly settled that such evidence — assuming always that there has been a due cross-examination — is admissible for the State in a criminal prosecution, without infringing the Constitution.[4]

§ 1398. [1] 1827, Finn *v.* Com., 5 Rand. 708.

[2] Peake, Evidence, 60 (1801).

[3] *Ala.* 1889, Anderson *v.* State, 89 Ala. 12, 7 So. 429 (here the statute expressly required consent of the defendant; but in this case the deposition had been taken by the defendant, and was not put in by him); *Ark.* 1895, Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102, *semble* (depositions; but see the earlier cases in the next note); *Ill.* 1887, Tucker *v.* People, 122 Ill. 583, 593, 13 N. E. 809 (said *obiter* that the use of depositions in a criminal case "would be a direct denial of the right to meet the witnesses face to face"; no authority cited; see the contrary later case in the next note); *Ia.* 1871, State *v.* Collins, 32 Ia. 36, 40 (see the contrary later case in the next note); 1905, State *v.* Mosher, 128 Ia. 82, 103 N. W. 105, *semble* (rule not applicable in disbarment proceedings; but "were this a criminal case, the point might be well taken"); *Kan.* 1897, State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144, *semble*; *Ky.* 1886, Kaelin *v.* Com., 84 Ky. 354, 368, 1 S. W. 594 (said 'obiter'; no precedent cited; see *contra* the case cited in the next note); *Mont.* 1893, State *v.* Lee, 13 Mont. 248, 33 Pac. 690 (but see the later case in the next note); 1899, Re Wellcome, 23 Mont. 260, 58 Pac. 711, *semble*; *Okl.* 1897, Watkins *v.* U. S., 5 Okl. 729, 50 Pac. 88; *Tex.* 1896, Cline *v.* State, 36 Tex. Cr. App. 320, 36 S. W. 1099 (apparently attempting, in a singularly unenlightened opinion, to overrule the long line of Texas precedents cited in the next note); *Va.* 1827, Finn *v.* Com., 5 Rand. 708; 1853, Com. *v.* Brogy, 10 Gratt. 722, 732 (Finn's Case approved: but nothing said of the constitutional question): 1909, Parks *v.* Com., 109 Va. 807, 63 S. E. 462 (Finn's Case repudiated, so far as concerns the general principle: testimony of a deceased former witness, admitted: Finn's Case restricted to the case of an absent witness; the above text quoted).

[4] Besides the following cases, many others cited in the sections *post*, after § 1402, use such evidence in criminal cases without expressly passing upon the constitutional question; the following cases represent the view stated above in the text, except as otherwise noted:
Federal: 1851, S. *v.* Macomb, 5 McLean 286; 1895, Mattox *v.* U. S., 156 U. S. 237, 240, 15 Sup. 337; 1897, Brown, J., Robertson *v.* Baldwin, 165 U. S. 275, 17 Sup. 326; 1904, West *v.* Louisiana, 194 U. S. 258, 24 Sup. 650 (cross-examined testimony before a committing magistrate, the witness now being permanently a non-resident, offered against a defendant; held, that the only Federal question can be whether there was due process of law under the Fourteenth Amendment, and this is not thereby violated; the Sixth Federal Amendment, quoted *ante*, § 1397, does not control State legislation); 1906, U. S. *v.* Greene, 146 Fed. 796, D. C.; 1906, U. S. *v.* Zucker, 163

But nevertheless the early doubt as to the constitutional propriety of allowing the prosecution to use depositions against the accused was widespread at the

U. S. 710, 16 Sup. 641 (the Court merely decided that a suit by the Government for duties payable, the plaintiff not having chosen to prosecute criminally for the evasion of the tax, was not a "criminal prosecution" under U. S. Const. Am. 6, and hence the question whether a deposition was properly taken in France was not affected by that clause). In *Federal Court-martial* practice, tradition excludes depositions in *capital* cases where offered by the prosecution; the statute still maintains this irrational distinction; U. S. St. June 4, 1920, ch. V, subchapter II, Articles of War, Art. 25.

Alabama: 1875, Horton *v.* State, 18 Ala. 488, 495;

Arkansas: 1860, Pope *v.* State, 22 Ark. 372; 1881, Green *v.* State, 38 Ark. 304, 321; 1894, Vaughan *v.* State, 58 Ark. 353, 370, 24 S. W. 885; 1895, McNamara *v.* State, 60 Ark. 400, 30 S. W. 762;

California: 1872, People *v.* Murphy, 45 Cal. 137; 1884, People *v.* Oiler, 66 Cal. 101, 4 Pac. 1066; 1893, People *v.* Douglass, 100 Cal. 1, 5, 34 Pac. 490, *semble;* 1895, People *v.* Chin Hane, 108 Cal. 597, 41 id. 697; 1897, People *v.* Sierp, 116 Cal. 249, 251, 48 Pac. 88 (because the Constitution has no confrontation-clause); 1897, People *v.* Cady, 117 Cal. 10, 48 Pac. 908; 1907, People *v.* Clark, 151 Cal. 200, 90 Pac. 549 (affirming People *v.* Sierp; "the matter should be considered as finally settled"). In this State there was originally a limitation, resting upon P. C. § 686 (quoted *ante*, § 1387), and excluding *testimony at a former trial*, while admitting testimony given before a committing magistrate, because the statute in terms authorized the latter only: 1881, People *v.* Chung Ah Chue, 57 Cal. 567; 1881, People *v.* Qurise, 59 Cal. 343; 1893, People *v.* Gardner, 98 Cal. 127, 131, 32 Pac. 880; 1893, People *v.* Gordon, 99 Cal. 227, 233, 33 Pac. 901; 1898, People *v.* Brennan, 121 Cal. 495, 53 Pac. 1098 (charges of rape, extortion, etc.; testimony at the preliminary examination excluded; reason obscure); 1901, People *v.* Bird, 132 Cal. 261, 64 Pac. 259 (testimony at a former trial, inadmissible for the prosecution, by reason of the omission to enumerate such a case in P. C. § 686; but the accused may use such testimony); 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (testimony before the magistrate, admitted for the State; no cases cited). But in 1911, by constitutional amendment (quoted *ante*, § 1387, n. 2), express provision was made for testimony at a former trial of the same cause, so that the foregoing rulings are no longer effective. Compare here also the peculiar local rulings under the statute for using a *stenographic report* of the testimony (*post*, § 1669).

Colorado: 1895, Ryan *v.* People, 21 Colo. 119, 40 Pac. 775 (under Const. Art. 2, sects. 16, 17) 1914, Henwood *v.* People, 57 Colo. 544, 143 Pac. 373 (following Young *v.* People, 54 Colo 293, 130 Pac. 1011);

Connecticut: 1921, State *v.* Gaetano, 96 Conn 306, 114 Atl. 82 (former testimony before the magistrate of a witness now escaped and disappeared);

Delaware: 1855, State *v.* Oliver, 2 Houst. 589;

Florida: 1920, Blackwell *v.* State, 79 Fla. 709, 86 So. 224 (former testimony of a witness now ill, admitted; but in this State a statute (engineered by what special interest or prejudice, does not appear) immediately proceeded to forbid the use in criminal cases: St. 1921, c. 8572, No. 177 (testimony . . . shall not be admitted against an accused person in a subsequent trial, but the witness shall be produced);

Georgia: 1856, Williams *v.* State, 19 Ga. 403; 1918, Smith *v.* State, 147 Ga. 689, 95 S. E. 281 (witness removed to another State);

Hawaii: 1916, Terr. *v.* Curran, 23 Haw. 421;

Idaho: 1890, Terr. *v.* Evans, 2 Ida. 627, 632; 1890, Terr. *v.* Evans, 2 Ida. Hasb. 651, 23 Pac. 232; 1908, State *v.* Zarlenga, 14 Ida. 305, 94 Pac. 55;

Illinois: 1870, Barnett *v.* People, 54 Ill. 325, 330 (former testimony); 1898, Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250;

Indiana: 1911, Wilson *v.* State, 175 Ind. 458, 93 N. E. 609 (witness out of the State and not found); St. 1905, p. 584, § 242, Burns Annot. St. 1914, § 2118 (a defendant's request or notice, in a criminal case, to take depositions "shall be deemed a waiver of his constitutional right to object to the taking of depositions by the State", etc.);

Iowa: 1884, State *v.* Fitzgerald, 63 Ia. 272, 19 N. W. 202; 1911, State *v.* Kimes, 152 Ia. 240, 132 N. W. 180; 1911, State *v.* Brown, 152 Ia. 427, 132 N. W. 862 (applied to former testimony of one now out of the jurisdiction;

Kansas: 1904, State *v.* Nelson, 68 Kan. 566, 75 Pac. 505 (thus presumably disposing of the doubt in State *v.* Tomblin, *supra*, n. 4); 1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805 (foregoing case approved); 1911, State *v.* Stewart, 85 Kan. 404, 116 Pac. 489 (preliminary examination); 1912, State *v.* Gentry, 86 Kan. 534, 121 Pac. 352 (preliminary examination);

Kentucky: 1855, Walston *v.* Com., 16 B. Monr. 35; 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923 (former testimony of a deceased witness, admitted; holding that St. 1903, § 4643, Stats. 1915, §§ 1019*a*, 6643, quoted *post*, § 1413, and providing that the consent of the defendant in criminal cases shall be necessary, applies in that respect "alone to the testimony of living witnesses so taken"); 1906, Austin *v.* Com., 124 Ky. 55, 98 S. W. 295 (former testimony);

bar, a hundred years ago. The doubt showed itself in the legislative omission, when providing authority for taking depositions generally, to make provision

Louisiana: 1876, State *v.* Harvey, 28 La. An 105; 1903, State *v.* Kline, 109 La. 622, 33 So. 618; 1903, State *v.* Banks, 111 La. 22, 35 So. 370; 1903, State *v.* Wheat, 111 La. 860, 35 So. 955 (the rule is not different under the Constitution of 1898);
Maine: 1906, State *v.* Herlihy, 102 Me. 310, 66 Atl. 643;
Massachusetts: 1836, Com. *v.* Richards, 18 Pick. 437;
Michigan: 1895, People *v.* Case, 105 Mich. 92, 62 N. W. 1017; 1910, People *v.* Droste, 160 Mich. 66, 125 N. W. 87 (illness; deposition);
Minnesota: 1895, State *v.* George, 60 Minn. 503, 63 N. W. 100;
Mississippi: 1837, Woodsides *v.* State, 2 How. 665; 1886, Owens *v.* State, 63 Miss. 450, 452 (former testimony; probably overruling Dominges *v.* State, 7 Sm. & M. 475); 1899, Lipscomb *v.* State, 76 Miss. 223, 25 So. 158; 1902, Dukes *v.* State, 80 Miss. 353, 31 So. 744, *semble;*
Missouri: 1857, State *v.* McO'Blenis, 24 Mo. 416 (see quotation *supra*); 1858, State *v.* Houser, 26 Mo. 433; 1918, State *v.* Barnes, 274 Mo. 625, 204 S. W. 267 (State *v.* McO'Blenis, *supra*, affirmed);
Montana: 1895, State *v.* Byers, 16 Mont. 565, 41 Pac. 708;
Nebraska: 1919, Koenigstein *v.* State, 103 Nebr. 580, 173 N. W. 603;
Nevada: 1877, State *v.* Johnson, 12 Nev. 123;
New York: 1876, Howard *v.* Moot, 64 N. Y. 262, 268 (St. 1821, c. 19, relating to the perpetuation of testimony, without cross-examination, held constitutional); 1902, People *v.* Elliott, 172 N. Y 146, 64 N. E. 837; 1891, People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; 1914, People *v.* Qualey, 210 N. Y. 202, 104 N. E. 138 (testimony before a magistrate under C. C. P. § 8; for the further point as to using the official stenographic report, see n. 8, *infra*);
Ohio: 1856, Summons *v.* State, 5 Oh. St. 341; 1857, Robbins *v.* State, 8 Oh. St. 163;
Oklahoma: 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561 (approving the above text); 1911, Warren *v.* State, 6 Okl. Cr. 1, 115 Pac. 812 (testimony at preliminary examination);
Oregon: 1909, State *v.* Walton, 53 Or. 557, 99 Pac. 431, 101 Pac. 389 (following Mattox *v.* U. S., cited *infra*, n. 7); 1911, State *v.* Myers, 59 Or. 537, 117 Pac. 818 (following State *v.* Walton, *supra*); in State *v.* McPherson, 70 Or. 371, 141 Pac. 1018, the opinion, without citing any authority, loosely expresses "grave doubt" whether anything less than "meeting the witnesses face to face in the very trial" will do;
Pennsylvania: 1873, Brown *v.* Com., 73 Pa. 321 325; 1892, Com. *v.* Cleary, 148 Pa. 26, 38, 23 Atl. 1110;
Philippine Islands: 1904, People *v.* Ruiz, 7 P. R. 129;
South Carolina: 1915, State *v.* Rogers, 101 S. C. 280, 85 S. E. 636;
South Dakota: 1909, State *v.* Heffernan, 24 S. D. 1, 123 N. W. 87 (former testimony; leading opinion by McCoy, J.);
Tennessee: 1838, Anthony *v.* State, Meigs 265; 1850, Kendrick *v.* State, 10 Humph. 484 (overruling, in effect, State *v.* Atkins, 1 Overt. 229); 1885, Baxter *v.* State, 15 Lea 660;
Texas: 1871, Greenwood *v.* State, 35 Tex. 587, 591; Const. Art. I, § 10 (quoted *ante*, § 1397, n. 7); 1876, Johnson *v.* State, 1 Tex. App. 333, 338, 344 ("the constitutional objection . . . is now no longer an open question"); 1876, Black *v.* State, 1 Tex. App. 368, 383; 1879, Sullivan *v.* State, 6 Tex. App. 319, 339; 1880, Dunlap *v.* State, 9 Tex. App. 179, 188; 1887, Steagald *v.* State, 22 Tex. App. 464, 490; 1888, Gilbreath *v.* State, 26 Tex. App. 315, 318; 1896, Cline *v.* State, 36 Tex. Cr. App. 320, 36 S. W. 1099 (*contra* to the foregoing, by a majority opinion); 1907, Porch *v.* State, 51 Tex. Cr. 7, 99 S. W. 1122 (testimony of a deceased witness before the committing magistrate, received; "we therefore without a further tedious discussion of the question, overrule the majority opinion in the Cline case [cited *supra*], and reaffirm the opinions of this Court rendered prior to the Cline case as the law"; this was a sensible and praiseworthy attitude, meant to set right once for all the law in this State; this decision therefore practically repudiates also on this point Smith *v.* State, 48 Tex. Cr. 65, 85 S. W. 1153, cited more fully *post*, § 1405); 1908, Pratt *v.* State, 53 Tex. Cr. 291, 109 S. W. 138 (former testimony of deceased witness, admitted: Davidson, P. J., diss., on authority of Cline *v.* State, but ignoring Porch *v.* State); 1908, Nixon *v.* State, 53 Tex. Cr. 325, 109 S. W. 931 (Porch *v.* State confirmed); 1908, Hobbs *v.* State, 53 Tex. Cr. 76, 112 S. W. 308 (former testimony of witness now in another jurisdiction, admitted; Davidson, P. J., still dissenting; his history is unsound); 1911, Kemper *v.* State, 63 Tex. Cr. 1, 138 S. W. 1025 (deceased witness at former trial of same case; Scott, Sp. J., for the majority: "We therefore adhere to the majority opinion of the Court as announced in the Cline Case, and expressly overrule the Porch Case and Hobbs Case and the Pratt Case, and in fact every other case in Texas which has announced a contrary rule"; the opinion vainly wrestles with the history and reason of the subject, and is a futile effort to turn this Court backward from the sensible rule, by invoking the supposed laws of Moses and of Rome; Prendergast, diss., files notice that whenever the majority is otherwise consituted "this decision may be overruled"); 1912, Robertson *v.* State, 63 Tex. Cr. 216, 142 S. W. 533 ("Kemper *v.* State is overruled on this point, and Cline *v.*

for *depositions on behalf of the prosecution*. This omission was almost universal in the several States. Hence, regardless of what the Courts might have held if such depositions (as distinguished from testimony at a former trial) were sought to be used, there was little or no opportunity to present the question; for in practice they could not be taken, lacking the authority in any officer to take them.[5] This deficiency, however, has in modern times begun to be cured by statutes (sometimes expressly sanctioned by constitutional provisions) authorizing depositions to be taken and used by the prosecution.[6]

(2) The same conclusion has been accepted for the constitutionality of evidence admissible by way of exception to the Hearsay rule. The use of *dying declarations* has been often thus passed upon, and without any dissenting rulings.[7] A like consequence must of course follow for the other ex-

State, and all cases following it are again overruled", Davidson, P. J., diss.); 1917, Young *v.* State, 82 Tex. Cr. 257, 199 S. W. 479 (Morrow, J.: "The rule in the Cline Case was abandoned by a divided Court in the opinion in Porch *v.* State . . . and in Hobbs' Case", admitting the testimony of one residing out of the State); 1921, Russell *v.* State, 89 Tex. Cr. 572, 232 S. W. 309;
Utah: 1876, U. S. *v.* Reynolds, 1 Utah 322; 1902, State *v.* King, 24 Utah 482, 68 Pac. 419; 1910, State *v.* Vance, 38 Utah 1, 110 Pac. 434;
Washington: 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 412;
West Virginia: 1894, Carrico *v.* R. Co., 39 W. Va. 86, 89, 19 S. E. 571 (left undecided);
Wisconsin: 1892, Jackson *v.* State, 81 Wis. 127, 130, 51 N. W. 89; 1907, Spencer *v.* State, 132 Wis. 509, 112 N. W. 462 (testimony before a committing magistrate; usable when the witness is deceased or permanently incapacitated mentally or physically; rule for a witness out of the jurisdiction, not stated; careful opinion by Winslow, J.);
Wyoming: 1916, Ivey *v.* State, 24 Wyo. 1, 154 Pac. 589.

Whether *disbarment* proceedings are criminal, in the constitutional sense, has usually been answered in the negative: 1905, State *v.* McRae, 49 Fla. 389, 38 So. 605; 1905, State *v.* Mosher, 128 Ia. 82, 103 N. W. 105; 1899, Re Wellcome, 23 Mont. 260, 58 Pac. 711.

Whether the 6th Amendment applies to *criminal contempts:* 1912, Merchants' S. & G. Co. *v.* Board of Trade, 8th C. C. A., 201 Fed. 20, 29 (in criminal contempt proceedings, the defendant is not entitled to be confronted with the witnesses against him).

[5] The following rulings show the application of the principle: 1899, State *v.* Potter, 6 Ida. 584, 57 Pac. 431 (depositions taken on preliminary examination by the State, not to be used at all at the trial, because not expressly authorized by statute; the opinion ignores the common-law practice, *ante*, § 1375; this is in truth not a deposition at all, but testimony at a former trial); 1886, Kaelin *v.* Com., 84 Ky. 354, 367, 1 S. W. 594 (deposition, taken by the accused, of a person abroad, not authorized by statute: excluded).

In People *v.* Turner, 265 Ill. 594, 107 N. E. 162 (1914), the Court refused to order a continuance, on application of the defendant, as an alternative to admitting a deposition of a non-resident taken by the defendant; "the Court ought not indirectly to change the law by compelling prosecutors to consent to the introduction of evidence for the defendant not legally admissible." This 'non possumus' attitude is unfortunate. The Courts have just as much power to deal with the law in litigation as the Legislature. But, even if not, they can at least revert to the original practice of themselves (mentioned in Greenleaf, I, § 320, as quoted in the above opinion). A good deal more courage and self-assertion on the part of Courts in their legitimate field of procedure should replace their present self-abnegation.

[6] For example, in *California*, formerly P. C. 1872, § 1335, authorized the use of *depositions* in criminal cases for the *accused only;* but by Const. 1879, Art. 1, § 13, and St. 1905, c. 540, p. 702, provision was made for taking depositions for the prosecution also, except in homicide cases: P. C. §§ 1335, 1345 (quoted *ante*, § 1387, *post*, § 1411).

The other jurisdictions now authorizing depositions to be taken by the State include the following; the provisions will be found cited *post*, § 1411, except as otherwise noted: *Alabama* (with accused's consent); *Colorado; Idaho; Indiana* (*supra*, n. 4; with accused's consent); *Kentucky* (*supra*, n. 4; with accused's consent); *Louisiana; Maine; Montana; Nevada; New York; Ohio* (*ante*, § 1397); *South Carolina* (in one class of cases only); *Texas* (*ante*, § 1397; in one class of cases only); *Virginia* (in one class of cases only); *Washington; Wisconsin; Wyoming*. In the *Federal military Courts* a similar authority exists (*supra*, n. 4, and *post*, § 1411).

[7] *Federal:* 1895, Mattox *v.* U. S., 156 U. S. 237, 243, 15 Sup. 337; 1897, Brown, J., in Robertson *v.* Baldwin, 165 U. S. 275, 17 Sup.

ceptions to the Hearsay rule; it has been expressly sanctioned for *official statements*,[8] and for *reputation* and other established exceptions.[9] The anoma-

326; *Cal.* 1858, People *v.* Glenn, 10 Cal. 36; *Ga.* 1852, Campbell *v.* State, 11 Ga. 374 (see quotation *supra*); 1908, Jones *v.* State, 130 Ga. 274, 60 S. E. 840; *Haw.* 1893, Govt. *v.* Hering, 9 Haw. 181, 189; *Ia.* 1858, State *v.* Nash, 7 Ia. 377; *Ky.* 1885, Walston *v.* Com., 16 B. Mon. 34; *La.* 1858, State *v.* Brunetto, 13 La. An. 45; *Mass.* 1853, Com. *v.* Carey, 12 Cush. 246; *Miss.* 1852, Lambeth *v.* State, 23 Miss. 322, 357 (see quotation *ante*, § 1397); *N. Y.* 1898, People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024; *N. Car.* 1850, State *v.* Tilghman, 11 Ired. 554; *Oh.* 1890, State *v.* Kindle, 47 Oh. St. 361, 24 N. E. 485; 1902, State *v.* Wing, 66 Oh. St. 407, 64 N. E. 514 (for the exceptions in general); *Or.* 1886, State *v.* Saunders, 14 Or. 300, 12 Pac. 441; *P. I.* 1909, U. S. *v.* Gil, 13 P. I. 530, 548; 1909, U. S. *v.* Javellana, 14 P. I. 186; *R. I.* 1889, State *v.* Murphy, 16 R. I. 533; 1900, State *v.* Jeswell, 22 id. 136, 46 Atl. 405; *Tex.* 1857, Burrell *v.* State, 18 Tex. 731; 1876, Black *v.* State, 1 Tex. App. 368, 384; *Utah:* 1914, State *v.* Inlow, 44 Utah 485, 141 Pac. 530 (affirming State *v.* King, *supra*, n. 4); *Wash.* 1896, State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650; *Wis.* 1870, Miller *v.* State, 25 Wis. 386; 1877, State *v.* Dickinson, 41 id. 299, 308; 1892, Jackson *v.* State, 81 id. 130, 137, 51 N. W. 89.

[8] FEDERAL: 1911, Dowdell *v.* U. S., 221 U. S. 325, 31 Sup. 590 ("where a clerk, upon suggestion of the diminution of the record, orders a clerk of the court below to send up a more ample record, or to supply deficiencies in the record filed", the provision of the Constitution is not applicable; here a clerk's certified copy of entries showing for the Supreme Court the defendant's arraignment in the lower court at Samar, P. I.); 1912, Heike *v.* U. S., C. C. A., 192 Fed. 83 (official records of U. S. weighers in revenue department, admitted); *Alabama:* 1915, Todd *v.* State, 13 Ala. App. 301, 69 So. 325 (transcript of stenographic report of testimony made admissible by statute); *Florida:* 1914, Collins *v.* Plant, 68 Fla. 337, 67 So. 80 (State chemist's certificate of analysis, admitted, under G. S. § 1271); 1919, Adams *v.* American Agricultural C. Co., 78 Fla. 362, 82 So. 850 (State chemist's certificate of analysis of fertilizer, made admissible by Gen. St. 1906, § 1271, in purchaser's claim for defective articles, held not unconstitutional); 1921, Fleischer *v.* Virginia-Carolina C. Co., 82 Fla. 50, 89 So. 401 (foregoing case followed); *Illinois:* 1887, Tucker *v.* People, 122 Ill. 583, 593, 13 N. E. 809 (certificate of marriage; the constitutional provision "has no reference to record evidence which may during the progress of a criminal trial become necessary to establish some material fact"); 1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (following Tucker *v.* People); *Iowa:* 1886, State *v.* Matlock, 70 Ia. 229, 30 N. W. 495 (county marriage records, not excluded by the Constitution); 1888, State *v.* Smith, 74 Ia. 580, 583, 38 N. W. 492 (approving State *v.* Matlock); *Louisiana:* 1917, State *v.* Wilson, 141 La. 404, 75 So. 95 (St. 1908, No. 40, providing for the use of the U. S. internal revenue collector's certificate of licenses issued, held valid to make the certificate admissible, but not 'prima facie' evidence; overruling State *v.* Donato, 127 La. 393); *New York:* 1914, People *v.* Qualey, 210 N. Y. 202, 104 N. E. 138 (Laws 1912, c. 390, April 15, adding § 221 *b*, C. C. P., for the admission of the official stenographic report of testimony before a magistrate, is constitutional); *North Carolina:* 1894, State *v.* Behrman, 114 N. C. 797, 804, 19 S. E. 220 (the use of official records does not violate the constitutional prohibition: here, a foreign marriage certificate was otherwise objectionable as unauthenticated); 1907, State *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002 (illegal sale of liquor; U. S. revenue collector's certified copy of a Federal liquor license record, admitted; following State *v.* Behrman); *Tennessee:* 1869, Reeves *v.* State, 7 Coldw. 96, 101, 108 (official paper on file; McClain, J., diss.; but the majority take the untenable stand that "the paper is the witness", and that production of a certified copy, where by law the original need not be produced, is in effect a confrontation); *Virginia:* 1916, Bracey *v.* Com., 119 Va. 867, 89 S. E. 144 (St. 1908, p. 286, § 24, making admissible the State chemist's certificate of analysis of a beverage, held constitutional).

Contra: 1868, State *v.* Reidel, 26 Ia. 430, 436 (notary's certificate of protest, not receivable in a criminal case to show no funds); 1887, People *v.* Foster, 64 Mich. 717, 720, 31 N. W. 596 (official signal-service record of weather; entrant required to be produced in a criminal case, upon the present principle); 1903, People *v.* Goodrode, 132 Mich. 542, 94 N. W. 14 (clerk's certificate of no record of marriage, excluded, under the Constitution; distinguishing People *v.* Jones, *supra*).

The following seem to belong here: Ky. Stats. 1899, § 4643 (official stenographic report not usable in criminal case except by defendant's consent); 1899, Cutler *v.* Terr., 8 Okl. 101, 56 Pac. 861 (statutory permission for use of official reporter's stenographic notes does not allow them to be used in a criminal case except by calling the reporter).

[9] 1888, State *v.* Waldron, 16 R. I. 192, 14 Atl. 847 (reputation); 1917, Cochran *v.* Com., 122 Va. 801, 94 S. E. 329 (express carrier's record of delivery of liquor, made admissible by St. 1916, c. 146, § 40). *Contra:* 1902, U. S. *v.* Tanjuanco, 1 P. I. 374 (robbery; held improper, on the present principle, to receive a resolution,

lous recent contrary rulings noticed under the former head and in the preceding paragraph above are interesting instances of that finical wisdom which looks back over a century of unquestioned professional practice and imagines sophomoric innovations which the fathers of the profession, living at the Constitution's birth, never dreamed of.

(3) The constitutional provision, so far as it may apply in a given case for lack of cross-examination, may of course be *waived* by the accused.[10]

The testimony of an *absent witness*, received by consent of the prosecution to avoid a continuance, is therefore not within the prohibition.[11]

§ 1399. **Confrontation, as requiring the Tribunal's or the Defendant's Sight of the Witness.** So far, then, as the essential purpose of Confrontation is concerned, it is satisfied if the opponent has had the benefit of full cross-examination. So far, furthermore, as a secondary and dispensable element is concerned, the thing required is the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom.

In asking whether these two requirements are fulfilled, the inquiry, for the first element, is determined by the rules already examined (*ante*, §§ 1373–1393).

For the second element, there is a little room for dispute in the application of the principle; it is satisfied if the *witness*, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed. It is possible to quibble over the precise fulfilment of this requisite in a given instance;[1] but it will ordinarily be easy to

adopted at a meeting of the residents of several towns, and certified by the proceedings of the municipal council, stating that the accused "was known as a man of bad character by reason of his notorious acts . . . robbery, theft, and other crimes").

[10] 1912, Diaz *v.* U. S., 223 U. S. 442, 32 Sup. 250 (testimony at the preliminary investigation, offered by the accused); 1870, State *v.* Polson, 29 Ia. 133, 135; 1884, State *v.* Fooks, 65 Ia. 452, 21 N. W. 561; 1898, State *v.* Olds, 106 Ia. 110, 76 N. W. 644; 1881, State *v.* McNeil, 33 La. An. 1332, 1335; 1910, State *v.* Vanella, 40 Mont. 326, 106 Pac. 3641; 1896, State *v.* Mitchell, 119 N. C. 784, 25 S. E. 783 ('ex parte' examination of bastardy-prosecutrix; failure to object is a waiver); State *v.* Rogers, 119 N. C. 793, 26 S. E. 142 (same); 1906, U. S. *v.* Anastasio, 6 P. I. 413 (charge of attempt at rape dismissed after evidence heard, and another charge substituted; defendant assented to be tried on the evidence of record on the former charge; held valid; Carson, J.: "Both the primary and the secondary purposes of confrontation were attained"); 1909, U. S. *v.* Raymundo, 14 P. I. 416, 438. Compare § 1371, *ante*.

[11] 1904, Schick *v.* U. S., 195 U. S. 65, 24 Sup. 826 (said 'obiter' that Art. 6 of the U. S. Constitution can be waived); 1909, Mullen *v.* U. S., 212 U. S. 516, 29 Sup. 330 (holding the same for U. S. Rev. St. 1878, § 1624, providing for courts-martial, in so far as that provision is intended to be analogous to the constitutional right); 1912, Diaz *v.* U. S., 223 U. S. 442, 32 Sup. 250; 1900, Ruiz *v.* Terr., 10 N. M. 120, 61 Pac. 126 (but here it was put upon the ground that the witness' agreed testimony turned out to be favorable to the defendant); and cases cited *post*, § 2595, n. 6.

§ 1399. [1] The following are instances of amusing legal pedantry: 1896, Bennett *v.* State, 62 Ark. 516, 36 S. W. 947 (holding erroneous the action of the trial Court in proceeding with the examination of witnesses during the accused's absence in the watercloset); 1899, State *v.* Mannion, 19 Utah 505, 57 Pac. 543 (a witness for the State claiming to be afraid of the defendant, the Court placed him back in the room, out of sight and hearing of the witness; held improper, on the absurd ground that the dictionaries define "confront" as meaning "to bring face to face", and that the constitutional provision was thus violated; Bartch, C. J., dissenting as to the reasoning). Compare the cases cited *ante*, § 1393.

determine whether in substance the desired object of the law has been obtained.[2]

2. Circumstances of Necessity making Witness' Personal Presence Unavailable

§ 1401. **Preliminary Distinctions; (*a*) Deposition and Testimony; (*b*) Civil and Criminal Cases; (*c*) Taking and Using a Deposition.** Before examining the circumstances of that necessity which dispenses with the witness' personal presence for testifying (*ante*, § 1396), it is desirable to notice certain distinctions which here play a more or less important part.

(*a*) There is on principle no distinction between a *deposition* and *former testimony* as to the conditions upon which either may be used at the trial. So far as the circumstances make it impossible to obtain the witness' personal presence for testifying, by reason of his death, illness, absence from the jurisdiction, and the like, that impossibility exists in precisely the same degree for a deposition and for former testimony to a jury, — supposing, of course, that in each case there has been cross-examination. There is on principle not the slightest ground for failing to recognize all the dispensing circumstances as equally sufficient for both kinds of testimony. Nevertheless, there is in most jurisdictions more or less inconsistency on this subject; and it can never be safely assumed that a Court will treat both kinds in the same way. There are usually independent lines of precedents for the two kinds of testimony. This is due, of course, to the peculiar inability of the common-law Courts to authorize depositions (*ante*, § 1376), in consequence of which the treatment of depositions has been handled apart by itself as a special legislative problem. The statutes, in granting the power to order depositions, have usually specified the conditions of necessity allowing their admission, and this statutory specification has rarely been sufficiently thoughtful of all the possible kinds of necessity; the result is an unfortunate patchwork of statutes and decisions. Presumably the statutory enumeration will not be treated as intended to exclude other causes unenumerated; this ought to be the construction.

As between depositions 'de bene esse' and 'in perpetuam memoriam', there are also to be found differences uncalled for on principle. The statutes authorizing depositions of the latter sort have seldom enumerated the conditions of use, and the judicial precedents are rare. The precedents and statutes will therefore here be distinguished according as they apply to former testimony and to depositions 'de bene esse' and 'in perpetuam memoriam.'

[2] *Eng.* 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1341 (Stafford: "I beg your lordships that he may look me in the face"; the witness was turned to the Court; "I desire the letter of the law, which says my accuser shall come face to face"; L. H. S. Finch: "My lord, you do see the witness: that is enough for face to face"); *U. S.* 1886, Skaggs *v.* State, 108 Ind. 57, 8 N. E. 695 (the prosecutrix, in a rape case, was deaf and dumb, and being shocked at a question put to her, ran out into an adjoining room; the interpreter followed her, obtained an answer, and returned with her, in about one minute, and then reported the answer to the Court; held, that no substantial right was prejudiced); 1918, Com. *v.* Principatti, 260 Pa. 587, 104 Atl. 53 (excluding persons who intimidated the witness; cited more fully *post*, § 1840).

(*b*) There is on principle no distinction, as to the conditions of necessity for using depositions and former testimony, between *civil* and *criminal cases*. If absence from the jurisdiction (for example) is a necessity in the one class of cases, it is equally a necessity in the other. The needs of public justice are as strenuous as those of private litigation. It is even more necessary that an offender against the community be duly punished than that a debtor discharge his private obligation. Our traditional tenderness for accused persons explains to some extent the prevalence of this distinction in some jurisdictions. But there are also two legal principles that chiefly account for the distinction where it is found: (1) The constitutional provision requiring the confrontation of witnesses with the accused is regarded in a few jurisdictions (*ante*, § 1398) as preventing any use, by the prosecution in criminal cases, of depositions and former testimony; (2) the statutory authorization for taking depositions has in some jurisdictions culpably failed to give that power on behalf of the prosecution in criminal cases; accordingly, if such a deposition is there offered, it is rejected for the simple reason that there never was authority in any officer to take it; the deposition is legally non-existent (*ante*, § 1398).

(*c*) There is a distinction to be observed between the statutory conditions upon which an *order to take* a deposition may be granted and those upon which it may be *used when taken*. The statutes empowering Courts to order the taking of depositions usually specified also the cases in which such an order could issue, — the witness' illness, or impending departure, or the like. Now there may be, by the time of the trial, no actual necessity for using a deposition taken merely in anticipation of a possible necessity; hence, the conditions of necessity for using the deposition are in law independent of the conditions of policy on which the order for taking may have issued. The order for taking concerns a preliminary stage of the trial, the machinery of preparing evidence; it is therefore without the present purview. Until the deposition is offered on the trial, the question of Admissibility is not raised. The statutes prescribing the mode of taking prescribe also usually the conditions of admissibility; but they sometimes make no provisions of the latter sort, and then resort may have to be had to the provisions of the former sort to ascertain the legislative intention.

The effect of those statutes which *abolish all limitations on taking* depositions before trial is virtually to make a radical change in another part of the law, viz. the rule against obtaining *discovery from a witness* before trial; that aspect of the statutes is considered *post*, §§ 1850–1856.

§ 1402. **General Principle of Necessity or Unavailability.** The principle upon which depositions and former testimony should be resorted to is the simple principle of *necessity*, — *i.e.* the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purposes of doing justice if it is not received in the form in which it survives and can be had. The only inquiry, then, need be: Is his testimony in court unavailable?

We may of course distinguish further between testimony unavailable by any means whatever and testimony unavailable without serious inconvenience. The common-law rulings certainly stopped at unavailability of the former sort; conditions of the latter sort rest wholly on statutory sanction. But the common-law principle clearly went in theory as far as the former line, *i.e.* there are indications of a principle broad enough to sanction any case in which the present testimony is in fact *unavailable by any means whatever.* Such a broad principle was never fully and consistently enforced in practice; but it clearly existed 'in gremio legis':

Ante 1726, GILBERT, C. B., Evidence, 61: "In this case the deposition is the best that can possibly be had, and that answers what the law requires."

1812, ELDON, L. C., in *Andrews* v. *Palmer*, 1 Ves. & B. 22: "The depositions, if published, could not be read at law unless it was proved to the satisfaction of the Court that the witness could not be examined at the trial."

1835, JOHNSON, J., in *State* v. *Hill*, 2 Hill S. C. 609: "What a deceased witness, or one who from other causes has become incapacitated to give evidence, has sworn upon a former trial, is admitted on the principle that is the best of which the case admits."

1898, GREEN, J., in *Wells* v. *Ins. Co.*, 187 Pa. 166, 40 Atl. 802: "The cause of the subsequently accruing incompetency is not material. It may arise from absence, from sickness, from interest, from death, or from a newly-created statutory incompetency; but the principle controlling them all is that if, at the time the deposition or testimony was taken, the witness was competent, it may be given in evidence after the incompetency had arisen. Such is the sense of all the modern decisions, and we think the conclusion is reasonable and just."

1842, Professor *Simon Greenleaf*, Evidence, § 168: "The same principle will lead us farther to conclude that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of producing the witness again, whether from physical or from legal causes, he may offer the secondary evidence of what he testified in the former trial. If the lips of the witness are sealed, it can make no difference in principle whether it be by the finger of death or by the finger of the law."

It remains to examine the precedents dealing with specific instances of unavailability. Some of these rulings have been rendered under the terms of express statutes (*post*, §§ 1411–1413); but it is not always practicable to distinguish whether a statute affected the ruling. The possible cases might be grouped under three heads, according as the witness (*a*) is not available even for the purpose of serving legal process to attend, or (*b*) is available for the purpose of process, but not of actual attendance, or (*c*) is available for the purpose of process and attendance, but not of actually testifying; but no such grouping has been recognized, nor does it assist to interpret the concrete rules.

§ 1403. **Specific Cases of Unavailability**; (1) **Death.** This has always been the typical and acknowledged case of unavailability, and is equally conceded to suffice for depositions and for former testimony.[1] The jurisdictions in which, by anomaly, it is not deemed sufficient are those (*ante*, § 1398) in

§ 1403. [1] For early illustrations, see the history of the Hearsay rule, *ante*, § 1364. For others, see *ante*, § 1398. For the use of *reputation* to evidence the witness' death, see *post*, § 1605.

which, for constitutional or other reasons, no use at all is permitted, in criminal cases, of either depositions or former testimony.

§ 1404. **Same**: (2) **Absence from Jurisdiction.** Where the witness is out of the jurisdiction, it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.[1]

Three conditions, however, have been by some Courts suggested as essential in order that the present testimony may be regarded as unavailable in the fullest sense:

(*a*) The absence, it is sometimes said, must be by way of *residence*, and not merely of *temporary sojourn*, because otherwise the trial could be postponed until his return.[2] This, however, seems too strict a rule; by his absence he is at the time actually unavailable, no matter when he is to return; and, if the witness is not of such importance as to require a postponement until his return, still more if the opponent does not desire or consent to a postponement, there is no reason for distinguishing between temporary and permanent absence.

(*b*) It is sometimes said that an effort should have been made to *persuade the witness'* voluntary attendance;[3] and no doubt the trial Court's discretion might occasionally make such a requirement; but it is unnecessary to prescribe this as a general rule.

(*c*) It has also been suggested[4] that an effort should have been made to obtain the *witness' deposition by commission;* but this is futile, for a deposition is no better than his former testimony.

This ground of admission, then (absence from the jurisdiction of trial), is generally accepted for *testimony at a former trial.*[5] A few Courts, following

§ 1404. [1] 1705, Lord Holt, C. J., in Altham *v.* Anglesea, Gilb. Eq. Rep. 18; 1911, U. S. *v.* Cohen, D. C. So. D. N. Y., Oct. 26, MS., Hough, J. (witnesses for the prosecution, released after former testimony, and then disappearing; former testimony admitted).

[2] See the Alabama cases, *infra.*

For the person's declarations as *evidence of intent not to return*, see *post*, § 1725.

[3] 1914, Spencer, J., in Levi *v.* State, 182 Ind. 188, 104 N. E. 765; 105 N. E. 898; 1877, Rothrock, C. J., in Shisser *v.* Burlington, 47 Ia. 302.

[4] 1914, Spencer, J., in Levi *v.* State, 182 Ind. 188, 104 N. E. 765; 105 N. E. 898; Shisser *v.* Burlington, *supra;* 1870, Berney *v.* Mitchell, 34 N. J. L. 341. *Contra* (*i.e.* holding that this is unnecessary): 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313; 1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 61, 69 C. C. A. 28.

[5] ENGLAND: 1737, Fry *v.* Wood, 1 Atk. 445.

CANADA: 1852, Roe *v.* Jones, 3 Low. Can. 58; 1859, Sutor *v.* McLean, 18 U. C. Q. B. 490, 492 (resident out of the jurisdiction, admitted); 1866, Abel *v.* Light, 6 All. N. Br. 423, 427.

UNITED STATES: *Federal:* 1897, Chicago St. P. M. & O. R. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361 (if his personal attendance cannot be secured); 1904, West *v.* Louisiana, 194 U. S. 258, 24 Sup. 650 (permanent non-residence suffices, at least under the fourteenth Amendment; here applied to testimony before a committing magistrate offered against a defendant); 1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 57, 69 C. C. A. 28 (former testimony of a witness in Indiana, out of the jurisdiction of this court and more than 100 miles away, admitted); 1916, Great Northern R. Co. *v.* Ennis, 9th C. C. A., 236 Fed. 17, 25 (both at common law and under Montana Rev. Codes, § 7887, it is not necessary that the witness' absence be permanent or indefinite);

Alabama: 1851, Long *v.* Davis, 18 Ala. 803 ("permanent absence"); 1860, Mims *v.* Stevant, 36 id. 630; 1888, Lowe *v.* State 86 Ala. 47, 50, 5 So. 435 (absence for an indefinite time, sufficient, even in criminal case); 1888, South *v.* State, 86 Ala. 617, 620, 6 So. 52 (permanent absence, sufficient); 1888 Perry *v.* State, 87 Ala. 30, 33, 6 So. 425 (per-

manent or indefinite absence, sufficient); 1890, Pruitt *v.* State, 92 Ala. 41, 9 So. 406 (absence "for such an indefinite time that his return is merely contingent or conjectural", sufficient); 1891, Lucas *v.* State, 96 Ala. 51, 11 So. 216 (preceding definition held not here satisfied on the facts); 1893, Lowery *v.* State, 98 Ala. 45, 50, 13 So. 498; 1894, Thompson *v.* State, 106 Ala. 67, 75, 17 So. 512 (same); 1894, Burton *v.* State, 107 Ala. 68, 73, 18 So. 240 (indefinite absence, sufficient); 1895, Thompson *v.* State, 106 Ala. 67, 17 So. 512; ("left the State permanently; or for such an indefinite time that his return is contingent and uncertain"); 1897, McMunn *v.* State, 113 Ala. 86, 21 So. 418; 1897, Mitchell *v.* State, 114 Ala. 1, 22 So. 71; Burton *v.* State, 115 Ala. 1, 22 So. 585; 1898, Dennis *v.* State, 118 Ala. 72, 23 So. 1002; 1900, Lett *v.* State, 124 Ala. 64, 27 So. 256 (non-residence in jurisdiction suffices); 1900, Birmingham N. Bank *v.* Bradley, — Ala. —, 30 So. 546 (former testimony of one who had "removed from the State and was at the time without the jurisdiction", admitted); 1902, Jacobi *v.* State, 133 Ala. 1, 32 So. 158 (removal from the State "permanently or for an indefinite time", suffices); 1902, Jacobi *v.* Alabama, 187 U. S. 133, 23 Sup. 48 (by the law of Alabama, the testimony is receivable if the witness is "beyond the jurisdiction of the Court, whether he has removed from the State permanently or for an indefinite time"); 1903, Southern Car & F. Co. *v.* Jennings, 137 Ala. 247, 34 So. 1002 (witness "staying indefinitely at M. in this State"; not sufficient); 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (a witness to a dying declaration, shown merely to have gone to Texas; former testimony excluded); 1904, Wilson *v.* State, 140 Ala. 43, 37 So. 93 ("residence and indefinite absence from the State" suffices); 1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (removal permanently or for an indefinite time suffices); 1904, Southern R. Co. *v.* Bonner, 141 Ala. 517, 37 So. 702 (similar); 1914, Francis *v.* State, 188 Ala. 39, 65 So. 969 (witness resident in Nebraska);

Arkansas: 1874, Hurley *v.* State, 29 Ark. 23; 1883, Dolan *v.* State, 40 Ark. 461; 1894, Vaughan *v.* State, 58 Ark. 353, 370, 24 S. W. 885; 1900, Wilkins *v.* State, 68 Ark. 441, 60 S. W. 30; 1905, Petty *v.* State, 76 Ark. 515, 89 S. W. 465; 1909, Wimberly *v.* State, 90 Ark. 514, 119 S. W. 668; 1910, Poe *v.* State, 94 Ark. 172, 129 S. W. 292 (witness "beyond the jurisdiction");

California: 1873, People *v.* Devine, 46 Cal. 48; 1894, Benson *v.* Shotwell, 103 Cal. 163, 168, 37 Pac. 147;

Colorado: 1914, Henwood *v.* People, 57 Colo. 544, 143 Pac. 373 (witnesses "beyond the jurisdiction of the court"); 1915, Bolles *v.* O'Brien, 59 Colo. 261, 151 Pac. 450 (testimony in a former trial in Florida, with no accounting for the witness, excluded);

Georgia: 1869, Adair *v.* Adair, 39 Ga. 75, 77, 1878, Eagle & P. M. Co. *v.* Welch, 61 Ga. 445; 1893, Atlanta & C. A. R. Co. *v.* Gravitt, 93 Ga. 369, 371, 20 S. E. 550 (whether a witness is "inaccessible" under Code § 3782 is for the trial judge's determination); 1900, Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969; 1906, Taylor *v.* State, 126 Ga. 557, 55 S. E. 474 (absence from the county, being last heard from within the State, does not suffice, under P. C. 1895, § 1001, P. C. 1910, § 1027); 1912, Crumm *v.* Allen, 11 Ga. App. 203, 75 S. E. 108 (where the witness is the party himself offering his former testimony, of course his voluntary absence from the State does not make him inaccessible); 1912, Taylor *v.* Felder, 11 Ga. App. 742, 76 S. E. 75 (under Civ. C. 1910, § 5773, a witness residing in an adjoining county within the State is not "inaccessible"); 1918, Smith *v.* State, 147 Ga. 689, 95 S. E. 281 (removal to another State; former testimony admitted; Pittman *v.* State, 92 Ga. 480, repudiated, and Smith *v.* State, 72 Ga. 114, affirmed);

Hawaii: 1916, Terr. *v.* Curran, 23 Haw. 421 (former testimony of a soldier absent from the jurisdiction on furlough and not due to return for a month, admitted; citing the above text with approval; Quarles, J., dissenting, in a learned opinion, on the ground that a merely temporary absence does not suffice);

Illinois: 1916, Stephens *v.* Hoffman, 275 Ill. 497, 114 N. E. 142 (former testimony of a witness residing in Oklahoma, excluded, no showing being made that a deposition could not have been taken; unsound);

Indiana: 1910, Reichers *v.* Dammeier, 45 Ind. App. 208, 90 N. E. 644 (non-resident); 1914, Levi *v.* State, 182 Ind. 188, 104 N. E. 765, 105 N. E. 898 (general principle recognized: but here former testimony was held improperly admitted because no effort was made other than by subpœna to obtain the witness' presence or their depositions; unsound); 1921, Zimmerman *v.* State, — Ind. —, 130 N. E. 235 (in military service in France);

Iowa: 1877, Shisser *v.* Burlington, 47 Ia. 302 (provided an effort has been made to secure the witness' voluntary attendance or his deposition); 1890, Bank *v.* Gifford, 79 Ia. 311, 44 N. W. 558 (residence in another county, sufficient, by statute); 1911, State *v.* Brown, 152 Ia. 427, 132 N. W. 862 (settling the rule for criminal cases);

Kansas: 1902, Atchison T. & S. F. R. Co. *v.* Osborn, 64 Kan. 187, 67 Pac. 547; 1904, State *v.* Nelson, 68 Kan. 566, 75 Pac. 505; 1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805 (absence from the State suffices); 1908, State *v.* Simmons, 78 Kan. 872, 98 Pac. 277; 1912, State *v.* Gentry, 86 Kan. 534, 121 Pac. 352;

Kentucky: 1895, Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299; 1896, Louisville Water Co. *v.* Upton, — Ky. —, 36 S. W. 520;

Louisiana: 1882, State *v.* Douglass, 34 La.

An. 523, 524; 1882, State *v.* Jordan, 34 La. An. 1219; 1898, State *v.* Madison, 50 La. An. 679, 23 So. 622 (residence out of the State, sufficient); 1901, State *v.* Banks, 106 La. 480, 31 So. 53 (permanent absence is necessary); 1903, State *v.* Kline, 109 La. 603, 33 So. 618 (absence from the State, with no reasonable probability of a return, held sufficient); 1903, State *v.* Banks, 111 La. 22, 35 So. 370 (permanently absent from the State; testimony at a preliminary hearing admitted; the prior ruling, *supra*, was made in construing a special statute, No. 123 of 1898, applying to certain New Orleans criminal courts); State *v.* Kline, 109 La. 603, cited *supra* (affirmed on writ of error, under the U. S. 14th Amendment, *s. v.* West *v.* Louisiana, U. S., cited *infra*); 1904, State *v.* Sejours, 113 La. 676, 37 So. 599 (permanent absence from the State suffices);

Maryland: 1829, Rogers *v.* Raborg, 2 G. and J. 60;

Massachusetts: 1915, Hansen *v.* Fitchburg & L. St. R. Co., 222 Mass. 116, 109 N. E. 813 ("the mere unexplained absence from the jurisdiction" is not enough as a matter of law; misguided ruling);

Michigan: 1878, Howard *v.* Patrick, 38 Mich. 799; 1899, Wheeler *v.* Jennison, 120 Mich. 422, 79 N. W. 643; 1907, Dolph *v.* Lake Shore & M. S. R. Co., 149 Mich. 278, 112 N. W. 981;

Minnesota: 1892, Minneapolis M. Co. *v.* R. Co., 51 Minn. 304, 315, 53 N. W. 639 (not necessary to try first for his deposition); 1893, King *v.* McCarthy, 54 Minn. 190, 195, 55 N. W. 960 ("not likely to return within the jurisdiction", sufficient); 1898, Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030 (residence in another State, sufficient); 1911, Finnes *v.* Selover B. Co., 114 Minn. 339, 131 N. W. 371 (admissible if "not a resident of the State, and without the jurisdiction of the court"); 1911, Gutmann *v.* Klimek, 116 Minn. 110, 133 N. W. 475 (residence in another State; here the plaintiff's own testimony at a former trial, offered in his own behalf; not decided);

Missouri: 1913, State *v.* Butler, 247 Mo. 685, 153 S. W. 1042 (testimony before committing magistrate, admitted for defendant, though Rev. St. 1909, §§ 5056, 5033, do not specify any conditions on which such testimony may be used);

Montana: 1903, Reynolds *v.* Fitzpatrick, 28 Mont. 170, 72 Pac. 510 (absence not sufficiently shown, on the facts); 1909, O'Meara *v.* McDermott, 40 Mont. 38, 104 Pac. 1049 (witness in California; admitted under Rev. Codes, § 7887); 1909, Motte & K. D. Co. *v.* Lowrey, 39 Mont. 124, 101 Pac. 966 (preliminary examination);

Nebraska: 1893, Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833; 1894, Omaha S. R. Co. *v.* Elkins, 39 Nebr. 480, 58 N. W. 164 (mere absence sufficient); 1896, Lowe *v.* Vaughn, 48 Nebr. 651, 67 N. W. 464; 1897, Ord. *v.* Nash, 50 Nebr. 335, 69 N. W. 964; 1899, Wittenberg *v.* Molyneaux, 59 Nebr. 203, 80 N. W. 824, *semble;* 1917, O'Connor's Estate, 101 Nebr. 617, 164 N. W. 570 (probate of a will; issue, forgery; former testimony of an expert now "in Chicago engaged in a hearing requiring his attendance for two weeks", admitted);

New York: 1918, People *v.* Fisher, 223 N. Y. 459, 119 N. E. 845 (testimony before the magistrate of the complaining witness, now gone to Italy, admitted);

North Dakota: 1915, Felton *v.* Midland Continental R. Co., 32 N. D. 223, 155 N. W. 23 (personal injury; former testimony of a witness who had gone to Nebraska and been "continuously absent from Jamestown since that time", admitted); 1917, Flamer *v.* Johnson, 36 N. D. 215, 162 N. W. 307 (former testimony of a witness not proved to have left the State and not diligently searched for, excluded);

Oklahoma: 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561; 1913, Atchison T. & S. F. R. Co. *v.* Baker, 37 Okl. 48, 130 Pac. 577; 1916, St. Louis & S. F. R. Co. *v.* Walker, 61 Okl. 37, 160 Pac. 79 (witness at the former trial was a railroad conductor of the defendant; evidence was offered that counsel had wired or written the general counsel at St. Louis, pursuant to custom, asking to procure the conductor's attendance, and the general counsel had replied that the conductor was residing in California; held insufficient; this is an example of the mechanical way to administer these rules; either the conductor was still in the employ of the party or he was not; if he was, the party should not have been excused at all, even by non-residence, from producing him; if he was not, the above evidence was ample);

Oregon: 1900, Wheeler *v.* McFerron, 38 Or. 105, 62 Pac. 1015; 1909, State *v.* Walton, 53 Or. 557, 99 Pac. 431, 101 Pac. 389;

Pennsylvania: 1818, Magill *v.* Kauffman, 4 S. & R. 317; 1824, Forney *v.* Hallagher, 11 S. & R. 203; 1898, Giberson *v.* Mills Co., 187 Pa. 513, 41 Atl. 525 (sufficient; nor need efforts be made to secure his attendance);

Rhode Island: 1908, Kolodrianski *v.* American Locomotive Co., 29 R. I. 127, 69 Atl. 505;

Texas: 1879, Sullivan *v.* State, 6 Tex. App. 319, 339; 1887, Steagald *v.* State, 22 Tex. App. 464, 488, 3 S. W. 771; 1887, Conner *v.* State, 23 Tex. App. 378, 384, 5 S. W. 189; 1888, Gilbreath *v.* State, 26 Tex. App. 315, 318, 9 S. W. 618; 1914, Millner *v.* State, 72 Tex. Cr. 45, 162 S. W. 348; 1917, Young *v.* State, 82 Tex. Cr. 257, 199 S. W. 479 (residence out of the State; see the prior cases cited *ante*, § 1398);

Utah: 1910, State *v.* Vance, 38 Utah 1, 110 Pac. 434; 1914, State *v.* Inlow, 44 Utah 485, 141 Pac. 530; 1916, State *v.* De Pretto, 48 Utah 249, 155 Pac. 336 (preliminary testimony of a witness absent in another State, admitted, applying Comp. L. 1907, § 4513);

an early New York ruling, refuse to recognize it at all;[6] a few others refuse to recognize it in criminal cases particularly.[7]

For *depositions*, this cause was at common law established as sufficient,[8]

Vermont: 1902, McGovern *v.* Hayes and Smith, 75 Vt. 104, 53 Atl. 326 (nor is it necessary to try to procure his attendance or to search for him);
West Virginia: 1922, Browning *v.* Hoffman, — W. Va. —, 111 S. E. 492 (witness in a distant State; former testimony admitted);
Wyoming: 1916, Ivey *v.* State, 24 Wyo. 1, 154 Pac. 589 (former testimony of absent witnesses, admitted).

[6] 1826, Wilbur *v.* Selden, 6 Cow. N. Y. 164; 1834, Crary *v.* Sprague, 12 Wend. N. Y. 45; 1874, Berney *v.* Mitchell, 34 N. J. L. 341; 1876, Collins *v.* Com., 12 Bush 273. In Cassady *v.* Trustees, 105 Ill. 567 (1883), the testimony was excluded on the facts of the case.

[7] 1881, U. S. *v.* Angell, 11 Fed. 43; 1886, Owens *v.* State, 63 Miss. 450, 452; 1858, State *v.* Houser, 26 Mo. 439; 1843, People *v.* Newman, 5 Hill N. Y. 296; 1827, Finn *v.* Com., 5 Rand. Va. 708; 1853, Com. *v.* Brogy, 10 Gratt. Va. 722, 732 (not sufficient in a criminal case, even for defendant).

In *Alabama*, the rulings in Dupree *v.* State, 33 Ala. 388, and Harris *v.* State, 73 Ala. 497, are superseded by the later ones in note 5, *supra*. In *Virginia*, Finn's Case, *supra*, was partly repudiated and its validity for the present purpose left undetermined, in Parks *v.* Com., 109 Va. 807, 63 S. E. 462 (1909).

[8] ENGLAND: 1688, Thatcher *v.* Waller, T. Jones 53 (deposition before coroner of one beyond sea, admitted; it was "all one as if he were dead"; for earlier English rulings, see *ante*, § 1364); 1705, Altham *v.* Anglesea, Gilb. Eq. Rep. 18; 11 Mod. 212; 1729, Patterson *v.* St. Clair, 1 Barnard. K. B. 268; 1744, Ward *v.* Sykes, Ridgw. t. Hardw. 193; 1772, Birt *v.* White, Dick. 473; 1806, Fonsick *v.* Agar, 6 Esp. 92 (deposition of one already on board ship, admitted); 1808, Falconer *v.* Hanson, 1 Camp. 172; 1841, Robinson *v.* Markis, 2 Moo. & Rob. 376 (mere inability to find does not suffice to establish absence); 1849, Varicas *v.* French, 2 C. & K. 1008 (absence in Australia, held sufficiently proved); 1856, R. *v.* Austen, 7 Cox Cr. 55 (mere absence in the witness' own country, without a showing of inability to secure his presence by request, not sufficient); 1873, 'Ex parte' Huguet, 12 Cox Cr. 551 (a French witness refusing to stay, and returning to France; admissible, per Martin, B., and, *semble*, Pollock, B.; *semble, contra*, Kelly, C. B.).

CANADA: *Alberta:* 1915, McQuaid *v.* Prudential Trust Co., 22 D. L. R. 877 (deposition of defendant's officers in Quebec, under Rule 395); *British Columbia:* 1914, R. *v.* Angelo, 16 D. L. R. 126 (deposition of a constable who had gone to the United States while on leave, and had failed to report for duty ever since, admitted); *Manitoba:* 1916, R. *v.* Roblin, 31 D. L. R. 724 (commission ordered for expert witnesses residing in the U. S., under Code § 997); *Northwest Terr.* 1900, R. *v.* Forsythe, 4 N. W. Terr. 398 (the evidence of absence must be such as reasonably to satisfy the trial judge); *Nova Scotia:* 1908, Rogers *v.* Troop, 43 N. Sc. 279 (trial Court decides, under Order 35, R. 17); *Saskatchewan:* 1915, Coristine Ltd. *v.* Haddad, 21 D. L. R. 350 (depositions authorized for witnesses living in Quebec and unwilling to leave that jurisdiction to attend the trial); 1915, First National Bank *v.* Kruse, 23 D. L. R. 684 (commission to take testimony of witness in Iowa, refused in the Master's discretion, under Rule 365).

UNITED STATES: *Federal:* 1873, Burton *v.* Driggs, 20 Wall. 125 (lost deposition of a witness living in another State and more than 100 miles away; contents allowed to be proved); 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313 (deposition burned; Burton *v.* Driggs approved); *Alabama:* 1839, McCutchen *v.* McCutchen, 9 Port. 650, 654 (that the witness had "started to move to the State of Arkansas with his family", though he expected to stop on the way in another county with relatives, sufficient); 1851, Long *v.* Davis, 18 Ala. 801, 803 (permanent absence, sufficient; no effort to obtain him necessary); *Connecticut:* 1854, Larkin *v.* Avery, 23 Conn. 304, 318 (absence on a journey other than the one contemplated at the taking of the deposition, sufficient; *semble*, fact of absence is determinable by trial Court); *Idaho:* 1890, Terr. *v.* Evans, 2 Hasb. Ida. 627, 632, 23 Pac. 232 (overruled by State *v.* Potter, 6 Ida. 584, 57 Pac. 431, cited *post*, § 1418); *Indian Terr.* 1899, Missouri K. & T. R. Co. *v.* Elliott, 2 Ind. T. 407, 51 S. W. 1068 (deposition by railroad employee, residing out of the jurisdiction, but frequently coming within it during their employment, admitted); *Illinois:* 1897, Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307 ("non-resident" includes one residing in another county but within the State, and his deposition on oral interrogatories may be received); *Massachusetts:* 1850, Kinney *v.* Berran, 6 Cush. 394 (mere inability to find is not sufficient to prove absence); *North Carolina:* 1897, Cunningham *v.* Cunningham, 121 N. C. 413, 28 S. E. 525 (evidence of absence held sufficient, the trial Court having discretion); *Pennsylvania:* 1819, Carpenter *v.* Groff, 5 S. & R. 165; *Vermont:* 1869, Johnson *v.* Sargent, 42 Vt. 195; *West Virginia:* 1897, Hoopes *v.* De Vaughn, 43 W. Va.

subject in occasional rulings to the distinctions above noted; and by statute it has been almost universally provided for.[9]

§ 1405. **Same: (3) Disappearance; Inability to Find; (4) Opponent's Procurement.** (3) If the witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance. Such a disappearance is shown by the party's *inability to find* him after diligent search. The only objection to recognizing this ground of unavailability is the possibility of collusion between party and witness; but supposing the Court to be satisfied that there has been no collusion and that the search has been 'bona fide', this objection loses its force.

For *former testimony* [1] this cause of unavailability has long been recognized.

447, 27 S. E. 251 (non-residence may appear from the deposition itself as well as from the statutory affidavit at the time of application); 1915, County Court *v.* Grafton, 77 W. Va. 84, 86 S. E. 924 (Code 1913, § 4891, applied).

Contra: 1911, Redhouse *v.* Graham, 20 Haw. 717 (plaintiff's own former testimony excluded, where he had left the jurisdiction before trial without any explained reason); 1897, State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144 (and in spite of the fact that the defendant himself had caused the taking; this is indeed using the law to shield crime); 1893, State *v.* Humason, 5 Wash. 499, 504, 32 Pac. 1[illegible] 'not sufficient in criminal cases for either party).

The rule has been held to be the same for the deposition of the *party himself*, though this seems erroneous: 1896, Standard L. & A. Ins. Co. *v.* Tinney, 73 Miss. 726, 19 So. 662 (party out of State; admissible). Compare § 1416, *post*.

For the case of a witness *once present during the time of trial, but subsequently departing*, see *post*, § 1415.

[9] The statutes are collected in § 1411, *post*.

The statute's omission to enumerate this case should not injure the established common-law principle. But if the statute has not even given the power to order a deposition taken out of the State it would seem to be inadmissible because legally non-existent; 1886, Kaelin *v.* Com., 84 Ky. 354, 367, 1 S. W. 594 (statutory limits held exclusive; therefore the accused cannot take the deposition of a person abroad).

§ 1405. [1] ENGLAND: 1623, Anon., Godbolt 326 ("If a party cannot find a witness, then he is as it were dead unto him", and his former testimony may be read, "so as the party make oath that he did his endeavor to find his witness, but that he could not see him nor hear of him"); 1685, Oates' Trial, 10 How. St. Tr. 1227, 1285 (Oates: "My lord, I will then produce what he swore at another trial"; L. C. J. Jeffreys: "Why, where is he? Is he dead?"; Oates: "My lord, it has cost a great deal of money to search him out; but I cannot anywhere meet with him, and that makes my case so much worse that I cannot, when I have done all that man can do to get my witnesses together. I sent in the depth of winter for him, when I thought my trial would have come on before; but I could never hear of him"; L. C. J.: "Look you, though in strictness, unless the party be dead, we do not use to admit of any such evidence, yet if you can prove anything he swore at any other trial, we will indulge you so far"); 1726, Gilbert, Evidence, 60.

CANADA: 1907, Cuff *v.* Frazee S. & C. Co., 14 Ont. L. R. 263 (witness supposed to have gone to the U. S.).

UNITED STATES: *Federal:* 1899, Motes *v.* U. S., 178 U. S. 458, 20 Sup. 993 (testimony of one who had escaped through the negligence of the prosecuting officers, excluded);
Alabama: 1895, Thompson *v.* State, 106 Ala. 67, 17 So. 512; 1897, Mitchel *v.* State, 114 Ala. 1, 22 So. 71 ("after diligent search is not found within the jurisdiction of the Court", sufficient; mere inability to find at the usual residence or in the county, not sufficient); 1902, Jacobi *v.* State, 133 Ala. 1, 32 So. 158 (a "fruitless search for him in every county in which there is any apparent likelihood of his being found", may suffice, as amounting to proof of removal from the jurisdiction; requirements of such a search considered); 1905, Bardin *v.* State, 143 Ala. 74, 38 So. 833 (mere inability to find, after searching the county of usual residence, insufficient); 1906, Woodstock Iron Work *v.* Kline, 149 Ala. 391, 43 So. 362; 1913, Pope *v.* State, 183 Ala. 61, 63 So. 71 (former testimony; inability to find after diligent search is sufficient to admit; here a defendant's witness); 1921, Wigginton *v.* State, 205 Ala. 147, 87 So. 700 (absence or inability to find, held not sufficiently shown on the facts);
Arkansas: 1878, Shackleford *v.* State, 33 Ark. 539; 1886, Sneed *v.* State, 47 Ark. 186, 1 S. W. 68; 1894, Vaughan *v.* State, 58 Ark. 353, 370, 24 S. W. 885 ("upon diligent inquiry cannot be found"; the trial Court's

discretion to control); 1895, McNamara *v.* State, 60 Ark. 400, 30 S. W. 762; 1896, Harwood *v.* State, 63 Ark. 130, 37 S. W. 304; 1913, Paxton *v.* State, 108 Ark. 316, 157 S. W. 396; 1918, Rogers *v.* State, 136 Ark. 161, 206 S. W. 152;

California: 1899, People *v.* Plyler, 126 Cal. 379, 58 Pac. 904 (trial Court's determination controls in applying P. C. § 686, cited *post*, § 1411); 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (same); 1804, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (testimony before the magistrate, admitted under P. C. § 686; here the witness was in Mexico); 1904, People *v.* Barker, 144 Cal. 705, 78 Pac. 266 (similar); 1921, People *v.* Johnson, — Cal. App. —, 197 Pac. 135 (search by subpœna in every county, etc., held sufficient; witness' statement of intention to leave the State, considered);

Connecticut: 1902, Mechanics' Bank *v.* Woodward, 74 Conn. 698, 51 Atl. 1084 (former testimony of a witness "who has since gone to parts unknown", admitted, under Pub. Acts 1895, p. 503, c. 116); 1921, State *v.* Gaetano, 96 Conn. 306, 114 Atl. 82 (witness escaped from detention and not found after diligent efforts);

Florida: 1904, Dorman *v.* State, 48 Fla. 18, 37 So. 561 (witness for the defendant; former testimony not admitted on the facts); 1908, Putnal *v.* State, 56 Fla. 86, 47 So. 864;

Georgia: 1880, Gunn *v.* Wades, 65 Ga. 537, 541 (after which, Williams *v.* State, 19 Ga. 403, is probably of no consequence); 1890, Atlanta & S. R. Co. *v.* Randall, 85 Ga. 302, 314, 11 S. E. 706; 1907, Robinson *v.* State, 128 Ga. 254, 57 S. E. 315 (due diligence not used, on the facts);

Hawaii: 1907, Tsuruda *v.* Farm, 18 Haw. 434 (witness subpœnaed in two places and not found; showing held insufficient on the facts);

Indiana: 1911, Wilson *v.* State, 175 Ind. 458, 93 N. E. 609 (not found in or out of the State);

Iowa: 1896, Spaulding *v.* R. Co., 98 Ia. 205, 67 N. W. 227 (information given to an officer serving a subpœna, as indicating the sufficiency of search on which to base a return if not found);

Kansas: 1915, State *v.* Chadwell, 94 Kan. 302, 146 Pac. 420 (preliminary examination);

Louisiana: 1876, State *v.* Harvey, 28 La. An. 105; 1884, State *v.* Coudier, 36 La. An. 291; 1894, State *v.* White, 46 La. An. 1273, 1276, 15 So. 623; 1898, State *v.* Timberlake, 50 La. An. 308, 23 So. 276;

Michigan: 1912, Krouse *v.* Detroit U. R. Co., 170 Mich. 438, 136 N. W. 434 ("the proofs should be full and convincing"); 1922, People *v.* Schepps, — Mich. —, 186 N. W. 508 (former testimony admitted, the witness having disappeared and diligent search in Michigan and Canada having been made);

Minnesota: 1898, Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030 (person's declarations as to residence, and sheriff's return of not found, received);

Missouri: 1904, State *v.* Riddle, 179 Mo. 287, 78 S. W. 606 (due diligence not found on the facts);

Nebraska: 1919, Koenigstein *v.* State, 103 Nebr. 580, 173 N. W. 603 (former testimony of a witness who could not be found and had probably left the State held admissible in the trial court's discretion based on an adequate search in good faith);

Oklahoma: 1908, Driggers *v.* U. S., 21 Okl. 60, 1 Okl. Cr. 67, 95 Pac. 612 (witness said to be dead; the marshal's return on the subpœna, and testimony that "they had been told he was dead", held not enough; unsound); 1911, Warren *v.* State, 6 Okl. Cr. 1, 115 Pac. 812 (witnesses not to be found, and last heard from in Arkansas); 1913, Edwards *v.* State, 9 Okl. Cr. 306, 131 Pac. 956 (preliminary examination); 1916, Jeffries *v.* State, 13 Okl. Cr. 146, 162 Pac. 1137 (witness searched for and returned not found, on the faith of hearsay that he had left the State; deposition admitted, citing the above text with approval: "the doctrine announced in Driggers *v.* U. S. [*supra*] has never been followed by this Court, and we think is not the law"); 1917, Fitzsimmons *v.* State, 14 Okl. Cr. 80, 166 Pac. 453 (witness not found after diligent search within the State; former testimony admitted, following Jeffries *v.* State, *supra*);

Pennsylvania: 1895, Seitz *v.* Seitz, 169 Pa. 510, 32 Atl. 594, *semble;*

Texas: 1879, Sullivan *v.* State, 6 Tex. App. 319, 342; 1905, Smith *v.* State, 48 Tex. Cr. 65, 85 S. W. 1153 (former testimony of an absent person, excluded; this Court here appeared to be unable clearly to tell the profession just what rules it meant to lay down on these points; from this opinion it is impossible to say whether the exclusion is (1) because the witness was not sought for with sufficient diligence, or (2) because mere inability to find is never enough, but only absence from the jurisdiction, or (3) because the Texas statutes for depositions, *post*, §§ 1411, 1413, are the only sources of admissibility, and under them no provision at all is made for using testimony at a former trial in a criminal case, or (4) because the use of former testimony in a criminal case is always unconstitutional, under Cline *v.* State, cited *ante*, § 1398; the only things fairly apparent from the opinion are that Sullivan *v.* State, *sup. x*, is regarded as overruled, in Evans *v.* State, 12 Tex. App. 370, on some point or other, and that Cline *v.* State, *supra*, may be still law for some purpose or other, though its status is doubtful on another point, *ante*, § 1398);

Utah: 1902, State *v.* King, 24 Utah 482, 68 Pac. 418 (under Rev. St. 1898, § 4513);

Washington: 1915, Kennedy *v.* Canadian Pacific R. Co., 87 Wash. 134, 151 Pac. 252 (excluded, there being no showing of due diligence).

It ought equally to suffice for *depositions;* the principle is no different.[2]

(4) If the witness has been by the *opponent procured* to absent himself, this ought of itself to justify the use of his deposition or former testimony,[3] — whether the offering party has or has not searched for him, whether he is within or without the jurisdiction, whether his place of abode is secret or open; for any tampering with a witness should once for all estop the tamperer from making any objection based on the results of his own chicanery.

§ 1406. **Same: (5) Illness, Infirmity, Age, preventing Attendance.** Any physical incapacity preventing attendance in court, except at the risk of serious pain or danger to the witness, should be a sufficient cause of unavailability; and this has been almost universally recognized by Courts.[1] Certain distinctions, however, have from time to time received special notice.

(*a*) The *duration* of the illness need only be in probability such that, with regard to the importance of the testimony, the trial cannot be postponed.[2]

Contra: 1837, R. v. Hagan, 8 C. & P. 169; 1834, Crary v. Sprague, 12 Wend. N. Y. 45 (Nelson, J.: "Even diligent inquiry, without being able to find the witness, is not sufficient, though it is obvious there can be scarcely a shade of difference between the two cases, death and absence, either in principle or hardship"); 1826, Wilbur v. Selden, 6 Cow. N. Y. 164 (former testimony of a witness who could not be found and had declared that he was going to Pennsylvania, excluded); 1902, State v. Wing, 66 Oh. 407, 64 N. E. 514 (prior testimony of a witness not found after diligent search, and believed to be without the State, held not admissible in a criminal case, unless the absence was due to the accused's connivance).

For the admissibility of *statements made to the searchers*, as evidence of inability to find, see *post*, §§ 1414, 1789; and compare the rulings for *lost documents*, *ante*, § 1196; for *attesting witnesses* (*ante*, § 1313), for *persons not heard from* (*ante*, §§ 158, 664), and for *statements of intent* (*post*, § 1725).

[2] 1895, Burton v. State, 107 Ala. 68, 18 So. 240; 1903, People v. Witty, 138 Cal. 576, 72 Pac. 177; 1917, Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 Pac. 467 (witness not found after diligent search; deposition admitted, as if absent from the county, under Gen. St. 1915, § 7262; this ruling shows the good sense of not treating the legislative enumeration as if it exhausted all possible wisdom on the subject, for it never does or can); 1828, Tompkins v. Wiley, 6 Rand. Va. 242 (due diligence not shown on the facts); 1818, Pettibone v. Derringer, 4 Wash. C. C. 219.

Contra: 1666, Lord Morly's Case, Kelyng 55 ("Agreed, that if a witness who was examined by the coroner be absent, and oath is made that they have used all their endeavors to find him and cannot find him, that is not sufficient to authorize the reading of such examination"; compare this case *ante*, § 1364, note 47); 1851, R. v. Scaife, 5 Cox Cr. 243, 17 Q. B. 243.

[3] 1692, Harrison's Trial, 12 How. St. Tr. 851; 1851, R. v. Scaife, 5 Cox Cr. 243 (procurement by a co-defendant, held not sufficient as to a defendant not procuring); 1876, U. S. v. Reynolds, 1 Utah 322, 98 U. S. 158; 1893, Peddy v. State, 31 Tex. Cr. 547, 21 S. W. 542 (removal by contrivance of a private prosecutor does not affect the use by the State).

Contra: 1856, Bergen v. People, 17 Ill. 427.

§ 1406. [1] *Contra*, for former testimony: 1827, Doe v. Evans, 3 C. & P. 221, Vaughan, B.; 1893, Com. v. McKenna, 158 Mass. 207, 210, 33 N. E. 389 (for criminal cases). *Contra*, for a *party's* examination: 1912, Park v. Schneider, Alta. S. C., 6 D. L. R. 451 (plaintiff lived in Ohio, and was too ill to travel; his examination on discovery by defendant was taken, with leave to treat it as on a commission; the plaintiff was not allowed to use it on the trial, the credibility of the witness being important; this erroneous ruling indicates a failure to perceive that a party's examination taken by an opponent stands exactly on the footing of a deposition for present purposes; compare the similar fallacy in Johnson v. Birket, Ont., cited *ante*, § 1389).

[2] 1916, R. v. Noakes, 1 K. B. 581 ("The question [of illness] . . . is a question for the determination of the presiding judge", approving R. v. Stephenson, L. & C. 165; the "credible witness" required by the statute was here a constable who had seen the witness in bed; the testimony of a medical man, held not necessary); 1891, Mitchell, J., in Thornton v. Britton, 144 Pa. 130, 22 Atl. 1048: "The determination of this question in each case as it arises rests largely in the discretion of the Court. On a trial for a murder, for instance, the judge presiding would feel it his duty to enforce the attendance of a witness having knowledge of the crucial facts,

(*b*) As to the *degree* of the illness, the traditional phrase, "so ill as not to be able to travel", sufficiently indicates the requirements of common sense; and the "ability" is to be considered with reference to the risk of pain or danger to the witness. That the illness should be such as to make it impracticable to take the witness' deposition at his home has been said by one Court to be the correct limitation;[3] but this is certainly incorrect, for a deposition obtained from a person during illness could not be any better than his former cross-examined testimony or deposition, and would probably be much less trustworthy.[4] There is no reason why the application of the general principle in a given instance should ever come before a Court of Appeal; to the trial Court should be left the determination of the existence of the necessity in a particular case.

There is further no distinction properly to be made between *former testimony*[5]

even at some risk to the witness' health or life; while in a civil action he might feel free to hold that a much smaller risk to the witness would be sufficient to excuse him from personal attendance."

[3] 1870, Berney *v.* Mitchell, 34 N. J. L. 341; 1908, Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892 (approving Berney *v.* Mitchell, and taking the singular view that a deposition is better than a stenographic report).

[4] 1828, Mathews, J., in Miller *v.* Russel, 7 Mart. N. s. La. 268.

[5] The rulings recognizing this ground for using former testimony are as follows:

ENGLAND: 1737, Fry *v.* Wood, 1 Atk. 445; 1831, R. *v.* Savage, 5 C. & P. 143; the ensuing rulings are under St. 11 & 12 Vict. c. 42, allowing testimony before a committing magistrate to be used when the witness is "so ill as not to be able to travel"; most of them are obstinately narrow; 1850, R. *v.* Harris, 4 Cox Cr. 440 (bowel-complaint, not sufficient on the facts); 1850, R. *v.* Harney, 4 Cox Cr. 441 (woman's confinement a week before, sufficient); 1850, R. *v.* Ulmer, 4 Cox Cr. 441 (cold; not sufficient); 1862, R. *v.* Stephenson, 9 Cox Cr. 156 (woman daily expecting confinement; sufficient in trial Court's discretion); 1862, R. *v.* Welton, 9 Cox Cr. 296 (illness must be proved by medical man); 1871, R. *v.* Bull, 12 Cox Cr. 31 (bowel complaint two days before, not sufficient); 1874, R. *v.* Farrell, 12 Cox Cr. 606, L. R. 2 Cr. C. R. 116 (the witness was "very nervous and 74 years of age"; "it might be dangerous for her to be examined at all", and particularly in open court; but the deposition was held not admissible); 1876, R. *v.* Thompson, 13 Cox Cr. 182 (the witness was 87 years of age and "in such a great state of nervous excitement that it would be attended with great risk to her life to bring her into court to give evidence"; "it might bring on an attack of apoplexy; there is no actual disease or illness, only a predisposition to it"; but the deposition was excluded); 1878, R. *v.* Heesom, 14 Cox Cr. 42 (deposition of a woman in daily expectation of confinement was admitted); 1878, R. *v.* Wellings, L. R. 3 Q. B. D. 428 (same; here it was pointed out that the degree of illness should be left to the discretion of the trial judge); 1887, R. *v.* Pruntey, 16 Cox Cr. 344 (unsworn statement of child, under St. 48 & 49 Vict. c. 69, *post*, § 1828, not receivable as a deposition in her absence through illness, under St. 11 & 12 Vict. c. 42).

UNITED STATES: *Florida:* 1920, Blackwell *v.* State, 79 Fla. 709, 86 So. 224 (temporary absence by reason of illness, held sufficient in the trial Court's discretion); *Louisiana:* 1828, Miller *v.* Russel, 7 Mart. N. s. La. 268 (see citation *supra*); 1882, State *v.* Granville, 34 La. An. 1088 ("lying sick in hospital", sufficient on the facts); 1903, State *v.* Wheat, 111 La. 860, 35 So. 955 (testimony before the committing magistrate, of one since become too ill to be able to attend, admitted; the trial Court's determination of the facts is generally to control; on a rehearing, the testimony was held inadmissible because the witness could attend at the next term and because the prosecution had misled the defence by applying for a continuance); *Maryland:* 1829, Rogers *v.* Raborg, 2 G. & J. 60; *Michigan:* 1878, Howard *v.* Patrick, 38 Mich. 795, 799; 1900, Siefert *v.* Siefert, 123 Mich. 664, 82 N. W. 511 (temporary illness, not sufficient); 1910, People *v.* Droste, 160 Mich. 66, 125 N. W. 87 (woman about to be confined; testimony before the examining magistrate, admitted; careful opinion by Brooke, J.; virtually overruling Siefert *v.* Siefert, which held that the illness must be permanent); 1917, Neal *v.* Novelty Leather Works, 198 Mich. 598, 165 N. W. 681 (illness not sufficient on the facts); *New Jersey:* 1870, Berney *v.* Mitchell, 34 N. J. L. 341 (see citation *supra*, n. 3); *North Carolina:* 1908, Smith *v.* Moore, 149 N. C. 185, 62 S. E. 892 (mere doctor's certificate that witness was "too unwell to attend court", held not sufficient on the facts); *Oklahoma:* 1921, Valentine *v.* State, — Okl. Cr. —, 194 Pac. 254 (manslaughter; testi-

thus rendered necessary, and *depositions*;[6] although the statutes (*post*, § 1411) have dealt with the latter in almost every jurisdiction.

§ 1407. **Same: Attendance prevented by** (6) **Imprisonment,** (7) **Official Duty or Privilege;** (8) **Distance of Travel.** (6) The witness' *imprisonment* for crime, supposing him not to be disqualified for infamy, is no reason for excusing his non-production; for his production can presumably be obtained by order of Court.[1] So far, of course, as this is not the case, there is good reason for using his former testimony or deposition;[2] a new deposition, obtained in prison, could be no better than either.[3]

(7) An *official duty* may be sufficient cause for not producing the witness engaged in that duty; the sufficiency should be left to the trial Court.[4] Where

mony before magistrate of B., now ill and unable to attend, admitted for the State); *Pennsylvania:* 1827, Pipher *v.* Lodge, 16 S. & R. 214, 221 (inability to travel, not sufficiently shown on the facts); 1874, Emig *v.* Diehl, 76 Pa. 373; 1881, McLain *v.* Com., 99 Pa. 97 (for civil cases; for criminal cases, question reserved); 1891, Thornton *v.* Britton, 144 Pa. 130, 22 Atl. 1048 (*supra*, note 2); 1893, Perrin *v.* Wells, 155 Pa. 299, 300, 26 Atl. 543 (too ill to be present, sufficient); *Vermont:* 1918, Martin's Will, 92 Vt. 362, 104 Atl. 100 (witness "unable to attend court as a witness or to give a deposition"; former testimony admitted); *Wisconsin:* 1907, Spencer *v.* State, 132 Wis. 509, 112 N. W. 462 (see the citation *ante*, § 1398).

[6] ENGLAND: 1666, Lord Morly's Case, Kelyng 55 (before coroner); 1682, Lutterell *v.* Reynell, 1 Mod. 282; 1709, Altham *v.* Anglesea, 11 Mod. 212, per Gould, J.; 1719, 2 Lilly's Pract. Reg. 703 ("A witness who by reason of sickness, extreme age, or other cause, cannot come to a trial, may by order of Court be examined in the country, before any judge of the Court where the cause depends, in the presence of the attorneys of each side; and the testimony so taken shall be allowed to be given in evidence at the trial"); 1752, Bradley *v.* Crackenthorp, Dick. 182 ("the witness being aged and infirm and unable to travel", it sufficed); 1785, Jones *v.* Jones, 1 Cox 184 (deposition of one "above 80 years of age and unable to attend in person" admissible); 1808, Palmer *v.* Aylesbury, 15 Ves. Jr. 176 ("in such a state of health as not to be capable of attending"); 1813, Corbett *v.* Corbett, 1 Ves. & B. 335, 342 (order in chancery made for depositions to be read at law if the deponent proved "unable to attend" the trial by reason of illness; Lord Eldon lays down the conditions on which such an order will be made beforehand in chancery); 1817, Morrison *v.* Arnold, 19 id. 672 ("sick, incapable of travelling, or prevented by accident", is sufficient; said of depositions 'in perp. mem.'); 1908, Stewart's Case, 1 Cr. App. 57 (statute applied, the witness being ill).

UNITED STATES: *Conn.* 1775, Avery *v.* Woodruff, 1 Root 76 ("The deposition of a woman who lived within 20 miles of the court, that had a child of a month old, dangerously sick so that the mother could not leave it" was admitted, as "within the reason of the statute"); *Ga.* 1874, Baker *v.* Lyman, 53 Ga. 339, 341, 350 (excluding a deposition where the witness was not too ill to be able to testify); *N. H.* 1859, Hayward *v.* Barron, 38 N. H. 366; *N. Car.* 1903, Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928 (witness "unable to talk and physically unable to remain in court"; deposition received); *Okl.* 1897, Hanley *v.* Banks, 6 Okl. 79, 51 Pac. 662 ("infirmity" does not include the case of a wife kept at the bedside of her sick husband by the necessity of attending him); *Vt.* 1869, Johnson *v.* Sargent, 42 Vt. 195 (old age); *Va.* 1898, Taylor *v.* Malory, 96 Va. 18, 30 S. E. 472.

§ 1407. [1] 1896, State *v.* Conway, 56 Kan. 682, 44 Pac. 627 (former testimony admissible, *semble*, where by a life-sentence of imprisonment civil death has ensued, but not here where a year's sentence produced no such result and a deposition could have been taken in prison or the prisoner brought into court; opinion obscure).

Statutes providing for a writ of 'habeas corpus ad testificandum' are noted *post*, § 2199.

[2] 1851, Switzer *v.* Boulton, 2 Grant U. C. 693 (witness in the penitentiary and refusing to be re-examined, knowing that he could not be punished for contumacy more severely than by imprisonment; former testimony received), 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561 (life prisoner in a Federal penitentiary out of the State, the prison authorities having refused the request of the State Governor to bring the prisoner to testify).

[3] 1900, People *v.* Putnam, 129 Cal. 258, 61 Pac. 961 (conditions determined for granting order to produce convicts under statute).

[4] 1796, Mushrow *v.* Graham, 1 Hayw. 361 (deposition of a Collector of Imposts received, as one of those "the duties of whose offices oblige them to attend at a particular place for the discharge thereof"); 1828, Noble *v.* Martins, 7 Mart. N. S. 282 (deputy sheriff officially engaged elsewhere; admitted).

the witness, exercising a *privilege* as an official (*post*, §§ 2206, 2370–2372) refuses to attend and his attendance is not compellable, the case falls under the present principle of impossibility of compelling attendance, and an excuse for non-production clearly exists.[5]

(8) On grounds of the *personal inconvenience* of attendance from a distance, statutes (*post*, §§ 1411, 1412) have almost everywhere provided, for the case of depositions, that *residence beyond a certain distance*, or without the county, shall allow the use of a deposition; the same cause should be equally sufficient for using former testimony, though this has rarely been provided.[6] In a few statutes (*post*, § 1411) this notion of personal inconvenience has been given such consideration that in cities of a certain size depositions are in general admissible on the ground that "to require the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interest without any corresponding personal advantage."[7] This policy is a poor one. In the first place, there is no reason for exalting the sacrifices of a wholesale merchant or a banker above those of a farmer; one deserves no more consideration than the other; moreover, the sacrifice in rural districts may be even greater, for it may require a whole day for a farmer to travel to and from the court, while a city merchant may easily be kept informed by his clerk by telephone of the course of a trial and need usually not give up more than an hour or two for the purpose. In the second place, the notion that any citizen's private interests should override his duty to the community is a false one. The principle that the whole community, and every member of it, should join in rendering all possible aid to the establishment of truth and justice is a fundamental one in civilized society (*post*, § 2192). An occasional reminder of these duties is a wholesome thing; and the attendance for that purpose upon a session of a court of justice tends vividly to strengthen the appreciation of this vital principle. That the citizen should by law be encouraged and abetted in shirking his fundamental duty to aid in the vindication of the rights of his fellow-citizens is reprehensible. Such statutes should nowhere be imitated.

§ 1408. **Same: (9) Insanity, or other Mental Incompetency.** A witness who has become *insane* is no longer qualified; his testimony in court is no longer available; and by universal concession his former testimony[1] or dep-

[5] Distinguish the following: 1856, Dubois' Case, Wharton, Digest of International Law, I, 668, Lawrence's Wheaton's International Law, 393 (upon the Netherlands minister's consenting to give his deposition out of court, but not subject to cross-examination, the district-attorney at Washington declined to take it, as "it would not be admitted as evidence"). For the case of the King, see *ante*, § 1384.

[6] Most of the following cases have reference to one of the statutes given *post*, § 1411: *Former testimony:* 1883, Broach *v.* Kelly, 71 Ga. 698, 704 (in adjacent county, insufficient); 1896, Spaulding *v.* R. Co., 98 Ia. 205, 67 N. W. 227 (absence from the county, sufficient); 1885, State *v.* Allen, 37 La. An. 685 (not in the parish, *semble*, sufficient); *Deposition:* 1848, McLane *v.* State, 4 Ga. 335 (deposition by commission taken for defendant of persons within the State, excluded, because the authorizing statute covered civil cases only); 1869, Riegel *v.* Wilson, 60 Pa. 388, 392, *semble* (residence more than 40 miles distant, sufficient).

[7] 1896, Atkinson, J., in Western & A. R. Co. *v.* Bussen, 95 Ga. 584, 23 S. E. 207, quoted *post*, § 1417.

§ 1408. [1] 1880, Marler *v.* State, 67 Ala. 62 (Somerville, J.: "There is no real or practical

osition [2] may therefore be used. So also the loss of any one of the faculties necessary for testimony (*ante*, § 478) furnishes an equal reason, whether the loss occurs through disease or through senility. This may be the case where the lost faculty is that of *speech*,[3] or (under certain circumstances) of *sight*,[4] or of *memory*;[5] and it would seem that a total loss of memory through lapse of time alone should equally suffice, providing the Court is entirely satisfied of the fact of the loss.[6]

§ 1409. **Same: (10) Disqualification by Interest or Privilege in the Cause.** A disqualification by subsequently-acquired *interest*, or the exercise of a *privilege*, makes the witness' present testimony unavailable, and hence should suffice to allow resort to his deposition or former testimony. This doctrine was not accepted in early English common-law practice;[1] which was followed by our Courts in a few instances.[2] But it was well established in English

difference between the death of the mind and the death of the body"); 1895, Thompson *v.* State, 106 Ala. 67, 17 So. 512; 1868, Cook *v.* Stout, 47 Ill. 531; 1892, Walkup *v.* Com., — Ky. —, 20 S. W. 221; 1878, Howard *v.* Patrick, 38 Mich. 799; 1883, Whitaker *v.* Marsh, 62 N. H. 478 (in effect overruling a contrary statement in State *v.* Staples, 47 N. H. 119); 1921, Com. *v.* Loomis, 270 Pa. 254, 113 Atl. 428 (insanity); 1908, People *v.* Hernandez, 14 P. R. 217, 225, *semble*.

For evidencing insanity by *prior or subsequent condition*, see *ante*, § 233; for evidencing it by *inquisition of lunacy*, see *post*, § 1671; and in general, *ante*, § 497.

[2] 1790, R. *v.* Eriswell, 3 T. R. 707; 1841, R. *v.* Marshall, Car. & M. 147 (even where temporary only); 1913, Atwood *v.* Atwood, 86 Conn. 579, 86 Atl. 29.

[3] 1857, R. *v.* Cockburn, 7 Cox Cr. 265 (stroke of paralysis rendering the witness unable to hear or to speak; sufficient).

[4] 1705, Kinsman *v.* Crooke, 2 Ld. Raym. 1166 (the witness had become blind; his deposition in chancery was used for those parts of his testimony which depended on his consultation of documents); 1883, Houston *v.* Blythe, 60 Tex. 509, 512 (sufficient, where the witness had lost his eyesight and the testimony necessarily involved the examination of documents).

[5] 1861, R. *v.* Wilson, 8 Cox Cr. 453 (illness of the brain affecting memory, sufficient); 1895, Central R. & B. Co. *v.* Murray, 97 Ga. 326, 22 S. E. 972 (loss of memory by old age); 1874, Emig *v.* Diehl, 76 Pa. 373 ("such a state of senility as to have lost his memory of the past"); 1879, Rothrock *v.* Gallagher, 91 Pa. 112 ("bereft of memory by senility or sickness"); 1819, Drayton *v.* Wells, 1 Nott & McC. S. Car. 247; 1879, Railroad *v.* Atkins, 70 Tenn. 250.

[6] The difficulty is that the witness must be called in order that this fact may appear, so that in practical application there would be no dispensation of his presence; moreover, he might in some cases be able to use the deposition or report of testimony as a record of past recollection (*ante*, §§ 737, 761). *Sanctioning* the above cause: 1901, State *v.* N. O. Waterworks Co., 107 La. 1, 31 So. 395 (former testimony of a witness who, "by reason of the lapse of time, 15 years, and his age, was no longer able to remember the facts testified to", held admissible; following Jack *v.* Woods, Pa., *infra*); 1857, Jack *v.* Woods, 29 Pa. 378, *semble*. *Repudiating it:* 1913, Rio Grande So. R. Co. *v.* Campbell, 55 Colo. 493, 136 Pac. 68 (new trial 5 years later, but the witness a young man of unimpaired health and mind); 1868, Cook *v.* Stout, 47 Ill. 531, *semble;* 1921, Stearns Lumber Co. *v.* Howlett, — Mass. —, 131 N. E. 217 (witness testifying about 1920 could not recall the events fully, but stated that his recorded testimony of 1916 before a former master represented his "best recollection"; held, that to allow the witness to adopt and read that former testimony in lieu of present fragments of recollection "would be to adopt a further exception to the rule . . . and would not be conducive to the practical administration of justice"; rather say that this ruling exhibits glaringly the artificiality and mental obliquity of the rules of Evidence as still administered by able minds in a hard rut); 1861, Robinson *v.* Gilman, 43 N. H. 297; 1883, Velott *v.* Lewis, 102 Pa. 326, 333; 1819, Drayton *v.* Wells, 1 Nott & McC. S. Car. 248.

§ 1409. [1] 1702, Holcroft *v.* Smith, 1 Eq. Cas. Abr. 224 (Common Pleas); 1718, Baker *v.* Fairfax, 1 Str. 101. So also for depositions 'in perpetuam memoriam': 1703, Tilley's Case, 1 Salk. 286 (the witness had by inheritance become interested; "Trevor, C. J., held that they ought [to be read]; for that he was disabled to give evidence by the act of God, so that it was in effect the same thing as if he were dead. Tracy and Blencow *contra*"; and the K. B. agreed with the majority).

[2] 1907, Greenlee *v.* Mosnat, 136 Ia. 639, 111 N. W. 996 (former testimony of a party now dis-

chancery practice,[3] and this would probably be generally followed in our Courts.[4] The analogies of the case of an attesting witness (*ante*, § 1316) are in harmony with this result.

§ 1410. **Same: (11) Disqualification by Infamy.** The same principle recognizes disqualification by *infamy* (or conviction of crime) as cause for using a deposition or former testimony;[1] but this has been denied by a few Courts,[2] apparently upon the notion that competency at the time of trial is essential. If this were true, then death itself, as well as insanity and interest, would be insufficient to allow the use of a deposition. There is no support for such a notion; the time of the witness' testifying is here the time of the deposition

qualified by the opponent's death; St. 1898, c. 9, § 1, quoted *post*, § 1669, n. 2, held not to alter this result); 1892, Messimer *v.* McCray, 113 Mo. 382, 389, 21 S. W. 17 (deponent incompetent since taking of deposition, excluded); 1848, Fagin *v.* Cooley, 17 Oh. 44, 50; 1808, Irwin *v.* Reed, 4 Yeates Pa. 512; 1828, Chess *v.* Chess, 17 S. & R. Pa. 412 (these Pennsylvania cases are no longer law; see the cases in note 4, *infra*); 1915, State *v.* Rogers, 101 S. C. 280, 85 S. E. 636 (witness disqualified since testifying; excluded, because "the present case did not fall within any of the exceptions"; unsound); 1896, Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142 (party made incompetent by opponent's death); 1917, Lyen *v.* Lyen, 98 Wash. 498, 167 Pac. 1113 (the time of testifying controls; here the husband was joined as defendant in an action by his wife for alienation of affections, and his deposition was taken, then the case was dismissed as against him; his deposition was held inadmissible as of the time offering it, because under Rem. Code § 1214 the marital privilege applied except in "proceedings by one against the other"; unsound); 1909, Sayre *v.* Woodyard, 66 W. Va. 288, 66 S. E. 320.

The following ruling seems erroneous: 1859, Hayward *v.* Barron, 38 N. H. 371 (liability to self-incrimination, not sufficient).

[3] 1702, Holcroft *v.* Smith, 2 Freem. 260, 1 Eq. Cas. Abr. 224; 1715, Gosse *v.* Tracy, 2 Vern. 699, 1 P. Wms. 287; 1743, Haws *v.* Hand, 2 Atk. 615 (interest sufficient, though the interest arose by the witness' own act in becoming administrator and therefore plaintiff; Hardwicke, L. C.); 1750, Glynn *v.* Bank, 2 Ves. Sr. 42; 1774, Brown *v.* Greenly, Dick. 504.

[4] *Colo.* Comp. St. 1921, § 6556 (in any suit in which one party is disqualified by reason of death, etc. of the other, and "the defendant in any such suit has previously been required to testify" under other provisions, the report of testimony may be read for the defendant, "so far as the same relates to the estate" etc.); *D. C.* 1898, Bowie *v.* Hume, 13 D. C. App. 286, 318 (testimony of one disqualified by survivorship admitted); *Kan.* 1911, State *v.* Stewart, 85 Kan. 404, 116 Pac. 489 (husband privileged not to testify against his wife, and claiming his privilege; his former testimony, admitted; able opinion by Johnston, C. J.); 1915, New *v.* Smith, 94 Kan. 6, 145 Pac. 880 (testimony, at a former trial, by a party now disqualified as survivor, admitted; the several local statutes examined); *Mass.* 1804, Gold *v.* Eddy, 1 Mass. 1; 1843, Sabine *v.* Strong, 6 Metc. 277; *Pa.* 1875, Evans *v.* Reed, 78 Pa. 415, 84 Pa. 254 (party becoming incompetent as survivor; former testimony admissible); 1876, Pratt *v.* Patterson, 81 Pa. 114 (same; former testimony); 1880, Walbridge *v.* Knipper, 96 Pa. 50 (same); 1879, Hay's Appeal, 91 Pa. 265, 268 (deposition; same); 1882, Galbraith *v.* Zimmerman, 100 Pa. 374 (same; former testimony); 1898, Wells *v.* Ins. Co., 187 Pa. 166, 40 Atl. 802 (physician becoming subject to privilege by passage of statute; deposition admitted).

Conversely, the deposition of one who *becomes competent after taking* and before offering should be excluded. *Contra:* 1912, Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792 (deposition of T. J. M., alleged to be husband of plaintiff, offered against her, a divorce having been granted to T. J. M. after deposition taken but before offered; admitted).

For the effect of *time* on privilege, see *post*, § 2237 (marital privilege); and for its effect on disqualification of an *attesting witness*, see *post*, § 1510.

§ 1410. [1] 1847, State *v.* Valentine, 7 Ired. N. Car. 225, 227; 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561 (approving the above text).

[2] 1887, St. Louis I. M. & S. R. Co. *v.* Harper, 50 Ark. 157, 159, 6 S. W. 720 (subsequent infamy does not admit; but here the Court added a touch of the absurd by ruling that even the ensuing death by hanging of the convicted felon did not admit his deposition); 1898, Redd *v.* State, 65 Ark. 475, 47 S. W. 119; 1817, LeBaron *v.* Crombie, 14 Mass. 235; 1882, Webster *v.* Mann, 56 Tex. 119; 1914, Goldstein *v.* State, 75 Tex. Cr. 390, 171 S. W. 709 (following Webster *v.* Mann, and here applying it to a conviction in another State since the former trial).

or former testimony; his qualifications then to speak the truth are alone concerned.[3]

§ 1411. **Same: Statutes affecting Depositions 'de bene esse.'** The conditions of necessity in which a witness' present testimony in court cannot be had are now in almost every jurisdiction dealt with, in part at least, by statutes.[1]

[3] Compare §§ 483, 583, *ante*.

§ 1411. [1] For certain decisions and other statutes which concern *bastardy* and *probate of wills*, see *post*, §§ 1413, 1417; for the following statutes in their bearing on the rules of *notice* and *cross-examination*, see *ante*, §§ 1380–1382:

ENGLAND: In criminal cases: 1867, St. 30 & 31 Vict. c. 35, § 2 (admissible if the witness is dead or if "there is no reasonable probability that such person will ever be able to travel or to give evidence"); in civil cases, the following series of statutes were progressively enacted, the Rules of 1883 being now in force (these statutes are cited more fully *ante*, § 1380): 1830–31, St. 1 Wm. IV, c. 22, § 10 (deposition may not be read unless "the deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial"); 1873, Rules of Procedure, under Judicature Act of 1873, c. 66, No. 36 (depositions are allowed where the witness' attendance in court "ought for some sufficient cause to be dispensed with"); 1875, Rules of Supreme Court, under Judicature Act of 1875, c. 77, Order XXXVII, Rule 4, now Rule 5 of the same Order in Rules of 1883 ("where it shall appear necessary for purposes of justice" depositions may be authorized and received in evidence); Rule 18 ("Except where by this Order otherwise provided, or directed by the Court or a Judge, no deposition shall be given in evidence at the hearing or trial of any cause or matter without the consent of the party against whom the same may be offered, unless the Court or Judge is satisfied that the deponent is dead or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing of trial"); 1883, Nadin *v.* Bassett, L. R. 25 Ch. D. 21 (personal identity of plaintiff; commission to take plaintiff's testimony in New Zealand, refused on the facts); 1887, Burton *v.* Railway, 35 W. R. 536, Kay, J. (the witness, under the above Order, must be "incapable of being examined"); 1894, St. 57 & 58 Vict. c. 41, § 16 (Prevention of Cruelty to Children; like St. 4 Edw. VII, *infra*, with an additional clause that the Court must be satisfied that the evidence of the child "is not essential to the just hearing of the case"); 1904, R. *v.* Hale, 20 Cox Cr. 739 (St. 57 & 58 Vict. c. 41, § 16, construed as to the child's evidence being "essential"); 1904, St. 4 Edw. VII, c. 15, § 13 (Prevention of Cruelty to Children Act; in trials for offences under this act, "where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child", in respect of whom an offence of cruelty is charged, "would involve serious danger to its life or health", the sworn deposition of the child may be taken); ib. § 14 (similar provision for the admission of a child's depositions taken under this or certain other acts); St. 1908, 8 Edw. VII, c. 67, §§ 28, 29 (Children Act; where the attendance at court of a "child or young person", the victim of the alleged offence, "would involve serious danger to the life or health of the child or young person", the deposition may be taken and used); St. 1914, 4 & 5 Geo. V, c. 59, Bankruptcy, § 141 (deposition of deceased debtor or his wife or any witness in bankruptcy, admissible).

CANADA: *Dominion:* R. S. 1906, c. 139, §§ 96, 102, 103, c. 140, §§ 64, 70, 71 (in proceedings in the Supreme or Exchequer Court, any person's deposition may be ordered when in the Court's opinion it is "owing to the absence, age, or infirmity, or the distance of the residence of such person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient to do so"; the depositions may be used without further proof, "saving all just exceptions"); c. 146, Crim. C. § 997 (depositions on commission out of Canada; the rules for criminal cases to be "as nearly as practicable" the same as in civil cases); c. 146, Crim. C. § 998 (the deposition of a sick person taken under ib. § 995 is admissible if the person is dead or if "there is no reasonable probability that such person will ever be able to attend at the trial to give evidence"); c. 146, Crim. C. § 999 (a deposition at a prior investigation of the charge or testimony at a former trial is admissible if the witness "is dead, or so ill as not to be able to travel, or is absent from Canada"); St. 1913, 3 & 4 Geo. V, c. 13, § 30 (amending Crim. Code, 1906, § 999; allowing former testimony or deposition to be used also "if such person refuses to be sworn or to give evidence"); St. 1919, 9 & 10 Geo. V, c. 36, § 81 (bankruptcy; "in case of the death of the debtor or his wife, or of a witness whose evidence has been received", etc., the deceased's deposition is admissible);

Alberta: Rules of Court 1914, No. 395 (the Court may empower a deposition to be given in evidence "on such terms as may seem just"); No. 409 (commission for persons out of the jurisdiction; like Ont. Rule 287);

British Columbia: Rev. St. 1911, c. 58, § 57

(Supreme Court; "on special grounds", the Court may order that 'viva voce' testimony be dispensed with); c. 67, §§ 30, 31 (special rules prescribed for divorce); c. 58, §§ 57, 59 (quoted *ante*, § 1380); Rules of Court 1912, No. 500 (like Eng. Ord. 37, R. 18);

Manitoba: Rev. St. 1913, c. 46, Rule of Court 464 (deposition may be admitted on terms directed by the Court); Rules 483, 484 (production of affiant for cross-examination may be required); Rules 500, 514 (depositions taken on commission of any "aged or infirm person resident within Manitoba, or of any person who is about to withdraw therefrom or who is residing without the limits thereof", may be taken; when taken on commission, they may be given in evidence "without any other proof of the absence from this country" than the solicitor's or agent's affidavit of belief); c. 44, § 138 (affidavit of a party or witness without the judicial district or the province may be received, in county courts; but "where it is reasonably practicable", the judge may require his appearance); c. 47, § 57 (Surrogate Court may allow testimony by deposition, where the witness "is without the limits of Manitoba, or where by reason of his illness or otherwise the Court does not think fit to enforce the attendance of the witness in open court");

New Brunswick: Consol. St. 1903, c. 111, § 263 (Supreme Court; depositions of witnesses taken in the Province by reason of illness, etc., are receivable; but if they "shall at the time of the trial be in the Province and able to travel, they shall be required to give their testimony 'viva voce' at such trial"); § 272 (Supreme Court; other depositions and commissions; the examination shall not be read unless the deponent "is out of the Province, or dead, or unable from sickness or other infirmity to attend the trial"); c. 112, §§ 84, 86 (Supreme Court in equity; depositions may be read as in c. 111);

Newfoundland: Cons. St. 1916, c. 83, Ord. 33, R. 1 (like Ont. Rule 269; R. 18 (except as otherwise ordered, no deposition shall be received unless the witness "is dead, or beyond the jurisdiction of the court, or resident in Labrador, or is unable from sickness or other infirmity to attend");

Northwest Territories: Consol. Ord. 1898, c. 21, Rule 263 (like Ont. Rule, 269; Rule 267 (deposition may be received "on such terms if any" as the Court directs); Rule 280 (except as otherwise directed, no deposition shall be received unless "the deponent is dead or beyond the jurisdiction of the court or unable from sickness or other infirmity to attend");

Nova Scotia: Rev. St. 1900, c. 163, § 41 (the deposition of a judge of the Supreme Court may be used "if he is, owing to official business, unable to attend such trial"); c. 149, § 41 (in municipal courts, a deposition may be read when the witness is "absent from the county, aged, infirm, or otherwise unable to travel"); Rules of Court 1900, Ord. 35, R. 1 ("any witness whose attendance in court ought for some sufficient reason to be dispensed with" may by order of Court be examined before a commissioner); R. 4 (the Court may empower a party to give a deposition in evidence "on such terms if any as the Court or judge directs"); R. 17 (except as otherwise provided in this Order or directed by a judge, no deposition shall be given in evidence without consent, unless the deponent "is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial");

Ontario: Rev. St. 1914, c. 63, § 118, par. 1, 2 (division courts; the deposition of a person without the Province may be taken, but, if he is the party applying or an employee of his, not unless "a saving of expense will be caused thereby, or unless it is clearly made to appear that the person is aged, infirm, or unable from sickness to appear as a witness"); par. 3 (a deposition may be taken, if it appears that "a material and necessary witness residing within the Province is sick, aged, or infirm, or that he is about to leave the Province, and that his attendance at court as a witness cannot by reason thereof be procured"; it "may be used upon the trial, saving all just exceptions"); par. 4 ("a witness who resides in a remote part of the Province and at a great distance from the place of trial, if it be clearly made to appear that his attendance cannot be procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance, should not under the circumstances be required" to incur it, may be examined by deposition); Rules of Court 1914, R. 269 (affidavit not to be authorized, if the witness "can be produced"; quoted *ante*, § 1380); R. 271 ("The Court . . . may permit such deposition to be given in evidence"); R. 287 (commission for a person residing out of Ontario; the deposition may be used "without any other proof of the absence from Ontario of the witness" than the affidavit of the solicitor or agent);

Prince Edward Island: St. 1889, § 56 (depositions shall not be read unless the witness "is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or infirmity or other sufficient cause to attend the trial"); St. 1910, c. 8, § 48 (chancery proceedings; deposition before a master shall not be read without consent "unless the inability of the witness to personally attend exists to the satisfaction of the Court at the time such evidence is offered"); St. 1910, c. 3, § 45 (special provision in election trials for a witness who "intends to leave the Province and cannot attend the trial"),

Saskatchewan: Rev. St. 1920, c. 41, § 28 (surrogate's court);

Yukon: Consol. Ord. 1914, c. 48, Rule 273 (like Ont. Rules of Court, 269; R. 277 (like N. W. Terr. Rule 267); c. 48, Rule 290 (like N. W. Terr. Rule 280).

UNITED STATES: *Federal:* Rev. St. 1878, § 861, Code § 1360 ("The mode of proof in trials of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided"); § 863, Code § 1364 (in civil cause in a district or circuit court a deposition may be taken "when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when he is ancient and infirm"); § 865, Code § 1366 ("Unless it appears to the satisfaction of the Court that the witness is then dead, or gone out of the United States, or to a greater distance than 100 miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause"); § 866, Code 1367 ("In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a 'dedimus potestatem' to take depositions according to common usage; . . . and the provisions of the three sections last preceding shall not apply to any deposition to be taken under the authority of this section"); for the construction of the foregoing provisions, see particularly *post*, § 1417, *ante*, § 1381; St. 1909, Feb. 16, c. 130, No. 230, Code § 3116 (35 Stat. L. p. 620), § 16 (rules for depositions in naval courts); St. 1911, Mar. 3, c. 231, Judicial Code, §§ 167, 168, Code, §§ 1132, 1136 (testimony for Court of Claims; superseding Rev. St. §§ 1081, 1082); Equity Rules 1912, Rules 46–48; St. 1916, Aug. 29, c. 418, § 3, 39 Stats., amending Rev. St. § 1342 (Articles of War; Art. 25: "in any case not capital" before a military court a deposition may be read "if such deposition be taken when the witness resides, or is found, or is about to go" beyond the State, etc., or "beyond the distance of 100 miles", or when "the witness by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause is unable to appear and testify"; "provided that testimony by deposition may be adduced for the defense in capital cases"); St. 1920, June 4, c. V, subchapter II (Articles of War; Art. 25 re-enacts the terms of St. 1916, *supra*); 1904, Zych *v.* American Car. & F. Co., C. C. A., 127 Fed. 723, 728 (cited *ante*, § 1381); 1917, Block *v.* Arrowsmith Mfg. Co., D. C. D. N. J., 243 Fed. 775 (Equity Rule 47 applied); for a valuable account of the practice under the Federal statutes and the Equity Rules of 1912, see the articles of Mr. Wallace R. Lane, on the Federal Equity Rules, in the Harvard Law Rev. XXVII, 629, XXIX, 55, XXXV, 276.

Alabama: Code 1907, § 4030 (deposition may be taken (1) if witness is a woman, or (2) "from age, infirmity, or sickness, is unable to attend court", or (3) resides "more than 100 miles from the place of trial, computing by the route usually traveled, or resides out of or is absent from the State", or (4) is "about to leave the State and will probably not return until after the trial", or (5) when "the claim or defense, or a material part thereof, depends exclusively on the evidence of the witness", or (6) when the witness is "the Governor, secretary of State, State treasurer, State auditor, attorney-general, superintendent of education, commissioner of agriculture and industries, examiner of public accounts, or the head of any other department or bureau of the State government, chancellor, judge, or clerk of any court of record, register in chancery, or sheriff; or president, director, or other officer of a bank incorporated in this State; postmaster or other officer of the United States; or practicing physician or lawyer; or a person constantly employed on any steamboat or other water-craft, or on any turnpike, or manufactory, or about the engine or other machinery of a railroad or is a superintendent, secretary, treasurer, master of road repairs, or conductor of any railroad; or is a telegraph operator; or a teacher of a public or private school actually engaged in teaching, or a minister of the gospel, or pastor of a religious society in charge of any diocese, parish, church, district, or circuit"); § 4044 (deposition not usable "if it appear at the trial that the cause for which it was taken, or some other cause, does not then exist, unless such witness is dead or of unsound mind"); § 4045 (where the witness resides in county and affidavit of necessity of personal attendance is made, deposition must be suppressed, "unless the witness, from age, infirmity, or sickness, is unable to attend court"); § 4660 (in justices' courts, depositions may be taken also of witnesses residing out of county and 10 miles distant); § 7886 (in criminal cases, defendant may take the deposition of "any witness who from age, infirmity, or sickness, is unable to attend court; or who resides out of the State, or more than 100 miles from the place of trial, computing by the route usually traveled; or who is absent from the State; or where the defense, or a material part thereof, depends exclusively on the testimony of the witness"); § 7888 (so also for prosecution's witness within the State, on defendant's written consent filed); § 7889 (a deposition is not admissible "if it appear that the witness is alive and able to attend court and within its jurisdiction"); § 7890 (convict's deposition may be taken by defendant); § 6559 (testimony of convicts in civil suits may be taken "as in other cases of taking by interrogatories"); § 6560 (in criminal cases, the convict may be taken to court to testify).

Alaska: Comp. L. 1913, §§ 1476, 1489 (like Or. Laws 1920, §§ 837, 851, except that § 1476, subdiv. 3, substitutes "about to go more than 100 miles beyond the place of trial").

Arizona: Rev. St. 1913, P. C. § 1249 (deposition of witnesses in the State taken by

accused, admissible if the witness "is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); § 1261 (deposition of a witness residing out of the State, taken by accused, admissible if "the witness is unable to attend from any cause whatever"); § 1713 (in civil cases, "no deposition of a witness shall be permitted to be read in evidence unless the party offering the same, his agent, attorney, or some competent person, shall first make oath that the witness is without the limit of the county where the suit is pending, or more than 50 miles from the place of trial, or that such witness is dead, or that by reason of age, sickness, infirmity, or official duty, such witness is unable to attend the court"); §§ 752, 768 (testimony on contested probate of will, admissible in subsequent contests over the will if the witness "is dead or has permanently removed from this State"); § 753 (like Cal. P. C. § 686).

Arkansas: Dig. 1919, § 4206 (deposition is usable (1) "where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the State, or is in the military service of the United States, or of this State"; (2) "where the witness is the Governor, Secretary of State, auditor or treasurer of this State, a judge or clerk of a court, a president, cashier, teller, or clerk of a bank, a practicing physician, surgeon, or lawyer, or keeper, officer, or guard of the penitentiary"; (3) "where, from age, infirmity, or imprisonment, the witness is unable to attend court, or is dead"; (4) "where the witness resides 30 miles or more" from the place of trial, "unless the witness is in attendance on the court"); § 4208 (the Court may order personal attendance, on affidavit that his testimony "is important, and that the just and proper effect of his testimony cannot, in a reasonable degree, be obtained without an oral examination before the jury"); § 4210 (deposition may be taken of "any witness 'de bene esse', which may be used under the circumstances described in § 4206"); § 3115 (depositions for the accused in criminal cases are usable "upon the death of the witness or his becoming mentally incapable of testifying, or physically incapable of attending the trial or giving his testimony, or a non-resident of the State, or absent therefrom, so that he could not be summoned"; but in last two cases defendant's affidavit "that he has tried in good faith to procure the attendance of such witness and been unable to do so" is necessary); § 10517 (on a will-probate, the attesting-witness' deposition is admissible if he resides out of State, or is confined in "another county or corporation" under legal process, or is "unable from sickness, age, or other infirmity, to attend", or reside more than 50 miles distant); § 10521 (testimony on application for probate, and "any deposition lawfully taken out of Court", "of witnesses who cannot be produced at a trial afterward before a jury", is admissible).

California: C. C. P. 1872, §§ 2020, 2021 (deposition of a witness out of the State may be taken; that of a witness in the State may be taken, 1, when he is a party, or an officer or member of a corporation-party, or a beneficiary of the action; 2, when he resides out of the county or more than 50 miles distant; 3, when he is "about to leave the county . . . and will probably continue absent when the testimony is required"; 4, when he, "otherwise liable to attend the trial, is nevertheless too infirm to attend"; 5, for a motion or like proceedings; 6, when the witness "is the only one who can establish facts or a fact material to the issue; provided that the deposition of such witness shall not be used if his presence can be procured at the time of the trial"); § 2032 (if taken under subdiv. 2, 3, or 4, above, "proof must be made at the trial that the witness continues absent or infirm, or is dead"); § 2022 (depositions taken and returned may be read except as provided in § 2032); § 1997 (production of a witness imprisoned in the county may be required); P. C. 1872, § 686 (testimony before a committing magistrate, or a deposition taken conditionally for the prosecution, admissible if the witness is "dead, or insane, or cannot with due diligence be found within the State"; quoted fully *ante*, § 1387; see the interpreting decisions cited *ante*, § 1398); § 1204 (motion for mitigation or aggravation of sentence; depositions allowed, under certain conditions); §§ 1335, 1345 (depositions taken for the accused, or, except in homicide, for the prosecution, usable if the witness is "unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); § 1346 (deposition of a jail-prisoner may be taken for the accused, subject to the foregoing); § 1362 (depositions taken on commission out of the State by the accused may be read upon a showing "that the witness is unable to attend from any cause whatever"); St. 1905, c. 540 (amends P. C. 1872, § 882, applying to depositions for the prosecution before the committing magistrate, by providing that "such deposition may be used upon the trial of the defendant, except in cases of homicide, under the same conditions as mentioned in § 1345", but this section is not to apply to an accomplice); Pol. C. 1872, § 282 (gubernatorial election contests; depositions admissible by "the same rule as . . . on the trial of civil actions").

Colorado: Comp. L. 1921, C. C. P. § 376 (deposition may be taken where the witness (1) is a party or a beneficiary, (2) "resides out of the county", (3) "is about to leave the county . . . and will probably continue absent when the testimony is required", (4) "though otherwise liable to attend the trial, is nevertheless too infirm to attend", (5) "is for any other cause expected to be unable to attend the trial"); § 378 ("If the deposition be taken by

reason of the absence, or intended absence, from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent or infirm, to the best of deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of a witness"); Const. 1876, Art. II, § 17, Comp. St. 1921, § 7086 (deposition by either party in a criminal case, admissible, unless "in the opinion of the Court, the personal attendance of the witness might be procured by the prosecution or is procured by the accused"); § 5207 (depositions of witnesses to a will, "non-resident" or "resident out of the county" of application for probate, admissible).

Columbia (District): Code 1919, § 1058 (depositions 'de bene' may be taken of witness living beyond the District, or likely to go beyond it or out of the U. S. and not return, or infirm or aged or if for any reason it is feared the testimony will not be obtainable, or if during the trial, illness or other cause prevents attendance; but "if at the time of the trial the witness can be produced to testify in open court, the deposition shall not be read in evidence; but if the attendance of the witness can not be produced, then the said deposition shall be admissible in evidence"); § 1060 (depositions of persons out of the District taken on commission shall not be admitted at the trial "if at the time the witness be present in the District, and his attendance can be obtained by the process of the court"); § 144 (in will cases, depositions taken on commission and 'de bene' "may be read").

Connecticut: Gen. St. 1918, § 5707 (depositions may be taken, in civil actions, or persons (1) living out of the State, (2) living more than 20 miles from place of trial, (3) "going to sea or out of the State", (4) "by age or infirmity unable to travel to court", (5) confined in jail; but nothing is said as to their admission); § 5708 (for persons more than 60 years old, depositions may be taken, and used if deponent is "unable to attend and testify"); § 7512 (depositions of persons in military or naval service may be used); § 6637 (depositions for accused, admissible "by reason of bodily infirmity or residence out of the State").

Delaware: Rev. St. 1915, § 3085, as reenacted by St. 1921, c. 134, § 5 (the mother's deposition in a bastardy case, admissible "if her attendance cannot be procured").

Florida: Rev. G. S. 1919, §§ 2741, 2756 (deposition may be taken if the witness "reside out of the county" or "be bound on a voyage to sea, or be about to go out of the State to remain until after the trial", or "be very aged or infirm", or upon affidavit that party "believes that a material part of his claim or defence depends upon the testimony of such witness"; no conditions of admissibility specified); § 2765 (deposition may be taken of an attesting-witness to a will residing out of the State); § 3372 (on adjournment or continuance before a justice of the peace, depositions of witnesses in attendance may be taken and used on trial "as if such testimony were given at the trial"); § 3605 (at a probate contest, a deposition is usable if "the personal attendance of any witness cannot be obtained, or if it be manifested inconvenient for any witness to attend"); § 6085 (accused person may take depositions of absent persons whose testimony is material and necessary, if they "reside beyond the jurisdiction of the court, or are so sick and infirm that with diligence their attendance cannot be procured at the same or the next succeeding regular or special term at which the case may be tried"); § 6090 (such a deposition is not to be read "when the attendance of the witness can be procured", or if the deponent "has absented himself by the procurement, inducement, or threats of the accused, or of any person in his behalf").

Georgia: Rev. C. 1910, § 5886 (deposition may be taken in a civil cause on interrogatories, if the witness (1) resides out of the county; (2) "from the condition of his health, from age or otherwise, he cannot attend the court, or from the nature of his business or occupation it is not possible to secure his personal attendance without manifest inconvenience to the public or to third persons, — such as postmasters, public carriers, physicians, schoolteachers, etc."; (3) is about to remove from the county, or to leave home on business, for a sojourn or a tour, which will extend "beyond the term of the Court"; (4) "all female witnesses"; (5) "the only witness to a material point in the case"); § 5887 (deposition of a member of the General Assembly may be taken, when its session conflicts with Court session); § 5888 ("If the state of facts on which the commission was issued ceases to exist before the trial of the cause, and the witness is then accessible by subpœna", the deposition taken on commission "cannot be used"); § 5909 (depositions without commission; "if the reasons for taking the deposition cease to exist before the trial, such deposition shall not be used in the case").

Hawaii: Rev. L. 1915, § 2569 (depositions are not to be read "unless it shall appear to the satisfaction of the Court" that the deponent is the opposite party, "or is beyond the jurisdiction of the court, or is resident in another circuit, or dead, or unable from permanent sickness or other permanent infirmity to attend").

Idaho: Comp. St. 1919, § 8016 (deposition may be taken "in the trial of all issues, in any action, in the following cases: first, when the witness does not reside in the county, or when he resides in a county adjoining and more than 30 miles from place of trial, or is absent from the State; second, when the deponent is so aged, infirm, or sick as not to be able to attend the court or place of trial, or is dead; third, when the depositions have been taken by agreement of parties, or by the order of the court

trying the cause; fourth, when the deponent is a State or county officer, or a practising physician, or attorney-at-law, and the trial is to be had in any county in which the deponent does not reside"); § 8008 ("No deposition shall be read in evidence on the trial of a cause, if at that time the witness is produced in court, unless the deposition has been taken by agreement of the parties, or by order of the Court"); § 8015 (when a deposition is offered, "it must appear to the satisfaction of the Court that the cause for taking and reading it still exists"); § 9037 (fixing of sentence; like Cal. P. C. § 1204); § 9150 (deposition taken for accused within the State may be read if the witness "is unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); § 9165 (deposition taken for the accused without the State may be read if the witness "is unable to attend from any cause whatever"); 1908, State *v.* Zarlenga, 14 Ida. 305, 94 Pac. 55 (a deposition taken for the prosecution, under Rev. St. 1887, § 7588: the conditions requisite to be shown, specified in full; *i.e.* due taking before a magistrate, notice, inability to attend, and due diligence).

Illinois: Rev. St. 1874, c. 51, § 25 (in suits at law, depositions of witnesses resident in the State may be taken wherever the witness "resides in a different county from that in which the court is held, is about to depart from the State, is in custody on legal process, or is unable to attend such court on account of advanced age, sickness, or other bodily infirmity"); § 26 ('dedimus potestatem' commission, allowed in civil causes for a witness residing in the State more than 100 miles distant, or not residing in the State, or engaged in the military or naval service of the United States or this State and out of this State); § 34 (every deposition duly taken and returned "may be read as good and competent evidence in the cause in which it shall be taken, as if such witness had been present and examined by parol in open court, on the hearing or trial thereof"); c. 148, § 4 (when an attesting-witness to a will "shall reside without the limits of this State", or the county in which probate is desired, "or shall be unable to attend said court", a deposition by commission may be taken and used).

Indiana: Burns' Ann. St. 1914, §§ 439, 448 (deposition is usable when the deponent (1) does not reside in the county, or adjoining county, of trial, or is absent from the State; (2) is "so aged, infirm, or sick, as not to be able to attend", or is dead; (3) when the deposition is taken by agreement or by Court order; (4) when the deponent is "a State or county officer, or a judge, or a practicing physician, or attorney-at-law", and the trial is in a county of non-residence); § 2118 (defendant in a criminal case may by leave of Court have depositions taken of witnesses residing out of the State, but must first enter consent for similar depositions by prosecution on the same matter); § 441 (if a witness "is produced in Court", his deposition is not to be read, unless taken by agreement or by Court order); § 1079 (in divorce causes, the Court may "for good cause shown" receive depositions, though the witnesses could attend).

Iowa: Code 1897, § 4684, Comp. Code, § 7392 (in a civil action, a deposition may be taken if the witness resides in a different county, or "is about to go beyond the reach of a subpœna", or is "for any other cause expected to be unable to attend court at the time of trial"); § 4709, Comp. C. § 7417 (unless the record discloses a cause for taking, the proponent must show that "the witness is a non-resident of the county, or such other fact as renders its taking legal"); § 3285, Comp. C. § 7807 (in a will probate, depositions are allowable of subscribing witnesses residing out of the State or judicial district); Comp. C. §§ 9462, 9463 (accused may take depositions as in civil cases); 1920, Bohen *v.* North American Life Ins. Co., 188 Ia. 1349, 177 N. W. 706 (statute held not to authorize the taking of a non-resident's deposition on oral interrogatories).

Kansas: Gen. St. 1915, §§ 7239, 7262 (depositions usable only "when the witness does not reside in the county" of trial, or "when from age, infirmity or imprisonment the witness is unable to attend court, or is dead", or upon a motion, etc.); §§ 11768, 11803 (will-probate; commission may issue for witness residing out of the jurisdiction, or for one residing within it but "infirm and unable to attend court").

Kentucky: C. C. P. 1895, § 554 (deposition is usable if the deponent resides 20 miles or more away; is absent from State; is its Governor, secretary, register, auditor, or treasurer; or is judge or court clerk; or is postmaster, or bank president, cashier, teller, or clerk; or is practising physician, surgeon, or lawyer; or is keeper, officer, or guard of penetentiary; or is dead; or has become of unsound mind; or is prevented by infirmity or imprisonment from attendance; or is in the Federal or State military service); § 556 (on affidavit that the testimony is important and its "just and proper effect" cannot "in a reasonable degree" be attained otherwise, the Court may order personal attendance); C. Cr. P. 1895, § 153 (defendant's depositions in criminal cases are usable only in case of death, absence from State, or physical inability to attend for examination); Stats. 1899, §§ 4855, 4863 (attesting-witness to a will; deposition may be taken if he resides out of the Commonwealth, or is confined under legal process in another county or corporation, or is unable from sickness, age, or other infirmity to attend, or resides more than 50 miles away; this may be used on the jury trial if the witness "cannot be produced").

Louisiana: Ann. Rev. St. 1915, §§ 615, 617 (depositions may be taken by the clerk of court

whenever the party desires; no conditions of using specified); §§ 938, 3485 (deposition of vessel master or officer or any transient person taken for a prosecution, may be used if the magistrate taking makes oath that the witness "is not at the time of the trial within the jurisdiction of the court"); § 3941 (deposition is allowable for a witness residing out of the parish of trial); § 3942 (deposition of a member of the religious order of Saint Ursuline Nuns in New Orleans); C. Pr. 1894, § 352 (party residing out of the parish may be examined on interrogatories without attendance); §§ 138, 425–439 (provision for taking depositions of non-residents, infirm persons, etc.; and "parties in all cases, except criminal and civil jury cases, may take testimony of witnesses out of court, who reside in the parish where the cause is pending"); St. 1896, No. 124, Wolff's Rev. L. 278 (in criminal cases the deposition of a witness taken under detention is admissible "in case of the death or departure of said witness from the parish or other inability to attend court", but not "when the presence of said witness can be procured by subpœna"); St. 1908, No. 105, p. 162, July 1 (no deposition of "a fugitive from justice from this State" shall be admissible); St. 1910, No. 176, p. 261, July 6 (testimony of witnesses residing out of the parish may be taken by deposition in civil cases).

Maine: Rev. St. 1916, c. 112, §§ 4, 11, 17 (deposition shall not be used if the cause for taking no longer exists; those causes are (1) "so aged, infirm, or sick, as to be unable to attend"; (2) residence or absence out of the State; (3) being bound to sea on a voyage, or about to go without the State or more than 60 miles away, and not to return in season; (4) being a judge and prevented by official duty from attendance; (5) residing in another town; (6) residing in the same town, provided he is dead or permanently removed from the town or too ill, or infirm to attend at the time of trial; (7) being confined in prison until after the trial); c. 136, § 20 (defendant and prosecution may take and use depositions out of the State as in civil causes; but the prosecution may not use its own if the defendant does not use his; defendant may take depositions within the State); c. 68, § 6 (admissible in probate proceedings when a will-witness lives out of the State, or more than 30 miles distant, or "by age or indisposition of body" is unable to attend).

Maryland: Ann. Code 1914, Art. 35, §§ 16, 17 (depositions on commission of witnesses "who for any reason cannot be brought" before Court or of non-resident witnesses "shall be admitted"; no conditions specified); §§ 19, 21 (deposition of any witness taken may be used "in case only" of his death, or of party's "inability to procure the attendance of such witness at the time of trial and the probable continuance of said inability" until the next term); § 27 (certain depositions usable, if the deponent is dead or out of the State or "cannot be had to attend"); Art. 84, § 9 (deposition of master or "other transient person", in shipping offence, admissible if not within jurisdiction at time of trial).

Massachusetts: Gen. L. 1920, c. 233, §§ 25, 35 (the reasons for taking are: residence more than 30 miles away; intention to go out of the Commonwealth and not return in time for the trial; "so ill, aged, or infirm, as to make it probable that he will not be able to attend"; the deposition is not to be used "if it appears that the reason for taking it or other sufficient cause for its use no longer exists").

Michigan: Comp. L. 1915, §§ 12494, 12500 (deposition may be taken if witness "is about to go or resides out of the State", or "more than 50 miles from the place of trial", or "beyond the jurisdiction of the court", or "when the witness is sick, aged, or infirm, or where there is reasonable cause for apprehension that his testimony cannot be had at the trial", or where "the purposes of justice will be aided thereby"; the deposition may be read, but nevertheless the Court may order "the production of the witness, if within the jurisdiction"; and in any case either party may compel his attendance "if he is within the jurisdiction of the court and able to attend and give his testimony"); 1908, Nolan *v.* Garrison, 151 Mich. 138, 115 N. W. 58 (Comp. St. 1897, § 10136, being § 12494 above, and § 10188 for chancery causes, compared, and held not to be inconsistent: both methods are available; under § 10136 the taker need not wait until 10 days after issue joined).

Minnesota: Gen. St. 1913, § 8381 (in civil causes, the deposition of a witness in the State may be taken if the witness "lives more than 30 miles from the place of trial, or is about to go out of the State and not to return in time for trial, or is so sick, infirm, or aged as to make it probable that he will not be able to attend at the trial or hearing"; also if he is without the State and within any U. S. State or Territory); § 8395 ("no deposition shall be used if it appears that the reason for taking it no longer exists", unless the party offering "shows any sufficient cause then existing for using such deposition");

Mississippi: Code 1906, § 1924, Hem. § 1584 (deposition in a civil case may be taken of a witness in the State, if he (1) is "about to depart from the State, or by reason of age, sickness, or other cause shall be unable, or likely to be unable, to attend the court"; (2) "when the claim or defense, or a material point thereof, shall depend upon the testimony of a single witness"; (3) when he is a judge of the Supreme Court, or circuit court, or chancellor, or "any other officer of the government of the State or the United States, who, on account of his official duties, cannot conveniently attend"; (4) "when the testimony of the clerk of any court of record, or of any sheriff or justice of the peace, shall be required beyond

the limits of the county of his residence"; (5) when a "female"; (6) when residing more than 60 miles distant); § 1925, Hem. § 1585 (in a civil cause before a justice of the peace, allowable also for any witness residing in another county); § 1928, Hem. § 1588 (commission may issue for non-residents); § 1933, Hem. § 1593 (depositions to be admissible; but the opponent "may procure the attendance of such witness" and put him on the stand); § 1936, Hem. § 1596 (deposition for a chancery bill may be taken if the witness is "sick, aged, infirm, or about to go out of the State"); § 1940, Hem. § 1600 (chancery deposition of "a party or other interested witness" is not to be admitted if the opponent file an affidavit ten days before trial that oral examination is "necessary to the attainment of justice", and if the witness "be alive at the time of trial and not unable to attend court on account of disability from permanent sickness, physical injury, or from weakness and disability incident to old age"); § 1941, Hem. § 1601 (in causes testamentary, etc., in chancery, the party may examine in open court; but this is not to change the rule as to non-resident witnesses or as to depositions in circuit court, or as to cases in which depositions generally are authorized); § 1994, Hem. § 1659 (non-resident subscribing witness to a will may testify by deposition); § 2464, Hem. § 2030 (in 'habeas corpus' proceedings, "whenever the personal attendance of a witness cannot be procured, his affidavit, taken on reasonable notice to the adverse party, may be received").

Missouri: Rev. St. 1919, § 3964 (the accused may take the deposition of a witness who "resides out of the State, or, residing within the State, is enceinte, sick or infirm, or is bound on a voyage or is about to leave this State, or is confined in prison under sentence for a felony"); § 3965 (such depositions are to be read "in like cases" as in civil suits); § 3966 (the accused may also take conditional examinations by commission as in civil cases); § 5440 (civil suits; any witness' deposition may be taken conditionally); § 5467 (depositions are usable, "first, if the witness resides or is gone out of the State; second, if he be dead; third, if by reason of age, sickness, or bodily infirmity, he be unable to or cannot safely attend court; fourth, if he reside in a county other than that in which the trial is held, or if he be gone to greater distance than 40 miles from the place of trial without the consent, connivance, or collusion of the party requiring his testimony; fifth, if he be a judge of a court of record, a practicing attorney or physician, and engaged in the discharge of his official or professional duty at the time of the trial"); § 520 (if an attesting witness to a will "shall reside without the United States, or out of this State and within the United States, or within this State and more than 40 miles" from place of probate, "or if such witness shall be prevented by sickness from attending at the time when any will may be produced for probate", his deposition may be taken); § 528 (on the trial of a will's validity, the oath of a subscribing witness at probate is admissible if he "be deceased or cannot be found").

Montana: Rev. C. 1921, § 10645, 10652 (like Cal. C. C. P. §§ 2021, 2032); § 12212 (like Cal. P. C. § 1362); § 11795 (deposition before a committing magistrate of a witness not giving an undertaking, admissible if the witness "be dead or absent from the State"); § 12197 (criminal cases; deposition may be read if the witness "is dead or is absent from the State"); § 12198 (deposition of a person imprisoned, taken for the accused, may be used like other depositions).

Nebraska: Rev. St. 1922, § 278 (the mother's examination on a bastardy complaint before a magistrate, admissible on the trial); § 8880 (a deposition is usable "only in the following cases": first, when the witness does not reside in the county or is absent from it; second, "when, from age, infirmity, or imprisonment, the witness is unable to attend the court, or is dead"; third, on a motion or where oral examination is not required); § 8894 (deposition not to be read unless, for a cause specified in ib. § 8880, the "attendance of the witness cannot be procured").

Nevada: Rev. L. 1912, § 5454 (witness in the State; like Cal. C. C. P. § 2021, par. 1, 2, 3, 4); § 5456 ("If the deposition be taken by reason of the absence or intended absence from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent or infirm, to the best of the deponent's knowledge or belief"; the witness' death also admits the deposition); § 5458 (witness out of the State; no conditions prescribed for using); §§ 5442, 5444 (deposition allowable for a witness imprisoned in jail); § 6855 (deposition of a witness for the People, taken conditionally, is admissible if it is "satisfactorily shown to the Court that he is dead or insane, or cannot, with due diligence, be found within the State"); § 7366 (defendant in a criminal case may take the deposition of a witness who "is about to leave the State, or resides out of the State, or has departed from the State and his or her place of abode is known, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will be unable to attend the trial"); § 7384 (such a deposition is usable "upon it being shown that the witness is unable to attend from any cause whatever").

New Hampshire: Pub. St. 1891, c. 225, § 1 (any deposition may be used in a civil cause unless the adverse party procures the witness' attendance); § 13 (depositions for the accused in criminal cases may be used in the Court's discretion when necessary for justice).

New Jersey: Comp. St. 1910, Evidence § 51 (a deposition is usable if the witness "resides or is out of the State, or is dead, or by reason of age,

sickness, or bodily infirmity is unable to attend"; see also Justices' Courts, § 116); § 35 (deposition of a party is not to be taken in his own behalf, except by consent or by judicial order); § 46 (deposition of a party residing out of the State may be taken like that of any witness); St. 1913, Mar. 12, c. 69 (party's deposition may be taken at his own instance, so as to be usable if he himself afterwards becomes incompetent though an opposing party's death); 1915, Stengel v. Stengel, 85 N. J. Eq. 277, 96 Atl. 358 (practice as to taking depositions 'de bene' out of the State, examined).

New Mexico: Annot. St. 1915, § 2125 (civil cases; a deposition may be taken (1) "when by reason of age, infirmity, sickness, or official duty, it is probable that the witness will be unable to attend the court"; (2) when he "resides without the State or the county in which the suit is pending"; (3) when he "has left or is about to leave" the State or county, "and will probably not be present at the trial"); § 2143 (it may be read in evidence; no conditions named); § 5877 (at the original probate of a will, deposition of a witness may be taken when he is "not a resident of the county in which such will is offered for probate, and also whenever any witness is incapacitated from sickness or age from attending upon such court"; the deposition when filed to have the same effect as if the witness testified in person); St. 1919, Mar. 10, c. 29, §§ 1, 6 (civil causes; supplementary provisions; deposition may be taken when the witness is a non-resident, or resides more than 100 miles distant, or "for any reason will not be able to attend the trial", or in any other case where the judge deems proper; it may be used "as if the witnesses were personally present and testifying").

New York: C. P. A. 1920, § 354 (a physician or surgeon or nurse attached to hospital, etc., may testify before a referee to the condition of a patient in an action for personal injury, the judge having discretion to order his examination in court); § 304 (a deposition, except one of an adverse party or one taken by stipulation, is not to be used unless the witness is dead, or out of the State or more than 100 miles distant, or unable personally to attend "by reason of insanity, sickness, or other infirmity or imprisonment" or when "for any reason" his attendance could not with reasonable diligence be compelled by subpœna); C. Cr. P. 1881, § 8 (depositions are admissible against the accused, if the witness is dead, insane, or cannot with due diligence be found in the State); §§ 219, 631 (a deposition taken on either side in a criminal case may be used if witness is "unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); N. Y. C. Mun. Ct. Code 1915, § 116 (similar to C. P. A. § 304; absence from city suffices); St. 1918, c. 64, amending C. C. P. § 830, now C. P. A. 1920, § 348, quoted *ante*, § 1387 (by adding a clause for former testimony of a person who "being a resident of the State has departed therefrom by reason of military or naval service under the State or United States").

North Carolina: Con. St. 1919, § 1821, (depositions are admissible if the witness (1) is dead or has become insane, (2) is a resident of a foreign country or another State and is not present, (3) is confined in prison beyond the county, (4) is "so old, sick, or infirm as to be unable to attend court", (5) is the Federal president or head of a department, or Federal judge, district attorney, or clerk, and the trial occurs during term of his court, (6) is the State Governor or head of a department or president of the university or other incorporated college or superintendent or physician of State insane hospital, (7) is a State Supreme Court judge, or a judge, presiding officer, clerk, or solicitor of a court of record, and the trial occurs during the court's term, (8) is a member of Congress or the General Assembly, and the trial occurs during a session, (9) if the witness, being summoned, is out of the State or more than 75 miles distant by usual mode of travel, without the offeror's procurement or consent, (10) in "justice's court", if the witness resides more than 75 miles distant); § 1812 (depositions taken by the accused may be read on above conditions); § 1815 (depositions taken in certain 'quo warranto' proceedings are admissible "without regard to the place of residence of such witness or distance of residence from said place of trial").

North Dakota: Comp. L. 1913, §§ 7889, 7904 (like Okl. Comp. St. 1921, §§ 612, 626); §§ 11048, 11049, 11062 (criminal cases; like Cal. P. C. §§ 1345, 1346, 1362); § 8577 (probate court may receive deposition of any witness residing within State, on ground of "necessary expense or inconvenience of procuring his attendance"); § 8578 (probate judge may go personally to hear testimony of a witness aged, sick, or infirm; unless interested party requests taking by deposition).

Ohio: Gen. Code Ann. 1921, § 11525 (a deposition is usable when the witness (1) "does not reside in or is absent from" the county; (2) "is dead, or from age, infirmity, or imprisonment, is unable to attend court"; (3) it is also usable on motions or "where the oral examination of the witness is not required"); § 10545 (in probating a lost or destroyed will, the deposition may be taken of a witness residing out of the jurisdiction, or infirm and unable to attend court); § 10518 (same, for ordinary probate); §§ 13668, 13668–1, 13668–2, 13668–3 (in criminal cases, the defendant or the prosecution may have a deposition taken of a witness who (1) resides out of the State, (2) is sick or infirm, (3) is about to leave the State, or (4) is confined in prison; nothing said as to admissibility); Const. 1851, Art. I, § 10, amended 1912 (depositions taken by the State or by the accused; quoted *ante*, § 1397).

Oklahoma: Comp. St. 1921, § 612 (a dep-

osition is usable only (1) when the witness does not reside in the county of trial or is absent from it: (2) when "from age, infirmity, or imprisonment, the witness is unable to attend court, or is dead"; (3) when the case is one in which oral testimony is not required); § 626 (on offering a deposition, it must appear that for "any cause specified" in the above section "the attendance of the witness cannot be procured"); § 2772 (on a hearing for mitigation or aggravation of sentence, depositions may be used if the witness is "so sick or infirm as to be unable to attend"); § 2843 (in criminal cases the deposition of a material witness may be taken for defendant if the witness is "about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial"); § 2851 (such a deposition is usable "upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); §§ 2853, 2865 (the deposition of a material witness for defendant residing out of the State may be read "upon it being shown that the witness is unable to attend from any cause whatever"); § 2852 (the deposition of a material witness for defendant may be taken if the witness is prisoner in a State prison or in a jail of a county other than that of trial).

Oregon: Laws 1920, § 837 (a deposition in the State may be taken when the witness (1) is a party, (2) is privileged from attendance under ib. § 818 by reason of distance, (3) is "about to leave the county and go more than 20 miles beyond the place of trial", (4) "though otherwise liable to attend the trial, is nevertheless too infirm to attend", and (5) on a motion or otherwise where oral examination is not required); § 851 (when taken under (2), (3), or (4) of ib. § 837, not usable unless proof is made "that the witness did reside beyond the service of a subpœna, or that he still continues absent or infirm, as the case may be").

Pennsylvania: St. 1909, Apr. 27, § 4, Dig. 1920, § 8178, Crim. Procedure (accused's nonresident witnesses in criminal cases; deposition usable unless it appears that witness "is in attendance, or has been or can be subpœnaed, or his attendance otherwise procured").

Philippine Isl. C. C. P. 1901, §§ 354, 355 (like Cal. C. C. P. §§ 2020, 2021, omitting the exception for distance in par. 2 of § 2021); § 362 (deposition taken in the Islands "may be also read in case of the death of the witness"; but there is nothing to explain this "also"); P. C. 1911, Gen. Order 58 of 1900, § 15 (like Cal. P. C. § 686).

Porto Rico: Rev. St. & C. 1911, §§ 1504, 1512 (civil cases; deposition cannot be read unless proof is made that the witness is "absent from the district", or resides out of it and 30 miles away, or is "too infirm to attend the trial", or is dead; but such proof is needless when the deponent is a party or resides out of the district, etc. at the time of taking) § 6022 ("to be confronted with the witnesses against him in the presence of the Court" except as provided in Cal. P. C. § 686); § 6469 (depositions for an accused; like Cal. P. C. § 1345); § 6484 (like Cal. P. C. § 1362).

Rhode Island: Gen. L. 1909, c. 292, §§ 22, 29, 30 (apparently no restrictions whatever as to accounting for witness' absence; but by § 38 any Court "may order the oral examination of witnesses in open court"); § 40 ('viva voce' testimony required in divorce cases, unless in case of physical disability to attend, residence and presence out of the State, or a deponent before a master in chancery).

South Carolina: C. C. P. 1922, §§ 685, 687, 688 (a deposition may be taken under commission, if the witness (1) resides out of the State or county, (2) or resides more than 100 miles from court, (3) or is about to remove from the State before trial expected, (4) or cannot personally be procured "by reason of indispensable attendance on some public official duty or professional duty as an attorney at such time", or (5) "by reason of such sickness or infirmity as incapacitates such witness or witnesses from traveling in order to appear and testify"; nothing is said as to conditions of admissibility; except that by § 687 personal attendance may be compelled of any deponent residing within the county or not more than 30 miles from court house; and by § 688 the attendance of an officer of a lunatic asylum in a civil cause is to be required only when "justice cannot be done" without it); § 694 (commissioners shall attend at the home of "persons unable to leave home by reason of age, infirmity, sickness, or bodily hurt"); § 695 (any party's or witness' deposition may be taken in civil causes before the clerk of court, subject to either party's right to require personal attendance); § 698 (depositions may be taken 'de bene' before a judge, clerk, notary, etc., if the witness (1) lives without the county, (2) lives more than 100 miles away, (3) is bound to sea, (4) is about to leave the State or the county or to go 100 miles away, or (5) is aged or infirm; but by § 700 such depositions are to be used only if it appears that the deponent is dead or out of the county or State or 100 miles away, or is by reason of age, sickness, bodily infirmity, or imprisonment, unable to travel and appear); § 15 (depositions for the Probate Court may be taken if the witness (1) resides out of the State or the county, (2) or resides more than 30 miles away, (3) or "by reason of age or bodily infirmity shall be unable to attend in person"); C. Cr. P. 1922, § 976 (in trials for rape, the deposition of the female may in the judge's discretion be admitted "as though such testimony had been given orally in court"); Crim. L. 1922, § 714 (harboring a deserting seaman; deposition of a vessel-master "or

other transient person", admissible if he is not "within the jurisdiction of the State").

South Dakota: Rev. C. 1919, §§ 2757, 2769 (like N. D. Comp. L. §§ 7889, 7904); § 4960 (deposition admissible, when sentence is to be fixed, if a witness "is so sick or infirm as to be unable to attend"); § 5015 (deposition within the State taken for accused may be read if the witness is "unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); § 5029 (deposition taken for accused on commission may be read if the witness "is unable to attend from any cause whatever").

Tennessee: Shannon's Code 1916, § 3210 (notary's deposition admissible, "should the notary die or remove out of the State before trial"); § 5624 (deposition in a civil action may be taken if the witness (1) "from age, bodily infirmity, or other cause", is incapable of attending; (2) resides out of the State; (3) resides out of the county; (4) is obliged to leave the State before issue; (5) is about to leave the county and "will probably not return until after the trial"; (6) is "the only witness to a material fact"; (7) is "an officer of the United States, an officer of this State or of any county in this State", clerk of another court of record, member of the General Assembly in session or a clerk or officer thereof, a practising physician or attorney, or a jailer or prison-keeper of another county; (8) is a notary public; (9) when the suit is brought 'in forma pauperis'); § 5625 (a female witness may testify by deposition, unless sufficient cause be shown for compelling her attendance); § 5626 (the deposition of any person in the county may be taken, but the opponent may summon him to attend); § 5631 (the opponent may compel attendance in the above cases, except where the witness is by law privileged not to attend); § 7356 (rules for civil cases, applicable to defendant's depositions in criminal cases); §§ 7574-7576 (a convict not being removable for a civil case, his deposition may be used; defendant in a criminal case may also use it).

Texas: Rev. Civ. St. 1911, § 3649 (depositions may be taken in all civil suits; "provided, the failure to secure the deposition of a male witness residing in the county in which the suit is pending shall not be regarded as want of diligence where diligence has been used to secure his personal attendance by the service of subpœna or attachment, under the rules of law, unless by reason of age, infirmity, or sickness or official duty, the witness will be unable to attend the court, or unless he is about to leave or has left the State or county in which the suit is pending, and will not probably be present at the trial"); § 3677 (depositions may be read; no conditions prescribed); § 3267 (at the probate of a will, "if all the [subscribing] witnesses are non-residents of the county, or those resident of the county are unable to attend court", their depositions may be used; where the subscribing witnesses are dead, the witnesses to handwriting may testify "by deposition"); Rev. C. Cr. P. 1911, § 817 (the accused may take the deposition of any witness, not to be used except on giving consent to use by the State; and also of a witness who resides out of the State or is aged or infirm); § 832 (such depositions "shall not be read, unless oath be made that the witness resides out of the State, or that since his deposition was taken the witness has died; or that he has removed beyond the limits of the State; or that he has been prevented from attending the court through the act or agency of the defendant, or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony"; or that by reason of "age or bodily infirmity such witness cannot attend"); § 833 (the foregoing oath "may be made by the district or county attorney or any other credible person" for the State; for the defendant "the oath shall be made by him in person").

Utah: Comp. L. 1917, §§ 7168, 7177 (the deposition of "a witness out of the State" is usable, without conditions specified); § 7178 (witness in the State; like Cal. C. C. P. § 2021, par. 1 to 5, omitting the second clause of par. 1 and of par. 2, and the whole of par. 6); § 7180 (like Cal. C. C. P. § 2032); § 8553 (criminal cases; like Cal. P. C. § 686); § 7139 (like Cal. C. C. P. § 1997); § 9053 (mitigation or aggravation of sentence; like Cal. P. C. § 1204); §§ 9307, 9323 (like Cal. P. C. §§ 1345, 1362, but omitting in § 9307 to provide for the State's depositions); § 8767 (summarized post, § 1413);

Vermont: Gen. L. 1917, § 1909 ("A deposition taken for any of the reasons, and in the manner hereinafter provided, shall be admitted as evidence in a civil cause for which it is taken"); § 1910 (a deposition may be taken of a person (1) residing more than 30 miles distant, (2) about to leave the State, not to return before trial, (3) incapable of traveling and appearing, through "age, sickness, or other bodily infirmity", (4) residing out of the State, (5) confined in jail, (6) being a judge of the Supreme Court, going out of his residence-county on official duty, not to return before trial; (7) a "cloistered sister of a religious community"); § 3196 (in probate proceedings, a deposition may be taken where the person resides out of the probate district, or is unable to attend through age or bodily infirmity); § 2556 (non-residents in criminal cases); § 2564 (criminal cases).

Virginia: Code 1919, § 6231 (a deposition is usable if the witness is "dead, or out of this State, or one of its judges, or a superintendent of a lunatic asylum distant more than 30 miles from the place of trial, or in any public office or service the duties of which prevent his attending the court, or be unable to attend it from sickness or other infirmity, or be more

than 100 miles from the place of trial"; but in the last instance the Court may require attendance); § 5252 (if a will-witness is "unable from sickness, age, or other infirmity to attend", or in case of his confinement in another county or corporation in the State under legal process, his deposition may be taken); § 5261 (testimony on a motion to probate a will, or depositions taken thereunder, of witnesses who "cannot be produced at a trial afterwards before a jury", are admissible); § 2618 (deposition of certain officers, not compellable to leave the office to testify in State bond-coupon suits, admissible); § 4415 (deposition of the female in rape or attempted rape may be read without accounting for her absence).

Washington: R. & B. Code 1909, § 1231 (a deposition may be taken when the witness (1) "resides out of the county and more than 20 miles from the place of trial", (2) "is about to leave the county and go more than 20 miles from the place of trial, and there is a probability that he will continue absent when the testimony is required", (3) "is sick, infirm, or aged, so as to make it probable that he will not be able to attend at the trial", (4) "resides out of the State"); § 1245 ("If it appear at the trial that the reason for taking the deposition no longer exists, the deposition shall not be read in evidence, unless the party offering it shows that another of the causes specified by § 1231 then exists, or that the witness is dead, or cannot safely attend at the trial on account of sickness, age, or other bodily infirmity"); § 1298 (the deposition of an attesting witness to a will may be taken when he is "prevented by sickness from attending at the time when any will may be produced for probate, or resides out of the State or more than 30 miles from the place"); § 1962 (a witness for the prosecution, released on recognizance; his deposition taken by a magistrate may be read on the trial "if the witness is not present when required to testify in the case"); § 1909 (before a justice of the peace, a deposition cannot be used unless the witness "1, is dead, or resides more than 20 miles from the place of trial; or, 2, is unable, or cannot safely attend before the justice on account of sickness, age, or other bodily infirmity; 3, that he has gone more than 20 miles from the place of trial without the consent or collusion of the party offering the deposition"); §§ 2131, 2306 (on a criminal trial, confrontation is necessary, but wherever witnesses whose depositions have been lawfully taken by a committing magistrate "are absent, and cannot be found when required to testify in such case, so much of such deposition" as is competent is admissible); § 1223 (the deposition of one confined in jail may be taken).

West Virginia: Code 1914, c. 130, § 36 (a deposition is usable if the witness be "dead, or out of this State, or one of its judges, or in any public office or service the duties of which prevent his attending the court, or be unable to attend it from sickness or other infirmity, or be out of the county"; but in the last case attendance may for good cause be required); c. 50, § 111 (before a justice of peace, it is usable if the witness is absent from county, sick, or otherwise unable to attend); c. 159, § 1 ("every deposition" in a criminal case, taken by the accused, may be read by him; it may be taken of one non-resident, or absent from the State in some employment, or aged and infirm so as to be unable to attend); c. 77, § 27 (subscribing witness to a will; the deposition may be taken and used if he is out of the State, confined under legal process in another county, or unable to attend from sickness, age, or other infirmity).

Wisconsin: Stats. 1919, § 4086 ("In all criminal or quasi-criminal cases in courts of record", the defendant or the State may obtain leave to take the deposition of "any material witness within the State who is in imminent danger of death or who resides or is to be without the State"); § 4089 ("No deposition shall be used if it shall appear that the reason for taking it no longer exists, unless the party producing it shall show other sufficient cause then existing for its use"); § 4095 (the deposition of a party may be taken for himself for the same causes as that of any witness); § 4101 (the deposition of a witness within the State may be taken when the witness (1) lives more than 30 miles distant or beyond the reach of subpœna, (2) is about to "go out of the State, not intending to return in time for the trial or hearing", (3) "is so sick, infirm, or aged as to make it probable that he will not be able to attend", (4) is a member of the Legislature and his House or a committee is in session, (5) "when his testimony is material to any motion or other similar proceeding pending in any court of record, and he shall have refused voluntarily to make his affidavit"); § 4110 (the deposition of any witness without the State may be taken); § 4113 (a deposition by commission for a witness without the State may be taken (1) after issue of fact joined, (2) after no answer or demurrer filed in due time, (3) before issue of fact joined, "when the witness is so sick, infirm, or aged as to afford reasonable ground to apprehend that he may die or become unable to give his testimony, or when he is about to remove so that his testimony cannot conveniently be taken, or for any other cause which shall be deemed sufficient by the Court"; (4) "when required for use on any trial or hearing or upon any motion or proceeding before or after judgment").

Wyoming: Comp. St. 1920, §§ 5831, 5847 (like Ohio Gen. Code Ann. § 11525); § 7518 (like Ohio Gen. Code Ann. § 13668, omitting par. 4); § 7512 (deposition for the prosecution in a criminal case may be taken of a material witness (1) about to leave the State, (2) so sick or infirm as probably to be unable

The causes enumerated in such statutes are seldom more than three or four in number, and never include all those recognized by the Courts at common law. It would therefore be an error to treat the statutory enumerations as exhaustive; they can seldom be construed as other than declaratory of rules already recognized. Nor is there any objection on principle to this result. So far as the statute confers a judicial power to order the taking of a deposition, the power exists only so far as specified by the statute, because the power did not exist at common law (*ante*, §§ 1376, 1398). But where a deposition had been lawfully taken — before a common-law judge in person, or before a master in chancery — the conditions on which it could be used in a common-law court were a simple question of the admissibility of evidence, and were constantly dealt with by the common-law courts, as the rulings in the foregoing sections indicate; hence, the principles already established for this purpose at common law remain in force unless expressly changed by statute.[2] Those principles have nothing to do with the lack of judicial power to initiate the taking of a deposition. It would be unfortunate if the patchwork legislation of the statutes on this subject should be thought to alter the already well-established principles of the common law.

§ 1412. **Same: Statutes affecting Depositions 'in Perpetuam Memoriam'.** It has been customary, in statutory enactments, to deal separately with depositions 'in perpetuam memoriam' in specifying the conditions of necessity allowing their use.[1] There is, however, no need for a separate treat-

to attend, (3) a non-resident, (4) unable or unwilling to recognize for appearance); § 7516 ("Should any witness whose deposition has been taken fail to appear", his deposition may be read as if he were "personally present and testifying").

[2] *Accord:* 1905, Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 58, 69 C. C. A. 28 (the term "except" in U. S. Rev. St. 1878, § 861, "was simply an opening for letting in an addition to the powers of the Court as they had been customarily exercised"; here admitting the former testimony of a witness out of the jurisdiction, though the statute names only depositions; good opinion by Severens, J.); 1913, State *v.* Butler, 247 Mo. 685, 153 S. W. 1042 (citing the text above). *Contra:* 1906, R. *v.* Snelgrove, 39 N. Sc. 400 (prosecutrix, examination before the magistrate; the prosecutrix being now deceased, her examination was held inadmissible under Cr. Code 1892, § 687, the case of death being not therein provided for, and the Code provision being meant as exhaustive; unsound).

§ **1412.** [1] With the following, compare the statutes cited *ante*, § 1383, for notice and cross-examination as required for such depositions: ENGLAND: 1918, Beresford *v.* Attorney-General, Prob. 33 (witness "unable, owing to their age and infirmities, to attend the trial");

UNITED STATES: *Federal:* St. 1878, § 867, Code § 1368 (quoted *ante*, § 1387); Rev. St. 1878, § 866, Code § 1367 ("In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a 'dedimus potestatem' to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may according to the usages of chancery direct depositions to be taken 'in perpetuam memoriam'", etc., and Rev. St. §§ 863-865 for 'de bene' depositions shall not apply); 1908, Westinghouse Machine Co. *v.* Electric S. B. Co., C. C. N. J., 165 Fed. 992 (statute applied, and order refused); *Alabama:* Code 1907, § 4068 (usable "upon proof of the death or insanity of the witness,'[1] or his absence from the State); §§ 4073-4076 (depositions perpetuated by heirs or distributees to prove kinship with a decedent, may be taken "when the witness is over 60 years of age, or is infirm, or resides out of the State, or is about to go beyond the United States, or when the claim of such person depends exclusively on the testimony of such witness or witnesses", and are apparently usable unconditionally); *Alaska:* Comp. L. 1913, § 1522 (like Or. Laws 1920, § 880); *Arizona:* Rev. St. 1913, § 1724 (usable "in like manner as "other depositions); *Arkansas:* Dig. 1919, § 4245 (usable "where the witness is dead or insane, or, if alive and of sound mind, where his attendance for oral examination cannot be required"); *Califor-*

ment; whatever causes are sufficient for the one suffice equally for the other class. The common-law principles applicable to depositions 'in perpetuam

nia: C. C. P. 1872, § 2088 (usable "upon proof of the death, or insanity of the witnesses, or that they cannot be found, or are unable by reason of age or other infirmity to give their testimony"); *Colorado:* Comp. L. 1921, C. C. P. § 405 (admissible "upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness, settled infirmity, or for any other cause"); *Delaware:* Rev. St. 1915, § 3617 (deposition to perpetuate in boundary cases, admissible "in case of the death of the witnesses or inability to procure their attendance"); *Florida:* Rev. G. S. 1919, § 2763 (usable on the same conditions as if taken 'pro lite'); *Georgia:* Rev. C. 1910, § 4563 (usable "'de bene esse', if, at the time the litigation arises, no more satisfactory examination of the witness may be had"); § 4558 (they "shall be afterward used only from the necessity of the case"); *Hawaii:* Rev. L. 1915, § 2588 (receivable "where the witness or witnesses are insane or dead, or their attendance for oral examination cannot be required or obtained"); *Idaho:* Comp. St. 1919, § 8063 (usable "upon the proof of death, insanity, or absence from the State of such witness, or distant more than 30 miles from the place of trial, or inability by reason of age or infirmity to attend"); § 8056 (deposition usable "upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable by reason of age or other infirmity to give their testimony"; this is for an order based on petition; § 8063 is for an order based on affidavit); *Illinois:* Rev. St. c. 51, § 46 (admissible as if originally taken in the suit); *Indiana:* Burns' Ann. St. 1914, § 462 (usable upon "death, insanity, or absence from the State of such witness, or inability by reason of age or infirmity to attend"); §§ 1307, 1313 (testimony before a recorder, etc., to perpetuate a lost deed, record, etc., usable apparently unconditionally); *Iowa:* Code 1897, § 4723, Comp. Code, § 7431 (usable "where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required"); *Kansas:* Gen. St. 1915, § 7295 (usable "where the witnesses are dead or insane, or where attendance for oral examination cannot be had or required"); *Kentucky:* C. C. P. 1895, § 613 (depositions usable on the conditions provided for 'de bene' depositions); Stats. 1915, § 1649*a* (real estate controversies; no conditions specified); *Louisiana:* C. Pr. 1870, § 440 (usable "should the witness examined be dead or absent"); St. 1914, No. 112 (similar); *Massachusetts:* Gen. L. 1920, c. 233, § 61, 63 (admissible on the same conditions "as if it had been originally taken" for the suit); *Michigan:* Comp. L. 1915, § 12498 (the testimony "may be used in case it cannot again be obtained at the time of trial"); *Minnesota:* Gen. St. 1913, §§ 8404, 8411 (usable on the same conditions as if originally taken for the action); *Mississippi:* Code 1906, § 1952, Hem. § 1612 (admissible in case of "death, insanity, subsequent incompetency, or departure to some place unknown"); *Missouri:* Rev. St. 1919, § 5491 (admissible, "first, if the deponent is dead; second, if he be unable to give testimony, by reason of insanity or imbecility of mind; third, if he be rendered incompetent, by judgment of law; fourth, if he be removed, so that his testimony cannot be obtained"); § 5508 (depositions taken to establish land-corners, admissible; no conditions specified); *Montana:* Rev. C. 1921, § 10691 (like Cal. C. C. P. § 2088); *Nebraska:* Rev. St. 1922, § 8933 (usable "where the witnesses are dead, or insane, or where their attendance for oral examination cannot be obtained or required"); *Nevada:* Rev. L. 1912, § 5670 (usable "upon proof of the death or insanity of the witness, or of his inability to attend the trial by reason of age, sickness, or settled infirmity"); *New Mexico:* Annot. St. 1915, § 2156 (admissible if the deponent is dead, or "unable to give testimony by reason of insanity or of imbecility of mind", or "rendered incompetent by judgment of law", or "removed out of the Territory so that his testimony cannot be obtained"); *New York:* C. P. A. 1920, § 313 (depositions 'in perpetuam' may be read if the witness "is deceased, or is unable personally to attend by reason of insanity, sickness, or other infirmity, or is confined in a prison or jail, or is absent from the State, and his attendance cannot be compelled by subpœna or his testimony taken by commission, with reasonable diligence"); *North Dakota:* Comp. L. 1913, § 7931 (like Cal. C. C. P. § 2089); St. 1917, Mar. 8, c. 110 (in personal injury cases deposition may be used on death of witness); *Ohio:* Gen. Code Ann. 1921, § 1221 (receivable if the witness is dead or insane or his "attendance for oral examination cannot be required or obtained"); § 2811 (deposition taken by a county surveyor in proof of old marks, etc., admissible only if the witness is dead or without the jurisdiction); *Oklahoma:* Comp. St. 1921, § 659 (admissible "where the witnesses are dead or insane, or where attendance for oral examination cannot be obtained or required"); *Oregon:* Laws 1920, § 886 (admissible on proof "of the death or insanity of the witness, or that he is beyond the State and his residence unknown, or of his inability to attend the trial by reason of age, sickness, or settled infirmity"; but in equity this proof is unnecessary); *Philippine Isl.* C. C. P. 1901, § 375

memoriam' never reached a full development (§ 1417, *post*); but it would be proper, where the statute was silent, to apply the principles dealt with in the foregoing sections.

§ 1413. **Same: Statutes affecting Testimony at a Former Trial.** Statutes dealing with this class of evidence are comparatively few in number.[1] It is

(like Cal. C. C. P. § 2088); *Rhode Island:* Gen. L. 1909, c. 292, § 34 (usable in case of death, unsound mind, absence from the State, or inability to attend); *South Dakota:* Rev. C. 1919, § 2779 (like Okl. Comp. St. 1921, § 659); *Tennessee:* Shannon's Code 1916, § 5678 (admissible on the witness' "death, insanity, or departure to some place unknown"); §§ 5624, 5682 (in case of a notary, admissible if he should "die or remove out of the State"); *Utah:* Comp. L. 1917, § 7198 (like Cal. C. C. P. § 2088); *Washington:* R. & B. Code 1909, § 1253 (usable "upon proof of the death or insanity of the witness, or his inability to attend the trial by reason of age, sickness, or settled infirmity"); *Wisconsin:* Stats. 1919, §§ 4121, 4129, 4134 (usable on "the same conditions" as depositions taken pending action); *Wyoming:* Comp. St. 1920, § 6311 (admissible "when the witnesses are dead or insane or when their attendance for oral examination cannot be required or obtained").

§ 1413. [1] With the following compare the statutes just cited in § 1411, for the word "deposition" is sometimes used to signify the magistrate's report of testimony; compare also the citations *ante*, § 1388, for identity of issues and parties; for statutes affecting probate and bastardy proceedings, see the interpreting decisions cited *post*, § 1417:

ENGLAND: 1849, St. 11 & 12 Vict. c. 42, § 17 (testimony before a committing magistrate, taken in writing, on a charge of an indictable offence may be used if the deponent "is dead, or so ill as not to be able to travel"); St. 1915, 5 & 6 Geo. V, c. 94, Evidence Amendment, § 1 (provision for using depositions of persons absent in military or naval service during the war).

CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 999 (quoted *ante*, § 1411); St. 1913, 3-4 Geo. V, c. 13, § 30 (amending Crim. C. § 999; quoted *ante*, § 1411); *N. Br.* Consol. St. 1903, c. 127, § 26 (former testimony admissible, if the witness "is dead, or out of the province, or from sickness or infirmity is unable to attend").

UNITED STATES: *Uniform Act:* Uniform Illegitimacy Act, § 26 (National Conference of Commissioners on Uniform State Laws, Proceedings, 1921, 1922; testimony of mother in bastardy proceedings at preliminary hearing, admissible if she is deceased or insane or not found);
Federal: U. S. St. June 4, 1920, ch. V, subchapter II, Articles of War, Art. 27 (record of proceedings of a court of inquiry may be read before a court-martial, etc.; but not in capital cases, or cases of officers' dismissal, without the accused's consent); under U. S. Rev. St. 1878, § 861, quoted *ante*, § 1411, a testimony at a former trial is not forbidden to be used, on the appropriate showing as to decease, absence, etc.; 1905, Toledo Traction Co. *v.* Cameron, 6th C. C. A., 137 Fed. 48 (good opinion by Severens, J.); 1920, Smythe *v.* New Providence, 3d C. C. A., 263 Fed. 481. *Contra*, but unsound: 1900, Salt Lake City *v.* Smith, 8th C. C. A., 104 Fed. 457; 1909, Chicago M. & St. P. R. Co. *v.* Newsome, 8th C. C. A., 174 Fed. 394.
Alabama: 1907, § 6209 (testimony of subscribing witnesses at a will-probate is admissible on a contest in chancery);
Arizona: Rev. St. 1913, Civ. C. § 1679, P. C. § 1052 (official report of testimony of witness at a former trial of the same cause, admissible for either party, if the witness "shall die or be beyond the jurisdiction of the Court in which the cause is pending without procurement by the party offering"); P. C. § 881, par. 7 (testimony at the preliminary hearing before a magistrate is admissible if the witness "is dead, or insane, or when such witness is shown by the return of the sheriff on a subpœna duly issued for his appearance to be out of the jurisdiction of the Court"); § 753 (like Cal. P. C. § 686);
California: C. C. P. 1872, § 1870, par. 8 ("testimony of a witness deceased, or out of the jurisdiction, or unable to testify", is admissible); § 1316 (testimony at a will-probate is admissible in subsequent contests, "if the witness be dead, or has permanently removed from the State"); P. C. 1872, § 686, as amended in 1911 (quoted *ante*, § 1387; this section originally applied only to testimony before a committing magistrate, and the decisions so limiting it are noted *ante*, § 1398; but by the amendment of 1911 it includes testimony "on a former trial of the action");
Columbia (Dist.): Code 1919, § 1065 (if a party "shall die or become insane or otherwise incapable of testifying", his testimony at a former trial is admissible);
Connecticut: Gen. St. 1918, § 5723 (testimony of a witness who "is beyond the reach of the process of the courts of this State or cannot be found", is admissible in civil causes "on a subsequent trial of said case", by a sworn certified copy of court stenographer's notes);
Delaware: Rev. St. 1915, § 1350, § 4 (deposition before a coroner, admissible, if the witness is dead); § 3972 (testimony before a committing

here even clearer than in the case of depositions (*ante*, § 1411) that the statutory enumeration of conditions of admissibility is not to be taken as exclusive.

magistrate, admissible, if the witness is dead);
Florida: Rev. G. S. 1919, § 2723 as amended by St. 1921, c. 8572, No. 177 (bill of exceptions of former testimony, in civil cases, usable if the "evidence . . . cannot be had", whatever that may mean; otherwise, a stenographic report may be used if "a sufficient reason is shown why the original witness is not produced"; quoted more fully *post*, §§ 1668, 1669);
Georgia: Rev. C. 1910, § 5773, P. C. § 1027 (admissible if the witness is "deceased, or disqualified, or inaccessible for any cause");
Idaho: Comp. St. 1919, § 7456 (testimony at the probate of a will; like Cal. C. C. P. § 1316);
Illinois: Rev. St. 1874, c. 148, § 7 (after probate of a will in the county court and on trial by jury in the circuit court, "the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence"; compare the cases cited *ante*, § 1303, *post*, § 1417);
Indiana: Burns' Ann. St. 1914, § 1019 (the written examination of the complainant in bastardy, usable "to sustain or impeach the testimony of such witness"); § 1023 (on the death of the complainant in bastardy, her written examination before the justice "may be read in evidence"); § 3168 (recorded testimony at the probate of a will, admissible in a controversy about lands devised, if the witnesses "are dead, out of the State, or have become incompetent" since probate);
Iowa: St. 1898, p. 16, c. 9, § 1, Comp. Code 1919, § 7391 (quoted more fully *ante*, § 1387, n. 2, *post*, § 1669, n. 2; admits former testimony with "the same force and effect as a deposition"); Comp. Code § 7312 (party disqualified as survivor; his deposition taken during lifetime or sanity of opponent may by read if filed 10 days before death or insanity);
Kansas: Gen. St. 1915, § 11777 (testimony before a probate court, admissible on the trial of a contest in the district court, if the witness is out of the jurisdiction, or dead, or has become incompetent since probate); § 3003 (court stenographer's transcript of former testimony, admissible like a deposition; cited more fully *post*, § 1669);
Kentucky: Stats. 1915, §§ 1019*a*, 4643 (official report is usable in the trial Court's discretion "where the testimony of such witness or witnesses cannot be procured"); 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923 (the proviso in the statute for the consent of the defendant in a criminal case applies "alone to the testimony of living witnesses so taken"; a better construction would be that it applies only to the use of the official report, leaving the sworn testimony of the stenographer on the stand unaffected by the statute);
Louisiana: Ann. Rev. St. 1915, § 1439 (testimony at a fire inquest, admissible, apparently unconditionally); C. Pr. 1870, § 586 ("All the testimony taken in writing in the parish court shall be used as evidence in the district court [on a trial 'de novo' on appeal]"); § 599 (same provision; testimony usable "without being obliged to produce the witnesses in person"); the two foregoing sections are annotated by the editor as "inoperative", without citing authority; § 1042 (testimony in writing before a probate court "may be read on the appeal"); § 943 (depositions of witnesses at the time of probating a will are admissible "in case the will is subsequently attacked, although such witness be dead or removed permanently from the State"); St. 1908, No. 247, p. 368, July 8 (on a new trial in a civil case, all the testimony at the former trial, if written down, may be used, without recalling the witnesses, except so far as the Court may permit on request of a party); St. 1915, No. 11, § 17 (trusts and monopolies; record of any other suit to which defendant has been party, admissible with certain limitations);
Maine: Rev. St. 1916, c. 87, § 135 (former testimony of a subscribing witness, in certain actions, admissible on his death);
Massachusetts: Gen. L. 1920, c. 276, § 50, Pub. St. 1882, c. 212, § 41, Rev. L. 1902, c. 217, § 49 (a witness' deposition before a magistrate may be read "if he is unable to attend at the time of the trial, by reason of his death, insanity, illness, or infirmity");
Mississippi: Code 1906, § 272, Hem. § 221 (testimony of the deceased mother before a justice on a bastardy complaint, admissible on the trial);
Montana: Rev. C. 1921, § 10036 (like Cal. C. C. P. § 1316); § 10531, par. 8 (like ib. § 1870, par. 8);
Nevada: Rev. L. 1912, § 6977 (testimony on examination before a committing magistrate may be used on the trial "when the witness is sick, out of the State, dead, or when his personal attendance cannot be had in court"); § 6855 (testimony before a committing magistrate, reduced to writing and subscribed, is admissible if it is "satisfactorily shown to the Court that he is dead or insane, or cannot, with due diligence, be found in the State"); § 5472 (former trial in civil cases; like Utah, Comp. L. 1917, § 7205);
New Jersey: Comp. St. 1910, Bastards, § 14 (the mother's examination in a bastardy case, admissible, if she is dead, or insane, or has left the State);
New Mexico: Ann. St. 1915, § 5878 (the testimony of a will-witness, reduced to writing, is admissible in future contests, "if the attendance of the witness cannot be procured"); St. 1919, Mar. 10, c. 29, § 7 (former testimony may be used if the witness is dead or insane,

or is a non-resident, or "after diligent effort" cannot be found);
New York: C. P. A. 1920, § 348 (where a party or witness has died or become insane or if a non-resident has departed the State, or if a resident has departed into military service, since or during the trial of an action or the hearing upon the merits of a special proceeding, the testimony of the decedent or insane person or absentee, or of any person who is rendered incompetent by the provisions of the last section, as quoted *ante*, § 488, may be read at a subsequent trial); C. Cr. P. 1881, § 8 (testimony at a commitment is admissible against the accused, in case the witness is dead, insane, or cannot with due diligence be found in the State); § 864 (bastardy: the mother's testimony on examination before the magistrate is admissible if she is dead or insane); St. 1913, c. 542, p. 1465 (amending Consol. L. 1909, Insanity, § 93; on second or later application for habeas corpus by insane person, testimony at any former hearing may be used without calling the witnesses);
North Carolina: Con. St. 1919, § 4572 (examinations taken by a committing magistrate are admissible if the deponent is "dead, or so ill as not to be able to travel, or by procurement or connivance of the defendant has removed from the State, or is of unsound mind"); § 4160 (when a subscribing witness "shall die or be absent beyond the State", the affidavits and proofs taken in common form shall be 'prima facie' evidence); § 4474 (desertion by seamen: testimony taken before justice may be used on the trial on appeal, if the witness is master, etc., on a vessel, "as if such person were in person present to give evidence");
North Dakota: Comp. L. 1913, § 8641 (on contested probate witness' testimony is admissible on subsequent testamentary trial, "if the witness be dead, or has permanently removed from the State");
Ohio: Gen. Code Ann. 1921, § 11469 (former testimony is admissible if the witness is dead, beyond the jurisdiction of the Court, insane, unable "through any physical or mental infirmity" to testify, or "has been summoned but appears to have been kept away by the adverse party", or "cannot be found after diligent search"); § 12125 (in bastardy proceedings, the testimony of the deceased mother before the magistrate is admissible); § 12084 (the testimony of a witness at a will-probate is receivable on the trial if the witness is dead or out of the jurisdiction or has become incompetent);
Oklahoma: Comp. St. 1921, § 1109 (testimony at a will-probate is admissible "in any subsequent contests or trials concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State");
Oregon: Laws 1920, § 727, par. 8 (like Cal. C. C. P. § 1870, par. 8); § 932 (official reporter's transcript of testimony, admissible as a witness' deposition "in the case mentioned in § 852 of the C. C. P.", quoted *ante*, § 1387);
Pennsylvania: St. 1887, May 23, § 9, Dig. 1920, § 8172, Crim. Procedure (testimony in criminal proceeding is admissible if the witness "die, or be out of the jurisdiction so that he cannot be effectively served with a subpœna, or if he cannot be found, or if he become incompetent to testify for any legally sufficient reason"); ib. § 9, Dig. § 21859, witnesses (similar, for civil cases);
Philippine Isl. C. C. P. 1901, § 298, par. 8 (like Cal. C. C. P. § 1870);
Porto Rico: Rev. St. & C. 1911, § 1403, par. 6 (like Cal. C. C. P. § 1870, par. 8);
South Dakota: Rev. C. 1919, § 3228 (testimony at a will-probate; like Okl. Comp. St. 1921, § 1109);
Texas: Rev. Civ. Stats. 1911, § 3275 (testimony at a will-probate is usable "on the trial of the same matter in any other court when taken there by appeal or otherwise"); C. Cr. P. 1911, § 834 (depositions before an examining court or jury of inquest are admissible on the same conditions as depositions 'de bene', set forth *ante*, § 1411); 1905, Smith *v.* State, 48 Tex. Cr. 65, 85 S. W. 1153 (cited more fully *ante*, § 1405 n.);
Utah: Comp. L. 1917, §§ 7205, 9277 (official stenographer's report may be read when the witness "shall die or be beyond the jurisdiction of the court"); § 8553 (committing magistrate; like Cal. P. C. § 686 without the second exception added by the 1911 amendment); § 7573 (probate testimony; like Cal. C. C. P. § 1316); § 8767 (testimony of witness released on bond, taken 'de bene' before committing magistrate, usable if the witness is "dead or insane or cannot with due diligence be found within the State"); St. 1919, Mar. 13, c. 36, amending Comp. L. § 1885 (city courts; official reporter's transcript of testimony may be read if the witness "shall die or be beyond the jurisdiction of the court");
Washington: R. & B. Code 1909, § 1310 ("In all trials respecting the validity of a will, if any subscribing witness be deceased, or cannot be found, the oath of such witness, examined at the time of probate, may be admitted as evidence"); § 1247 ("The testimony of any witness, deceased, or out of the State, or for any other sufficient cause unable to appear and testify", when written and certified as in § 1669, *post*, may be used in any civil case); St. 1913, c. 126, p. 386, § 6 (official reporter's certified transcript, admissible in any civil cause "when satisfactory proof is offered to the judge presiding that the witness originally giving such testimony is then dead or without the jurisdiction of the court", subject to objections as if he were present testifying); St. 1919, Mar. 25, c. 203 (bastardy proceeding: mother's testimony before the justice may be read, if the mother dies);
Wisconsin: Stats. 1919, § 4141*a* (testimony

§ 1414. **Proof of Unavailability of Witness.** The proponent of the former testimony or the deposition is of course ordinarily the party to *prove the necessity* of resorting thereto in consequence of the witness' unavailability in person.

Where former testimony is offered, no difficulty arises in applying this principle.[1]

But where a deposition is offered, it is usually the case that the proponent, in applying for authority to take the deposition, has already had occasion to make proof of the same cause as that now alleged by him to prevent the witness' non-attendance. In such cases — chiefly, illness, absence from the jurisdiction, and residence beyond a certain distance — must the proponent show at the trial that the *cause* upon which the taking was authorized *still continues* as a reason for non-attendance? On principle, he must, for the admissibility of the deposition depends on the existence of that cause and the question is for the first time before the trial Court for determination.[2] Nevertheless, it is practically desirable and proper, where the cause for taking was a probably permanent one — for example, residence without the limits — to presume that it continues, and to leave it to the opponent to show (if such is the case) that the cause has ceased.[3]

of "any deceased witness or any witness who is absent from the State", taken in any "action or proceeding except in a default action or proceeding where service of process was obtained by publication", offered in any "retrial, other action, or proceeding", is admissible if the issue is substantially the same and the opponent had opportunity to cross-examine);

Wyoming: Comp. St. 1920, § 6715 (in probate trials, the former testimony of an attesting witness is receivable if he "be dead, has permanently removed from the State, or is otherwise incompetent").

§ **1414.** [1] 1904, Fitch *v.* Traction Co., 124 Ia. 665, 100 N. W. 618 (former testimony); 1909, Van Norman *v.* Modern Brotherhood, 143 Ia. 536, 121 N. W. 1080 (former testimony).

[2] 1839, Weguelin *v.* Weguelin, 2 Curt. Eccl. 263 (deposition of one in danger of death; new affidavit of illness required at trial); 1920, Wilmer *v.* Placide, 137 Md. 107, 111 Atl. 822 (deposition held inadmissible, there being nothing in the record to show unavailability of the witness in person); 1825, Read *v.* Bertrand, 4 Wash. C. C. 559 (similar).

[3] *Federal:* 1831, Patapsco Co. *v.* Southgate, 5 Pet. 616 (absence [illegible] miles away); *California:* 1906, Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695 (deposition of a non-resident taken under C. C. P. § 2024; continued non-residence presumed); *Iowa:* 1859, Nevan *v.* Roup, 8 Ia. 207 (the deponent had stated that he was a non-resident but intended to be present if alive and well; held, admissible, "unless it is shown that the witness is present in court"); 1878, Cook *v.* Blair, 50 Ia. 128 (deposition taken on the ground of expected absence at the time set for trial, that time having afterwards been postponed; admitted, "unless the witness was in court"); 1887, Sax *v.* Davis, 71 Ia. 400, 32 N. W. 403 (deposition of one temporarily disabled a year before, the trial having been postponed nearly a year; the proponent required to show the witness' inability to attend); *Michigan:* 1904, Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (age, and inability to travel); *Missouri:* 1921, Mayne *v.* Kansas City R. Co., 287 Mo. 235, 229 S. W. 386 (deposition by soldier at Camp Funston, in Kansas; evidence held sufficient to show absence); *Nebraska:* 1887, Sells *v.* Haggard, 21 Nebr. 357, 32 N. W. 66 (non-residence of deponent presumed to continue to the time of trial); 1904, Chicago B. & Q. R. Co. *v.* Krayenbuhl, 70 Nebr. 766, 98 N. W. 44 (non-residence in Iowa presumed to continue); *South Carolina:* 1897, Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16; *Washington:* 1894, Hennessy *v.* Ins. Co., 8 Wash. 91, 93, 35 Pac. 585; *West Virginia:* 1915, County Court *v.* Grafton, 77 W. Va. 84, 86 S. E. 924.

Contra: 1876, Bowie *v.* Findly, 55 Ga. 604 (after dismissal of the original case, the cause for the deponent's non-attendance must be shown anew); 1894, Atkinson *v.* Nash, 56 Minn. 472, 58 N. W. 39 (because the taking officer was not authorized to certify to the cause); 1908, O'Brien *v.* St. Louis Transit Co., 212 Mo. 59, 110 S. W. 705 (non-residence

As *evidence* of the witness' death, absence, or non-residence, *replies received* during the search ought to be admissible; whether or not they are testimony in themselves, they serve as circumstances indicating due diligence of the party in seeking the witness.[4]

§ 1415. **If Witness is Available for Testifying, Deposition is not Usable.** No one has ever doubted that the former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial. But, in the case of a deposition, authorized as it is by statute to be taken for subsequent use in the trial, a notion has sometimes been formed that the authorized taking involves an absolute authority to use the deposition, unconditionally and without showing the witness' unavailability at the trial.

Such a notion is entirely opposite to the orthodox principle of the common law. A deposition was taken 'de bene esse', *i.e.* conditionally. The fundamental notion was that it was taken as a provision against the loss of the evidence at the trial, so that if the witness was after all at the time of the trial available for testifying, the deposition was not needed and was not admissible. But for this principle, all the inquiries, above examined, as to the sufficiency of death, illness, insanity, and the like, would have been meaningless:

1839, Dr. LUSHINGTON, in *Weguelin* v. *Weguelin*, 2 Curt. Eccl. 263 (affidavit of continuing illness required): "The very meaning of the phrase 'de bene esse' implied that it was conditional, and that the witness must be re-examined if capable."

1863, CAMPBELL, J., in *Dunn* v. *Dunn*, 11 Mich. 292 (appeal in Chancery from a decree dismissing a divorce-bill, based on the verdict in an issue framed for a jury): "The deposition of E. L. was allowed to be read when she was present in Court. This was also illegal. It is very well settled that the order usually made [in Chancery for trying an issue by jury] that the depositions may be [there] read, is only designed to remove legal objections which might exist by reason of the trial at law being technically a separate proceeding, which, until our Courts were entrusted with jurisdiction both at law and in equity, was in another tribunal. But trials before a jury of issues from Chancery are governed by rules of courts of law, which do not permit depositions to be read when the witness is present."

in the county must be shown by the party offering the deposition; one judge diss.); 1904, Carter *v.* Wakeman, 45 Or. 427, 78 Pac. 362 (because the statute, cited *ante*, § 1411 n. 1, expressly requires that proof be made that the witness "still continues" unavailable).

For the *time of making objections* to a deposition, see *ante*, §§ 18, 486.

[4] 1921, Wigginton *v.* State, 205 Ala. 147, 87 So. 698 (deposition of absentee; ruling not clear).

Compare the authorities upon the similar question arising in proof of *loss of an original document* (*ante*, § 1196), *absence of an attesting witness* (*ante*, § 1313), *statements of intention* (*post*, § 1725), *statements made to searchers* (*post*, § 1789), *persons not heard from* (*ante*, §§ 158, 664).

The following case is peculiar and unsound: 1908, Driggers *v.* U. S., 21 Okl. 60, 95 Pac. 612 (witness said to be dead; the marshal's return on the subpœna and the testimony of others that they "had been told he was dead", held not enough; this is a sample of the Court's twiddling thumbs over a game of checkers while the world clamors for justice to be done on murderers; the question here, Was Jim Saddler dead? could probably have been answered positively in two minutes if the Court had gone about it as directly as they would go about it in their ordinary business affairs. Is it necessary for Judicial Justice to shut itself off from the world in a temple and perform a sort of legal-religious ritual in order to determine the answers sought by its suppliants?). This ruling has been repudiated in Jeffries *v.* State, 1916, 13 Okl. Cr. 146, 162 Pac. 1137, cited more fully *ante*, § 1405.

1892, MAXWELL, C. J., in *Everett* v. *Tidball*, 34 Nebr. 803, 806, 52 N. W. 816: "It is the right of the adverse party to have the witness produced in court, unless for some of the causes mentioned above he cannot be present. The appearance of the witness, his manner of testifying, his apparent fairness or interest or bias in the case, are facts for the consideration of the jury in judging of the credibility of the witness. In addition to these, in case the witness testifies to a wilful falsehood, he may more readily be prosecuted for perjury where the parties reside and the facts are known than at some distant point, perhaps in another State."

It is clear, therefore, that if the witness is *present in the court-room* at the time when his deposition is offered, the deposition is inadmissible, because there is no necessity for resorting to it.[1] So also if the witness is *within reach of the court-process* and is not shown to be unavailable by reason of illness or the like, the deposition is inadmissible.[2] Where the witness, at some time since trial begun and prior to the moment when his deposition is offered, has been within reach of process, but is *not at the precise moment*, the deposition's admissibility would seem to depend on whether the witness' absence is due in any respect to bad faith on the proponent's part; but here the rulings are not harmonious.[3] The opponent's *waiver* of cross-examination by failure to

§ 1415. [1] To the express statutory provisions, *ante*, § 1411, add the following: *Federal:* 1901, Texas & P. R. Co. *v.* Watson, 50 C. C. A. 230, 112 Fed. 402; *Ala.* 1877, Mobile L. Ins. Co. *v.* Walker, 58 Ala. 290; 1883, Humes *v.* O'Bryan, 74 Ala. 77; *Conn.* 1896, Neilson *v.* R. Co., 67 Conn. 466, 34 Atl. 820; 1904, Handy *v.* Smith, 77 Conn. 165, 58 Atl. 694; *Ia.* 1904, Lanza *v.* Le Grand Quarry Co., 124 Ia. 659, 100 N. W. 488 (testimony at a former trial, assimilated to a deposition, under St. 1898, 27 Gen. Ass. c. 9, Rev. Code § 7417, excluded, the witnesses being present); *Mich.* 1863, Dunn *v.* Dunn, 11 Mich. 292 (see quotation *supra*); *Mo.* 1893, Schmitz *v.* R. Co., 119 Mo. 256, 271, 24 S. W. 472; 1896, Benjamin *v.* R. Co., 133 Mo. 274, 34 S. W. 590 (but his arrival in court after the deposition is read does not require it to be struck out); 1896, Barber Co. *v.* Ullman, 137 Mo. 543, 38 S. W. 458; 1906, State *v.* Coleman, 199 Mo. 112, 97 S. W. 574 (testimony at a former trial, excluded, the witness being present in court); *Nev.* 1871, Gerhauser *v.* Ins. Co., 7 Nev. 189; *N. Car.* 1821, State *v.* McLeod, 1 Hawks 344; *P. I.* 1903, U. S. *v.* Castillo, 2 P. I. 17 (testimony of a co-defendant, given at the preliminary inquiry, excluded the co-defendant being present in court; applying Gen. Order 58, § 15); 1903, U. S. *v.* Caligagan, 2 P. I. 433; *S. Car.* Salley *v.* R. Co., 62 S. C. 127, 40 S. E. 111; *Vt.* 1801, Doe *v.* Adams, 1 Tyl. 197; *Wis.* 1904, Hughes *v.* Chicago, St. P. M. & O. R. Co., 122 Wis. 258, 99 N. W. 897.

[2] *England:* 1702, Anon., 2 Salk. 691 (prior examination, on a rule of Court, of a witness going to sea; if he has not gone when the trial comes on, "he must appear; for the rule was made on supposal of his absence"); 1847, Blagrave *v.* Blagrave, 1 De G. & Sm. 252, 259 (the deponent must be shown unavailable; distinguishing London *v.* Perkins, 1734, 3 Bro. P. C. 602, where the ground of decision is obscure); *United States:* 1907, Dover *v.* Greenwood, C. C. R. I., 154 Fed. 855 (patent application; testimony taken in interference proceedings, refused to be made a part of the record, on the present principle); 1885, Baldwin *v.* R. Co., 68 Ia. 37, 25 N. W. 918 (a statute making shorthand notes admissible, held not to take away the necessity of "showing an excuse for not producing the witness in court"); 1895, Frankhouser *v.* Neally, 54 Kan. 744, 39 Pac. 700; 1894, Munro *v.* Callahan, 41 Nebr. 849, 60 N. W. 97; 1859, Morgan *v.* Halverson, 9 Wis. 271.

[3] *Cal.* 1906, Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695 (trial began Nov. 2, deposition was taken Nov. 11, witness left the State Dec. 5, deposition was offered Dec. 7; admitted); *Conn.* 1864, Spear *v.* Coon, 32 Conn. 292 (admitted, where a non-resident deponent was merely "a short time before the trial in the place" of taker's residence); *Ga.* 1849, Hammock *v.* McBride, 6 Ga. 178 (excluded, where the witness "has resided within the county a sufficient time previous to the trial for his personal attendance to be coerced by process of subpœna", provided the taker had notice thereof); *Kan.* 1887, Waite *v.* Teeters, 36 Kan. 604, 14 Pac. 146 (deponent residing in another county and therefore not compellable to attend; his temporary presence in the county on the morning of trial, without further showing as to the proponent's ability to secure him, not sufficient to exclude the deposition); 1893, Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471 (non-resident deponent, present

attend (*ante*, §§ 1371, 1378) would not be a waiver of the right to require the witness to be shown unavailable.[4]

A few Courts, ignoring the above principle, take the extraordinary attitude of nullifying the conditional nature of a deposition, by admitting it even when the witness is in the court-room.[4] 5

§ 1416. **Same: Rule not applicable (1) to Deposition of Party-Opponent; or (2) to Deposition containing Self-Contradiction; but applicable (3) to Deposition of Opponent's Witness; and (4) to Former Testimony in Malicious Prosecution.** (1) The general principle that the witness must be shown unavailable for testifying in court does not apply to a party's use of his *party-opponent's deposition* (taken, as is usual, under statutes allowing in common-law courts a process similar to a bill for discovery) — for the simple reason that every statement of an opponent may be used against him as an admission without calling him (*ante*, § 1049); the opponent's sworn statement, though called a deposition, is no less an admission than any other statement of his:[1]

at the trial; deposition admitted, neither the proponent nor the Court being shown aware of his presence until after the deposition was read, and the deponent being afterwards placed on the stand); *Mo.* 1894, McFarland *v.* Accid. Ass'n, 124 Mo. 204, 221, 27 S. W. 436 (the witness was present during plaintiff's testimony in chief, then went home; the deposition was offered in rebuttal, though properly testimony in chief; admitted, no collusion being shown); 1896, Benjamin *v.* R. Co., 133 Mo. 274, 34 S. W. 590 (mere presence in the jurisdiction, at the time of trial, of one whose deposition was taken without it, does not exclude); *Nebr.* 1892, Everett *v.* Tidball, 34 Nebr. 803, 805, 52 N. W. 816 (witness temporarily absent, but for some time before the trial present in the county; excluded); *N. J.* 1904, Flannery *v.* Central B. Co., 70 N. J. L. 715, 59 Atl. 157 (a deposition of the plaintiff taken by consent was offered and received on the opening of the trial; on the second day the plaintiff appeared in court; after close of the plaintiff's case, a motion to strike out the deposition was made by the defendant; held, that the defendant's unexplained delay was a waiver of objection); *Vt.* 1843, Starksboro *v.* Hinesburgh, 15 Vt. 200 (witness present at the time first set for trial, but not available at the adjourned date when his testimony was called for; admitted); 1869, Johnson *v.* Sargent, 42 Vt. 195 (same).

[4] 1829, Carrington *v.* Cornock, 2 Sim. 567.

That a stipulation expressly *waiving attendance* is *constitutional*, see *post*, § 2591.

[5] *Georgia:* 1894, Western & A. R Co. *v.* Bussey, 95 Ga. 584, 23 S. E. 207 (a deposition taken under Code § 3893, admitted without regard to personal inability to attend; the witness here was present in court); 1908, Georgia W. & A. R. Co. *v.* Sasser, 4 Ga. App. 276, 61 S. E. 505 (like Western & A. R. Co. *v.* Bussey); *Illinois:* 1856, Bradley *v.* Geiselman, 17 Ill. 571; Frink *v.* Potter, 17 Ill. 408 (but these seem inconsistent with Cook *v.* Stout, 47 Ill. 531, cited *ante*, § 1408, note 6; the statutory wording in this State is likely to mislead); *Kentucky:* 1898, Edmonson *v.* R. Co., — Ky. —, 46 S. W. 679; 1899, Louisville *v.* Muldoon, — Ky. —, 49 S. W. 791; *Michigan:* 1904, Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (under Comp. L. 1897, §§ 10136–10142, quoted *ante*, § 1411, the judge's discretion controls); *New York:* 1835, Phenix *v.* Baldwin, 14 Wend. 62, *semble*; *Tennessee:* 1850, Ford *v.* Ford, 11 Humph. 89, 90 (the opponent's statutory right to summon deponents out of the county does not prevent the deposition being received, subject to cross-examination, when the witness is present); 1903, Sherrod *v.* Hughes, 110 Tenn. 311, 75 S. W. 717 (under Code, § 5626, the deposition may be read by the taker, even though the opponent has produced the witness in court; settling the prior conflict of rulings in this State); *Texas:* 1914, Holt *v.* Guerguin, 106 Tex. 185, 163 S. W. 10 (left to the trial Court's discretion; the opinion shows an imperfect apprehension of the subject); 1919, Cook *v.* Denike, — Tex. Civ. App. —, 216 S. W. 437 (collecting prior cases); *Wisconsin:* 1861, Thayer *v.* Gallup, 13 Wis. 539, 541 (left to the trial Court's discretion).

Whether, in such a case, the opponent has a right to *oral cross-examination at the trial*, in addition to the deposition, is considered *ante*, § 1393.

§ **1416.** [1] *Accord: California:* 1887, Newell *v.* Desmond, 74 Cal. 46, 15 Pac. 369 (under §§ 2021, , 2032 plaintiff's deposition taken by defendant may be read, though plaintiff be present); 1897, Adams *v.* Weaver, 117 Cal. 421, 48

1888, BRACE, J., in *Bogie* v. *Nolan*, 96 Mo. 85, 91, 9 S. W. 14: The Legislature . . . did not intend to narrow the scope of inquiry . . . by abrogating that ancient, well-recognized, and hitherto unquestioned rule of evidence that the declarations of a party to the suit may be given in evidence against him. . . . There can be no difference in the character of the evidence whether the declarations are made in the deposition of a party taken in his own case then on trial, his deposition taken in another case to which he was a party, or taken as a witness in a case in which he was not a party and had no direct interest. They are admissible in each case for the same reason, not as the deposition of a witness under the statute, but as the declaration of a party to the suit."

But this allowance of the use of a party's deposition as an admission presupposes that it is the party-*opponent's;* a party's statements offered in his *own favor* are of course not admissions, and hence there is no reason why a party should be allowed to put in his *own deposition* instead of taking the stand.[2]

(2) So also the use of a deposition to show in it a *contrary statement of the deponent*, who has already testified on the stand, is allowable even though

Pac. 972; *Florida:* 1914, Bennett v. State, 68 Fla. 494, 67 So. 125 (accused's former testimony); *Georgia:* 1914, Hope v. First National Bank, 142 Ga. 310, 82 S. E. 929 (testimony in supplemental proceedings); *Kansas:* 1880, Moore v. Brown, 23 Kan. 269; *Maine:* 1874, Hatch v. Brown, 63 Me. 410, 419; *Michigan:* 1911, Merrill v. Leisenring, 166 Mich. 219, 131 N. W. 538 (opponent's former testimony used, although he was at the later trial disqualified); *Missouri:* 1855, Kritzer v. Smith, 21 Mo. 296; 1858, Charleston v. Hunt, 27 Mo. 34; 1882, Pomeroy v. Benton, 77 Mo. 64, 82; 1885, Priest v. Way, 87 Mo. 16, 28 (*contra*); 1888, Bogie v. Nolan, 96 Mo. 85, 9 S. W. 14 (overruling the preceding case; see quotation; *supra*); 1907, Southern Bank v. Nichols, 202 Mo. 309, 100 S. W. 613; *New Hampshire:* 1903, Profile & F. H. Co. v. Bickford, — N. H. —, 54 Atl. 699; *Porto Rico:* 1916, De Diego v. Rovira, 9 P. R. 71, 82; *Texas:* 1885, Schmick v. Noel, 64 Tex. 406, 408; *Virginia:* 1891, Lee v. Hill, 87 Va. 497, 504, 12 S. E. 1052, *semble* (testimony of a now disqualified opponent at a former trial); *Washington:* 1894, Denny v. Sayward, 10 Wash. 422, 428, 39 Pac. 119; *Wisconsin:* 1887, Meier v. Paulus, 70 Wis. 165, 35 N. W. 301; 1904, Hughes v. Chicago, St. P. M. & O. R. Co., 122 Wis. 258, 99 N. W. 897 (rule for parties not applicable to employees of a corporation); 1905, Johnson v. St. Paul & W. C. Co., 126 Wis. 492, 105 N. W. 1048 (rule applied to an officer of a corporation, distinguishing Hughes v. R. Co., *supra*); 1906, Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231 (similar); 1906, Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077 (like Hughes v. R. Co., *supra*); St. 1913, c. 246, p. 259 (amending Stats. § 4096, so as to make it plain that the answers on examination of an adverse party or "any of the persons mentioned" may be received in evidence from the taker "notwithstanding the person who was so examined may be present at the trial or proceeding"); 1921, Thomas v. Lockwood Oil Co., 174 Wis. 486, 182 N. W. 841 (death by wrongful act of defendant's agent F.; F.'s deposition taken adversely by plaintiff under Stats. § 4096, as amended by St. 1913, c. 246, held admissible for plaintiff without calling F.).

But an oral answer which has been *stricken out* of the written deposition before signing cannot be used at all: 1904, Young v. Valentine, 177 N. Y. 347, 69 N. E. 643.

For the opponent's right to use *parts of such a deposition* not read by the first party, see *post*, § 2124 (principle of Completeness).

[2] *Can.* 1919, Massey-Harris Co. & Gray-Campbell Co. v. Dell, 45 D. L. R. 734, Sask. (party's answer to discovery interrogatories); *U. S.* 1895, State v. Oliver, 55 Kan. 711, 41 Pac. 954 (former testimony); 1896, Moore v. Palmer, 14 Wash. 134, 44 Pac. 142 (even though originally taken by opponent; but *semble*, if the party had died or become incompetent, the deposition of course would be admissible); 1920, Lange v. Heckel, 171 Wis. 59, 175 N. W. 788 (the examination of a party, taken adversely under Stats. 4096, is not admissible on his own behalf at the trial). *Contra*, but erroneous: 1890, Johnson v. McDuffee, 83 Cal. 30, 23 Pac. 214.

If the party is *out of the jurisdiction*, this does not excuse his absence and allow him to take and offer his own deposition, for he must be assumed to be willing to come to court on his own behalf: 1916, Laurel Printing & P. Co. v. James, 6 Boyce Del. 185, 97 Atl. 601 (well-reasoned opinion, by Conrad, J.).

If, however, he is *deceased*, he is unavailable in person, and his successor may use the deposition like that of any other witness: Cases cited *ante*, § 1389.

the witness be present and available; for the deposition is here used not as substantive testimony (*ante*, § 1018), but only as containing a statement inconsistent with the same witness' testimony already given.[3]

(3) But the use of the deposition of an *opponent's witness* — *i.e.* a deposition taken by the opponent but not used by him — which, as already noted, is in other respects allowable (*ante*, § 1389) is not the use of an opponent's admission. It is offered as the substantive testimony of that witness, whose testimony has not as yet been heard. There is therefore no reason why one party rather than the other should be allowed to resort to a deposition without showing the deponent unavailable in person; and this the non-taker, as well as the taker, must do before using it:

1822, TILGHMAN, C. J., in *Gordon* v. *Little*, 8 S. & R. 532, 548: "The defendants say that it was the business of the plaintiff [who took the deposition] to subpœna his own witness, and therefore they did not do it. But in this they were wrong. The plaintiff might not like the evidence, and, if he did not, he was under no obligation to summon the witness. If the defendant thought this testimony favorable to himself, it was his business to secure it, by taking out a subpœna for the witness and endeavoring to procure his personal attendance."

1854, WATKINS, C. J., in *Sexton* v. *Brock*, 15 Ark. 345, 349: "It is argued that this [filing for security] was also designed to make them common property, so as to entitle either party to use them at pleasure. . . . But all depositions in common-law cases are taken 'de bene esse', and can only be read as if the witnesses 'were present and examined in open court',— as, if it be shown the witness is dead, sick, or infirm, or residing without the county, and the like, so as to excuse his personal attendance; . . . [they are] but a substitute, and an imperfect one, for the personal attendance of the witness when that is impossible or inconvenient to be obtained. . . . Depositions are not in the first instance original evidence, though a substitute for it; the party taking it upon due notice may be entitled, upon showing the death, infirmity, or absence of the witness from the county, to read it. There is no reason, from the necessity of the case, why the opposite party, if he desired the testimony, could not have procured it by deposition or enforced the attendance of the witness. . . . [In this case, the plaintiff was wrongly allowed to read a deposition, filed by the opponent,] without showing any compliance with the conditions prescribed by statute or any effort to procure the attendance of the witnesses by subpœna."

Distinguish, however, from the above principle, the use of a deposition or affidavit of an opponent's witness *used and adopted* by the opponent on a former occasion. So far as the opponent has thus by adoption made it his own statement, it may be used as the opponent's admission (on the principle examined *ante*, § 1075), and the deponent therefore need not be shown unavailable.

(4) Where in *malicious prosecution* the former testimony of a witness on the original prosecution is offered, the present principle is no less applicable than in other cases, and the witness must be shown to be deceased or otherwise unavailable.[4] The apparent exception, early established, that the *now*

[3] 1896, People *v.* Hawley, 111 Cal. 78, 43 Pac. 404; Me. Rev. St. 1916, c. 112, § 11.

[4] 1876, Fitch *v.* Murray, Wood Man. 74, 89 (admissible, if the witness is absent); 1865, Chapman *v.* Dodd, 10 Minn. 350, 357 (malicious prosecution; magistrate's report of the testimony before him, excluded, the witnesses not being shown unavailable; good opinion, by McMillan, J.); 1830, Burt *v.* Place, 4 Wend. N. Y. 591 (cited *infra*); 1827, Rich-

defendant's own former testimony could be used,[5] serves merely to "prove the rule"; for at common law the now defendant would have been disqualified as a witness in the second trial, and thus he would be unavailable as a witness (on the principle of § 1409, *ante*). It has, however, sometimes been thought that the former testimony might be used (without accounting for the witnesses) not as testimony of the facts recited in it, but as evidence of the *grounds of belief* of the then prosecutor, now the defendant (on the principle of § 258, *ante*.[6] It is true, in some varieties of the action for malicious prosecution, that this use would be correct.[7] But ordinarily the theory of it is not applicable, because testimony delivered after prosecution begun cannot be said to have served as probable ground for a belief which must have existed before prosecution begun.[8]

(5) Occasionally, a provision is found permitting the use of depositions

ards *v.* Foulke, 3 Oh. 52 (the testimony of other witnesses than the defendant, at the former trial, excluded, as being merely "secondary evidence").

The objection of difference of *parties and issues* (*ante*, § 1387) might also be raised; but the difference does not seem to be substantial.

[5] 1705, Johnson *v.* Browning, 6 Mod. 216 (L. C. J. Holt admitted the testimony of the now defendant's wife, given at the former trial, she being now disqualified; "for otherwise, one that should be robbed, etc., would be under an intolerable mischief; for if he prosecuted for such robbery, etc., and the party should at any rate be acquitted, the prosecutor would be liable to an action for malicious prosecution, without the possibility of making a good defence"); 1767, Buller, Trials at Nisi Prius, 19; 1810, Swift, Evidence (Conn.) 131; 1830, Burt *v.* Place, 4 Wend. 591, 596, 601 (the witnesses not being deceased, the defendant was not allowed to prove the testimony delivered for him at the prior trial, as evidence of probable cause; but "where the prosecution alleged to have been malicious was for a crime, and the defendant was a witness", he would be allowed to "show what was his testimony"); 1798, Moody *v.* Pender, 2 Hayw. N. C. 29 (defendant's former testimony admitted, on the ground of necessity; otherwise, perhaps, "had any other witness sworn to the same facts and circumstances"); 1813, Scott *v.* Wilson, Cooke Tenn. 315 (the testimony of the now defendant, given at the former trial, may be admitted, even concerning facts not "alone confined to his knowledge", on the ground of necessity). Presumably this exception would no longer be law, the defendant being now a qualified witness.

[6] 1903, Kansas & T. Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. 521 (malicious prosecution by arresting for contempt of an injunction; testimony of E. in the contempt proceedings allowed to be proved without calling E.; good opinion by Bunn, C. J.); 1849, Bacon *v.* Towne, 4 Cush. 217, 238 (malicious prosecution before magistrate; testimony before the magistrate admitted, because "the knowledge that he would so testify might have been one of the grounds on which the defendants made their complaint").

[7] 1814, Burley *v.* Bethune, 5 Taunt. 580 (in an action against a magistrate for malicious conviction without probable cause, the testimony before the magistrate, being material, may be proved; whether without producing the witnesses, not decided); 1911, Carpenter *v.* Ashley, 15 Cal. App. 461, 115 Pac. 268 (malicious prosecution by indictment for perjury in a suit of M. *v.* R.; E.'s testimony in the suit of M. *v.* R. admitted as bearing on probable cause for the indictment).

[8] 1844, Newton *v.* Rowe, 1 C. & K. 616 (libel in charging the plaintiff with falsely and maliciously accusing R.; plea, truth; testimony before the magistrates, held not material for the defendant to show the plaintiff's malice); 1865, McMillan, J., in Chapman *v.* Dodd, 10 Minn. 350, 358 ("The testimony delivered upon the hearing could not have influenced the action of the prosecution in commencing the proceedings, for at that time it had no existence"); 1827, Richards *v.* Foulke, 3 Oh. 52 (the question to be decided being that of probable cause, "this the jury was required to decide, not upon the evidence given before the justice, but upon the facts of the case and the defendant's knowledge of these facts"); 1834, Huidekoper *v.* Cotton, 3 Watts Pa. 56, 58.

No doubt, when sometimes it has been said that the "evidence" in the first trial is also admissible in the second one, it was merely meant that the *facts to be proved* would be the same in the latter; *e.g.* 1902, Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72.

For a similar question arising in suits by a *surety* or *joint-tortfeasor* against *principal* or *co-tortfeasor* for *contribution* to a claim sued for and paid, see *ante*, § 1387.

in a former case where the issue involves merely the bearing of a *former conviction* of crime.[9]

§ 1417. **Same: Exceptions to the Rule for (1) Chancery and analogous Proceedings; (2) Commissions by 'Dedimus Potestatem'; (3) Depositions 'in Perpetuam Memoriam'; (4) Will-Probates; (5) Bastardy Complaints; (6) Sundry Cases.** (1) According to the traditional *chancery practice*, all evidence was taken and presented to the Court of Chancery in the form of written depositions; there was no requirement of 'viva voce' testimony on the trial. The chancery practice is not within the present purview. But in a few jurisdictions such a practice appears to have been introduced by statute, in certain cases, for common-law trials.[1] So far as such a procedure has been expressly sanctioned by statute, it is clear that the trial may proceed upon written depositions without showing the deponent unavailable in person. But certainly this effect should not be judicially attributed to a statute by mere implication. The fragmentary introduction of such chancery practice into a common-law trial is an unfortunate measure. The impropriety of the unfair discrimination and of the underlying policy of the typical statutes of this class has already been noticed (*ante*, § 1407).

(2) Under the *Federal statute* [2] a deposition taken 'de bene esse' cannot be used unless the witness is shown to be unavailable in one of the specified ways.[3] Even under the Act of 1892 (*ante*, § 1381) empowering Federal Courts to order the taking of depositions "in the mode prescribed by the laws of the States in which the courts are held",[4] it was ruled that, even in a State in which depositions may be used without showing the witness unavailable, such a showing must still be made according to the Federal statute.[5] But the depositions under the 'dedimus potestatem' clause [6] stand upon a different footing. These are taken under a commission, supposed to be grantable wherever it is necessary to prevent a failure or delay of justice; and, when once allowed to be taken, are unconditionally admissible; so that there is no need at the trial to account for the witness as unavailable.[7] It does not ap-

[9] *Can.* Dom. R. S. 1906, c. 146, Crim. C. 908 (on an issue of former conviction or acquittal, the depositions, etc., in the former case are admissible).

§ 1417. [1] *Ante*, § 1415, note.

[2] U. S. Rev. St. 1878, § 865, Code § 1366; quoted *ante*, § 1411.

[3] 1831, Patapsco Co. *v.* Southgate, 5 Pet. 616; and the cases in note 5.

So in *patent* proceedings: 1910, Dover *v.* Greenwood, C. C. R. I., 177 Fed. 946 (bill in equity over a patent; testimony taken in interference proceedings in patent office held inadmissible under Rev. St. § 4915, without accounting for the witness in the usual way).

So, too, in *equity*, under Equity Rules 46–48 of 1912; here "good and exceptional cause for departing from the general rule" is to be shown.

[4] St. 1892, c. 14, Mar. 9, Code § 1372 ("in addition to the mode herein provided of taking the depositions of witnesses in causes pending at law or equity in the district courts of the United States, it shall be lawful to take depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held").

[5] 1895, Mulcahey *v.* R. Co., 69 Fed. 172; 1899, Texas & P. R. Co. *v.* Wilder, 35 C. C. A. 105, 92 Fed. 953 (depositions taken in a State Court cannot be used on removal in a Federal Court unless the witness is unavailable under § 865, in spite of St. March 9, 1892). Compare the rulings cited in § 1381, *ante*.

[6] U. S. Rev. St. 1878, § 866, Code § 1367, quoted *ante*, § 1411.

[7] 1819, Sergeant *v.* Biddle, 4 Wheat. 511; 1875, Jones *v.* R. Co., 3 Sawyer 527, Deady, J. Compare Rhoades *v.* Selim, 4 Wash. C. C. 724 (1827), under a rule of court.

pear that this anomalous theory is applied in other jurisdictions to 'dedimus potestatem' depositions.[8]

(3) Depositions 'in perpetuam memoriam' ought to stand on precisely the same footing as other depositions, *i.e.* they are taken conditionally, to be used at the trial only in case the witness is not available.[9] Yet the contrary view has occasionally been hinted at judicially,[10] or sanctioned by statute.[11]

(4) In some States the statutes providing for a jury trial or chancery hearing, on appeal from the preliminary *probate of a will* in the probate court, are so worded that the formal (and usually 'ex parte') testimony of the subscribing witnesses delivered and reduced to writing at the preliminary probate, is receivable absolutely at the later trial, *i.e.* without accounting for the witnesses' absence.[12] But this is anomalous and accidental.

(5) Similarly, the mother's testimony before the magistrate in a *bastardy complaint* is sometimes by statute made absolutely receivable at the later and regular trial;[13] though most statutes expressly condition this on the mother's decease or insanity.

(6) So, also, before *tribunals authorized to dispense with the usual rules* of evidence, this rule as to confrontation may be dispensed with.[14]

§ 1418. **Anomalous Jurisdictions in which no necessity suffices to admit.** There may be jurisdictions in which no cause whatever of unavailability will suffice to admit a deposition or former testimony. The reasons for this have already been noted, but may here be summarized. (1) So far as the *constitutional provision* securing the right of confrontation to an accused person is

The later statutes, noted *ante*, § 1381, do not seem to change this theory, except so far as they allow the local State practice to be recognized.

[8] It seems to be, however, in *Colorado:* 1906, Stone *v.* Victor E. Co., 36 Colo. 370, 85 Pac. 327 (for a deposition taken out of the State).

[9] 1618–19, Order in Chancery, No. 73, Bacon, L. C. ("no benefit shall be taken of the deposition of such witnesses in case they may be brought 'viva voce' upon the trial, but only to be used in case of death before the trial, or age or impotence [preventing attendance]. or absence out of the realm at the trial"); 1720, Dorset *v.* Girdler, Finch Prec. Ch. 532 ("these depositions cannot be made use of so long as the witnesses are living and may be had to be examined before a jury"); 1732, Benson *v.* Olive, 2 Stra. 919; 1817, Morrison *v.* Arnold, 19 Ves. Jr. 672; 1856, Booker *v.* Booker, 20 Ga. 777, 780.

[10] 1766, Apthorp *v.* Eyres, 1 Quincy, Mass. 229 (three judges to two; but chiefly because it was treated as an affidavit and the issue was not to a jury).

[11] *E.g.* in Michigan, cited *ante*, § 1412.

[12] The statutes are placed *ante*, §§ 1411, 1413; some of the rulings applying them are as follows: *Ill.* 1851, Rigg *v.* Wilton, 13 Ill. 15, 18; 1897, Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113 (the statute applied; but here one subscribing witness was called at the contest in chancery); 1899, Entwistle *v.* Meikle, 180 Ill. 9, 54 N. E. 217; 1903, Baker *v.* Baker, 202 Ill. 595, 67 N. E. 410 (at the chancery contest, the "certificate of the oath" of witnesses at the first probate may be either in affidavit form or in the form of questions and answers); 1903, Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77; 1916, Lyman *v.* Kaul, 275 Ill. 14, 113 N. E. 944 (this provision does not admit the testimony of any but the subscribing witnesses); *Kan.* 1907, McConnell *v.* Keir, 76 Kan. 527, 92 Pac. 540; *N. J.* 1905, Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874;
Contra: 1922, McCarty *v.* Weatherly, — Okl. —, 204 Pac. 632 (probate of a will; attesting witnesses' affidavits, excluded). Compare *post*, § 1658, par. 5, and n. 4.

[13] 1841, Walker *v.* State, 6 Blackf. Ind. 1, 4; 1905, McLaughlin *v.* Joy, 100 Me. 517, 62 Atl. 348 (here merely to show compliance with the statute as to complaints); 1874, Hoff *v.* Fisher, 26 Oh. St. 8; and cases and statutes cited *ante*, § 1413.

Compare the rule about *accusations in travail* (*ante*, § 1141).

[14] 1919, Ocean Accident & G. Co. *v.* Industrial Commission, 180 Cal. 389, 182 Pac. 35 (applying St. 1917, p. 831, § 60).

held, as it erroneously is in some jurisdictions (*ante*, § 1398), to preclude the use of depositions or former testimony by the prosecution, it is obvious that no cause, even the witness' death, will suffice to admit them. (2) So far as the *statute has not empowered* the Court to order the taking of depositions in a given class of cases, a deposition taken in such a case is unlawfully taken and has therefore no legal existence; such a deposition therefore is inadmissible (*ante*, §§ 1398, 1401).

SUB-TITLE II: EXCEPTIONS TO THE HEARSAY RULE

INTRODUCTORY

CHAPTER XLVI.

§ 1420. **Principle of the Exceptions to the Hearsay Rule.** The purpose and reason of the Hearsay rule is the key to the exceptions to it. The theory of the Hearsay rule (*ante*, § 1362) is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment — for example, by reason of the death of the declarant —, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. These two considerations — a Circumstantial Guarantee of Trustworthiness, and a Necessity, for the evidence — may be examined more closely, taking first the latter.

(1) Where the test of cross-examination is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative. Whatever might be thought of the general policy of choosing the former alternative without any further requirement, it is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception. The mere necessity alone of taking the untested statement, instead of none at all, might not suffice; but if, to this necessity, there is added a situation in which some degree of trustworthiness more than the ordinary can be predicated of the statement, there is reason

for admitting it as not merely the best that can be got from that witness, but better than could ordinarily be expected without the test of cross-examination. We thus come to consider the second essential element.

(2) There are many situations in which it can be easily seen that such a required test would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. Supposing that such a situation exists, the statement could properly be received, especially if no other evidence from that person was now available. The law of evidence properly assumes that such situations can and do exist, and the exceptions to the Hearsay rule are concerned with defining them.

A perception of these two principles and their combined value has been responsible for most of the Hearsay exceptions.[1] Each exception, to be sure, has come into existence and been maintained independently and amid considerations peculiar to itself alone. There has been no comprehensive carrying-out of a system of principles. Yet the results may be coördinated under those two heads. There has rarely been any judicial summing-up of the principles; yet their existence has been fully perceived and often judicially stated. The following utterances illustrate this recognition:

1876, JESSEL, M. R., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154: "So inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule. . . . Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence; for no doubt the ground for admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.[2]

"Now all these reasons exist in testifying both as to matters of public and general interest, and as to matters of pedigree, and some, if not all of them, exist in the other cases to which I have referred."

1810, SWIFT, C. J., Evidence, 121: "The law has therefore very wisely rejected all such evidence, excepting where it is impossible in the nature of things to obtain any other, and where this is sufficient to establish the matter in question."

1811, TILGHMAN, C. J., in *Garwood* v. *Dennis*, 4 Binney 328: "It is objected that, however impressive the declaration of a man of character may be, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation in cases of necessity or extreme inconvenience."

§ 1420. [1] Mr. Starkie (Evidence, I, 45), in 1824, was the first writer to state plainly the philosophy of the Exceptions.

[2] The learned judge, in this fourth element is referring merely to the requirement that the hearsay witness must possess the ordinary knowledge-qualifications of every witness. This is therefore not peculiar to the Hearsay exceptions (*post*, § 1424).

1826, EWING, C. J., in *Westfield* v. *Warren*, 8 N. J. L. 251: "The general rule of evidence excludes all hearsay. From necessity and from the impracticability, in some instances, of other proof, exceptions to this rule have been made."

1852, JOHNSON, C. J., in *Cornelius* v. *State*, 12 Ark. 804 (stating that hearsay lacks the securities of oath and cross-examination): "Where, however, the particular circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible."

1881, LOOMIS, J., in *Southwest School District* v. *Williams*, 48 Conn. 507: "The law does not dispense with the sanction of an oath and the test of cross-examination as a prerequisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth."

§ 1421. **First Principle: Necessity.** The scope of the first principle may be briefly indicated by terming it the Necessity principle. It implies that since we shall lose the benefit of the evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it. The reason why we shall otherwise lose it may be one of two:

(1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing. This is the commoner and more palpable reason. It is found in the exception for Dying Declarations and in the five ensuing ones. The principle is not always fully and consistently carried out in the rules; but the general notion is clear and unmistakable, and it is acknowledged in these exceptions with more or less directness and strictness.

(2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. This appears more or less fully in the exception for Spontaneous Declarations, for Reputation, and in part elsewhere. Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.

§ 1422. **Second Principle: Circumstantial Guarantee of Trustworthiness.** The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial guarantee of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation.

May we, however, generalize any further among the different exceptions and find any more detailed principles involving the reasons why these circumstances suffice as substitutes? Though no judicial generalizations have been made, there is ample authority in judicial utterances for naming the following different classes of reasons underlying the exceptions:[1]

a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

As to these, it may be said:

First, it is not always that an Exception is founded merely on a single one of these considerations. Often it rests on the operation, in different degrees, of two of them. For example, the exceptions for Declarations of Mental Condition, Spontaneous Declarations, and Declarations against Interest rest entirely on Reason *a*; while the exception for Declarations about Family History (Pedigree) rests largely upon Reason *a*, though partly also on Reason *c*. The exception for Dying Declarations rests entirely on Reason *b* (the fear of divine punishment). The exception for Regular Entries rests chiefly on Reason *b*, though partly also on Reasons *a* and *c*. The exception for Official Statements rests chiefly on Reasons *b* and *c*, though *a* also enters. Mixed considerations have thus often prevailed.

Secondly, the Exceptions have been established casually in the light of practical good sense, and with little or no effort (except in modern times) at generalization or comprehensive planning. The Courts have had in mind merely to sanction certain situations as a sufficient guarantee of trustworthiness. As elsewhere in the development of Anglo-American law generally, they have not (until recently) looked ahead, or behind, or about, to make comparisons and obtain unity of theory. Nevertheless, in analyzing the notions on which the exceptions have proceeded, we may distinguish clearly the three separate types of reason above set forth. This is no more than saying that the exceptions are and were to that extent rational; for wherever a reason is given for a result, it is possible to analyze and classify the results according to the nature of the reason.

§ 1423. **Incomplete Application of the Two Principles.** These two principles — Necessity and Trustworthiness — are only imperfectly carried out in the detailed rules under the exceptions. It would be strange if it were otherwise, in a legal system formed as ours is, partly on precedent and partly on principle, at the hands of judges of varying disposition and training. The two principles are not applied with equal strictness in every exception;

§ 1422. [1] The judicial utterances illustrating the above reasons will be found under the several exceptions.

sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking. Nevertheless they play a fundamental part. It is impossible without them to understand the exceptions. In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness. It is the proper office of an expounder of the law of Evidence to note this element of living principle, and to distinguish its applications from rulings which are merely arbitrary. It is through the failure to do this strictly that a general appearance of unreason and unpracticalness has been given to the Hearsay rule and its exceptions. In the following expositions of the Exceptions, the mode of treatment will consist in clearly separating that which can be directly placed to the credit of these two leading principles from that which remains as mere precedent and tradition. It may be affirmed that this residuum is on the whole decidedly a minor portion.

In making this separation, regard must strictly be had to the judicial utterances. There should be no forcing, no infusion of that which cannot be found in the authorities. The office of the commentator is to expound rules of law as he finds them declared and enforced; and, where he finds a rule without a principle, to note this with equal fidelity. But this fidelity is wanting where he neglects to distinguish between rules which rest on principle and rules which do not. What the judges supply is the rule and its principle if any. What the commentator is usually left to supply is a systematic analysis and a comprehensive grouping; and this must not merely be forgiven to him, — it must be demanded of him.[1]

§ 1424. **Witness-Qualifications, and other Rules, also to be applied to Statements admitted under these Exceptions.** The Hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the *qualifications of a witness* (*ante*, §§ 483–721) in regard to knowledge and the like. [1] These qualifications are fundamental as rules of Relevancy. Thus these extra-judicial statements may be inadmissible because of their failure to fulfil the ordinary

§ **1423**. [1] How little the judges can be expected to supply this element is seen in the present instance by the fact that until the Master of the Rolls, Sir George Jessel, uttered his memorable generalization, in 1876 (*ante*, § 1420), nothing of the same sort had been given us by a judge. Some dozen distinct exceptions are expounded in the following chapters; but upon even such an elementary point as the number of the exceptions there has been a total absence of correct judicial appreciation. The following enumerations have been made: Mansfield, C. J., in 4 Camp. 401 (1811), *two;* Best, C. J., in 2 Moo. & R. 25 (1828), *two;* Lord Campbell, in 11 Cl. & F. 85 (1844), *three;* Mellor, J., in L. R. 2 Q. B. 326 (1867), *two;* Lord Blackburn, in 5 App. Cas. 623 (1880), and Brett, M. R., in 13 Q. B. D. 818 (1884), *five;* Marshall, C. J., in 7 Cranch U. S. 295 (1813), *five;* Skinner, J., in 17 Ill. 20 (1855) and McGowan, J., in 13 N. C. N. S. 462, *one* in criminal cases.

§ **1424**. [1] 1881, Lord Blackburn, in Dysart Peerage Case, L. R. 6 App. Cas. 489, 504: "It is impossible to say that if a person said something, and could not himself if alive have been permitted to give testimony to prove it, he can by dying render that statement admissible. I think that is a self-evident proposition."

rules about qualifications, even though they meet the requirements of a hearsay exception. For example, in the Pedigree Exception there are rules about membership in the family which rest solely on the necessity of knowledge in the person whose statement is offered, — *i.e.* a rule of Testimonial Qualifications.

However, in applying these principles to hearsay exceptions, special situations arise, and the rules that depend upon merely the usual testimonial qualifications for witnesses on the stand come naturally in practice to be bound up with the rules about hearsay exceptions as special details of those exceptions. In the following chapters, for clearness' sake and convenience of reference, these rules involving the application of ordinary testimonial qualifications will be examined at the same time, instead of being relegated to the general treatment of those principles. It must be understood, however, that the principles involved do not have their origin in the Hearsay rule.

For similar reasons, testimony received under a hearsay exception being none the less testimony, the opponent may desire to *discredit* or to *corroborate* the declarant in the ways appropriate to discrediting or corroborating an ordinary witness (*ante*, §§ 875–1144). The application of such principles to hearsay exceptions can most conveniently be dealt with under the different exceptions.

In the same way, the allowance of an exception to the Hearsay rule does not of itself dispense with the application of the other *Auxiliary Rules of Probative Policy* (*ante*, § 1171), of which the Hearsay rule is only one. For example, when a written entry is offered under an exception to the Hearsay rule, the rule about Producing the Original of a Document (*ante*, § 1177) comes into application and must be observed; in offering a dying declaration, the rule of Completeness (*post*, § 2095) may come into place; and the rules of Testimonial Preference (*ante*, §§ 1286, 1325, 1335, 1345) are often invoked throughout the exceptions. These, with the rule of Authentication (*post*, §§ 2129–2169) and the rule of Integration or Parol Evidence (*post*, § 2400) are the Auxiliary Rules that find most frequent application to testimony admitted under hearsay exceptions. For purposes of practical convenience, their application here will be treated under the different exceptions, instead of under the heads of the respective auxiliary rules.

§ 1425. **Outline of Topics for each Exception.** Under each exception, then, the general order of topics will be as follows:

a. The Necessity principle, and its applications in the Exception in hand;

b. The principle of a Circumstantial Guarantee of Trustworthiness, and its applications in the Exception in hand;

c. The rules based on the independent principles of Testimonial Qualifications, Primariness, Authentication, and the like, as applied to the class of statements admitted; and, finally,

d. Arbitrary limitations and modifications not resting on any principle whatever.

This order of treatment must occasionally be slightly varied, but it serves as a general plan to be followed.

§ 1426. **Order of the Exceptions.** Owing to the mode of development of the Hearsay rule (*ante*, § 1364), it is scarcely possible to predicate a definite order of historical origin for the exceptions to the rule; we merely find that, after the time that the rule comes to be established (the early 1700s), certain classes of hearsay statements continued to be received as before. Recorded cases under some of these classes are found earlier in some instances than in others, but this, for the above reason, does not entitle us to say that such statements, as exceptions to the rule, are older in recognition than the others. It can be said definitely that most of the exceptions began to be recognized during the 1700s, and that the few remaining ones were not recognized until the 1800s; but that is all.

A more profitable order of arrangement is one based upon the differing nature of the Necessity principle (*ante*, § 1421) as recognized in the different exceptions. In several of them, the notion of Necessity is satisfied only where the particular declarant is shown to be *personally unavailable* as a witness, by reason of death or the like. In the others, the resort to the hearsay statement is allowed *without showing the personal unavailability* of the declarant at all. A grouping based on this radical difference seems to be the only one in any way dictated by the nature of the exceptions; and within these two groups the further arrangement may be left to be determined merely by convenience of orderly exposition.

The arrangement, then, is as follows, the first six forming the first group above mentioned, and the seventh bridging the gap to the remaining seven, which fall into the second group:

1. Dying Declarations; 2. Statements against Interest; 3. Declarations about Family History; 4. Attestation of a Subscribing Witness; 5. Regular Entries in the Course of Business; 6. Sundry Statements of Deceased Persons; 7. Reputation; 8. Official Statements; 9. Learned Treatises; 10. Sundry Commercial Documents; 11. Affidavits; 12. Statements by a Voter; 13. Declarations of a Mental Condition; 14. Spontaneous Exclamations.

§ 1427. **Future of the Exceptions.** The needless obstruction to investigation of truth caused by the Hearsay rule is due mainly to the inflexibility of its exceptions and to the rigidly technical construction of those exceptions by the Courts (*ante*, § 8 *a*).

The next and needed step in the liberalization of the Rule is the adoption of the general exception for all statements of deceased persons; leaving the application of the rule to the trial Court. This general exception, once foreshadowed a century ago (*post*, § 1576), has in modern times been introduced in a few States (*post*, § 1577), and should receive universal recognition.

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC I: DYING DECLARATIONS

CHAPTER XLVII.

§ 1430. **History.** This exception, as such, dates back as far as the first half of the 1700s, — the period when the Hearsay rule was coming to be systematically and strictly enforced (*ante*, § 1364) and at the same time certain excepted cases were coming to be recognized and defined. The ruling of Lord Mansfield in Wright *v.* Littler, in 1761 (*post*, § 1431), is generally taken as the leading early case, though the notion that special trust may be reposed in deathbed statements was already long understood.[1]

§ 1430. [1] Compare Shakespeare's allusion, about 1595, quoted *post*, § 1438.

The custom of using dying declarations probably comes down as a tradition long before the evidence-system arises in the 1500s; 12th Cent., London Custumal: "[When the sheriff holds inquest over a man killed], if the neighborhood names any one or suspects any one, or if the dead man himself has accused any one before he died, the sheriff ought to attach him who is accused, if he can find him" (Bateson's Borough Customs, I, 13; Selden Soc. vol. XVIII, 1904).

The earliest reported passages in trials seem to be the following: 1603, Sir Walter Raleigh's Trial, Jardine Crim. Tr., I, 435 (the accused argues, "Besides, a dying man is ever presumed to speak the truth"); s. c. 2 How. St. Tr. 18 (Serjt. Philips: "Nemo moriturus præsumitur mentiri"); 1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1335 (murder; the deceased's statements after the assault though apparently not made in consciousness of approaching death, were received, the counsel premising that "the sayings of a dying man in such circumstances are remarkable"); 1691, Lord Mohun's Trial, 12 id. 967, 975, 987 (murder); 1722, R. *v.* Reason, 16 id. 24 ff.; 1760, Earl Ferrers' Trial, 19 id. 918, 936 (described by counsel as "the

The exception has in some jurisdictions been recognized by statutes.[2] These, however, were seldom intended to alter in substance the details of the common-law rule.[3]

1. The Necessity Principle

§ 1431. **Scope of the Principle.** The requirements of this principle, as generally accepted in the beginning, were simple. The notion was that, since the witness had died, there was a necessity for taking his only available trustworthy statements — his dying declarations. The necessity, then, lay simply in the death of the witness, and that was all that need be shown. Conceivably, there might be still a necessity if the witness, though supposed to be dying, had recovered and had since left the jurisdiction, but this case had never occurred, and the question never arose.

By the 1800s, however, another interpretation of the Necessity principle had arisen, and this came to prevail. It is artificial and inconsistent with precedent and with itself, and its rules are now in fact nothing more than arbitrary. Nevertheless, as they purport to be logical deductions from a supposed principle, they must be treated as rational rules, and not as merely arbitrary limitations.

1. First, then, the original, orthodox, and only legitimate limitation was that the witness whose declarations it was desired to use should be *unavailable by death*. This is amply shown by the cases up to the beginning of the 1800s,[1]

declarations of the deceased, while a dying man, and after the stroke is given"); 1765, Lord Byron's Trial, ib. 1191, 1197, 1201, 1205 (the dying explanations of Lord Byron's antagonist, Mr. Chaworth, in the duel); 1791, R. *v.* Dingler, Leach Cr. C. 300, Gould, J.; 1793, R. *v.* Callaghan, McNally, Evidence, 385, Downs, J.; 1793, R. *v.* Trant, ib. 385, Downs, J.; 1800, R. *v.* Minton, ib. 386.

[2] *Cal.* C. C. P. 1872, § 1870, par. 4 ("in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of death", is admissible); *Ga.* P. C. 1910, § 1000 ("made by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him", admissible in evidence "in a prosecution for homicide"); *Mont.* Rev. C. 1921, § 10531, par. 4 (like Cal. C. C. P. § 1870); *Or.* Laws 1920, § 727, par. 4 (like Cal. C. C. P. § 1870); *P. R.* Rev. St. & C. 1911, § 1403, par. 4 (like Cal. C. C. P. § 1870, par. 4); *S. D.* St. 1921, c. 230 (dying declarations are "statements of material facts concerning the cause and circumstances constituting the 'res gestæ'" in homicide, rape, and abortion, "made by the victim voluntarily while sane and under the fixed and solemn belief that his death is inevitable and near at hand", and are admissible, "provided the deceased would be a competent witness if living", and are equally admissible for the defence); *Tex.* Rev. C. Cr. P. 1911, § 788 ("The dying declarations of a deceased person may be offered in evidence, either for or against a defendant charged with the homicide of such deceased person, under the restrictions hereafter provided. To render the declarations of the deceased competent evidence, it must be satisfactorily proved: 1, that at the time of making such declaration he was conscious of approaching death and believed there was no hope of recovery; 2, that such declaration was voluntarily made, and not through the persuasion of any person; 3, that such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement; 4, that he was of sane mind at the time of making the declaration").

[3] For statutes altering specific details, see *post*, § 1432.

§ 1431. [1] 1761, Wright *v.* Littler, 3 Burr. 1244 (in an action of ejectment, the genuineness of a will being in issue, evidence was received by Mansfield, L. C. J., that one of the subscribing witnesses on his deathbed declared it a forgery, the other judges concurring); 1769, Camden, L. C., and Mansfield, L. C. J., in the Douglas Peerage Case, 2 Hargr. Collect. Jurid. 387, 389, 397 (receiving "dying declarations" of Lady Douglas as to the paternity of the claimant, apparently on a general principle; "Would she have died

as well as by the treatises of the same period.[2] In particular, there is found no distinction between civil and criminal cases, or between different kinds of criminal cases.

2. But at this point (as has more than once happened), the misconstrued words of a treatise-writer, followed by a 'nisi prius' decision or two, started a heresy which in the next generation obtained full sway, and must now be taken as orthodox; it limits the use to *criminal cases of homicide*. The language of Serjeant East seems to have been the unwitting source of the heresy:

1803, Serjeant *East*, Pleas of the Crown, I, 353: "Besides the usual evidence of guilt in general cases of felony, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it is committed. Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of." [3]

This language led to a change of practice, and its influence is clearly to be traced in subsequent American cases. Finally, in 1860, a note of Chief Justice Redfield, in his edition of Professor Greenleaf's treatise, gave it the widest credit and led to its general acceptance:[4]

1857, OGDEN, J., in *Donnelly* v. *State*, 26 N. J. L. 617: "Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment. When a death-wound is inflicted in

with a lie in her mouth and perjury in her right hand?"); 1784, R. *v.* Drummond, Leach Cr. L. 4th ed., 337 (on an indictment for robbery, the dying confession of another person, recently executed, that he was the true robber, was rejected solely because of the deceased's incompetence as a convict); *ante*, 1805, Anon., cited in 6 East 195, per Ellenborough, L. C. J., as occurring under Heath, J. (action on a bond; dying confession of forgery by a witness admitted); approved (1805) by Ellenborough, L. C. J., *ubi supra*, (1808) by the same, in 1 Camp. 210; 1836, Stobart *v.* Dryden, 1 M. & W. 615 (Parke, B.: "Both then [*coram* Lord Mansfield] and at the time of the Nisi Prius trial before Mr. Justice Heath, an opinion prevailed (which is now properly exploded) that any declaration 'in extremis' was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath").

[2] 1802, McNally, Evidence, 381, 386 ("In exception to the general rule that 'no evidence can be received against a prisoner but in his presence', it has been repeatedly determined and is unquestionably law, that on a trial for murder the declarations of the deceased, after the mortal wound is given, conscious of approaching death, may be received in evidence against the prisoner, although such declaration was not made in his presence. . . . In civil cases the rule of receiving as evidence the dying declaration of a person 'in extremis' hath also been adopted, and on the same principle as in criminal cases"); 1810, Swift, Evidence, 125 ("In civil cases the rule of receiving as evidence the dying declarations of a person 'in extremis' has also been adopted, and on the same principle as in criminal cases"). The distinction had been suggested as early as 1743, by counsel in Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1161 (ejectment); but the absence of any settled distinction was in 1744 conceded by Mr. Chute, *arguendo* in Omichund *v.* Barker, 1 Atk. 38 ("A man, as he is just leaving the world, may be supposed to have a greater regard to truth").

[3] It was natural, in a chapter on Homicide, to call special attention to these considerations; but Mr. East did not and could not cite any authority for confining the evidence to such cases, and probably had no intention of making such an absolute statement.

[4] The same view of the Necessity principle is illustrated in the following cases: 1835, State *v.* Ferguson, 2 Hill S. C. 624; 1852, Campbell *v.* State, 11 Ga. 375; 1855, Walston *v.* Com., 16 B. Monr. Ky. 34; 1868, Marshall *v.* R. Co., 48 Ill. 476; 1869, Morgan *v.* State, 31 Ind. 198; 1872, Schell *v.* Stephens, 50 Mo. 374; 1881, State *v.* Wood, 53 Vt. 564; 1884, Waldele *v.* R. Co., 95 N. Y. 274; 1885, Railing *v.* Com., 110 Pa. 105, 1 Atl. 314.

secret, as was done in this case, no person can be expected to speak to the fact except the victim of the violence."

1860, REDFIELD, C. J., in Greenleaf, Evidence, I, § 156, editorial note: "It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission. . . . And although it is not indispensable that there should be no other evidence of the same facts, the rule is no doubt based upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished is unquestionably the chief ground of this exception in the law of evidence."

This orthodox heresy, with its narrow view of the necessity for such evidence, has been applied with some attempt at consistency, the result of which is the following limitations.

§ 1432. **Rule Applicable in Certain Criminal Cases only.** (1) The proceeding in which the statements are offered may *not* be a *civil case*.[1]

(2) It must be a public prosecution for the specific crime of *homicide*.[2]

(3) It must be a prosecution, not merely for an act which has resulted in fact in death, but for an offence *involving legally* the resulting *death* as a necessary element. This limitation is a refinement evolved from the earlier and simpler form of statement that "death must be the subject of the charge." When the evidence was offered in a prosecution for attempted *abortion* and *like offences*, where the woman's death resulted, the earlier form of statement became capable of opposite interpretations. Generally the narrower one has been adopted.[3]

§ 1432. [1] 1836, Stobart *v.* Dryden, 1 M. & W. 615; 1865, Daily *v.* R. Co., 32 Conn. 357; 1869, Wooten *v.* Wilkins, 39 Ga. 223; 1886, East Tenn. Valley & G. R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; 1869, Duling *v.* Johnson, 32 Ind. 155; 1896, Thayer *v.* Lombard, 165 Mass. 174, 42 N. E. 563; 1871, Brownell *v.* R. Co., 47 Mo. 245; 1806, Jackson *v.* Kniffen, 2 Johns. N. Y. 36; 1818, Wilson *v.* Boerem, 15 Johns. N. Y. 286; 1854, Barfield *v.* Britt, 2 Jones L. N. C. 43 (overruling McFarland *v.* Shaw, 2 N. C. Law Repos. 105); 1917, Ross *v.* Cooper, 38 N. D. 173, 164 N. W. 679 (defendant's son shot and killed plaintiff's husband, who was farm foreman; issue as to defendant's liability for his son's acts as agent; deceased's dying declarations excluded; another example of the shockingly unjust results of this irrational limitation of the rule; Grace, J., diss.); 1921, Milne *v.* Landers, 143 Tenn. 602, 228 S. W. 702 (workmen's compensation; dying declarations of employee as to cause of death, excluded).

The following cases are therefore practically outlawed: 1806, Jackson *v.* Vredenburgh, 1 Johns. N. Y. 159, 163 (wife's dying declarations as to her husband's will; left undecided, as to the present point); 1859, People *v.* Blakely, 4 Park. Cr. C. N. Y. 184 (admitting a declaration that a note had been signed; "It is true this is said only in regard to criminal cases; but the rules of evidence in criminal cases are in most respects the same as in civil cases"; here the declaration was in any case admissible as against interest).

See § 1141, *ante* (Corroboration by Similar Statements) for the Delaware statute treating a *bastard's mother's* declaration in travail as a dying declaration.

[2] Excluded in the following cases: 1824, R. *v.* Mead, 2 B. & C. 605 (perjury); 1830, R. *v.* Lloyd, 4 C. & P. 233 (robbery); 1874, Johnson *v.* State, 50 Ala. 459 (rape); 1905, People *v.* Stison, 140 Mich. 216, 103 N. W. 542 (incest, followed by death at childbirth; deceased's declarations excluded); 1876, State *v.* Barker, 28 Oh. St. 583; 1866, Hudson *v.* State, 3 Coldw. Tenn. 359 (robbery); 1911, Haley *v.* State, — Tex. Cr. —, 138 S. W. 631 (rape); 1918, Taylor *v.* Com., 122 Va. 886, 94 S. E. 795 (felonious assault upon B. T., wife of defendant); 1871, Crookham *v.* State, 5 W. Va. 514 (assault with intent to kill).

In some of the statutes cited *ante*, § 1430, the scope is extended to "criminal actions" in general, though the subject of the declaration must be "the cause of death."

[3] 1822, R. *v.* Hutchinson, 2 B. & C. 608, note, Bayley, J. (administration of drugs to a

Through this pedantic refinement much labor has been wasted, and justice has often been hampered and defeated, for it is obvious that the evidential need and value of the statement is precisely the same, whatever the criminal issue. We see here that the strictly evidential question has been entirely lost sight of, and the exclusion or admission of the statements is made to depend arbitrarily on the definition of a particular criminal offence.

In several jurisdictions the aid of the Legislature has been invoked to stop the further defiance of common sense by the Courts over such monstrous trivialities, and to admit dying declarations in charges of abortion and related offences.[4]

In another jurisdiction, the shackles of irrational tradition have been boldly thrown off, by judicial interpretation, so as to admit dying declarations in *civil cases generally*.[5] In another jurisdiction the Legislature has enlarged the exception so as to include *civil cases of personal injury*.[6]

pregnant woman); 1860, R. *v.* Hind, 8 Cox Cr. 300, Pollock, C. B. (attempt to procure a miscarriage); 1891, Com. *v.* Homer, 153 Mass. 344, 26 N. E. 872; 1900, State *v.* Meyer, 64 N. J. L. 382, 45 Atl. 779 (excluded on a charge of abortion in which the woman's death was not of the essence of the crime, though it affected the punishment); 1874, People *v.* Davis, 56 N. Y. 95; 1878, State *v.* Harper, 35 Oh. St. 78; 1908, State *v.* Fuller, 52 Or. 42, 96 Pac. 456; 1885, Railing *v.* Com., 110 Pa. 103, 1 Atl. 314. *Contra: Del.* 1906, State *v.* Fleetwood, 6 Penna. Del. 153, 65 Atl. 772; *Ind.* 1881, Montgomery *v.* State, 80 Ind. 345 (Elliott, C. J.: "We conclude, where death results from the unlawful attempt to produce an abortion, that death is the subject of the enquiry and that dying declarations are competent. If we adopt any other view, we shall sacrifice principle to a mere form of words. . . . We regard the statute as clearly intending that death shall be deemed a controlling element of the offence, and in this respect it differs from the statutes of New York and Ohio, as construed by the courts of those states. . . . If in reality the offence is homicide and the subject of enquiry the manner of the deceased's death, the settled rules of evidence which prevail in such cases should be enforced"); 1903, Seifert *v.* State, 160 Ind. 464, 67 N. E. 100; *N. J.* 1900, State *v.* Meyer, 65 N. J. L. 237, 47 Atl. 486 (even where abortion is a crime, though the death did not result from that cause, the woman's dying declaration is admissible; approving Montgomery *v.* State); *Wis.* 1877, State *v.* Dickinson, 41 Wis. 308.

The following are distinguishable: 1901, Worthington *v.* State, 92 Md. 222, 48 Atl. 355 (causing abortion followed by mother's death; dying declaration admitted, because abortion consists in killing the unborn child); 1894, State *v.* Pearce, 56 Minn. 226, 233, 57 N. W. 652, 1065 (manslaughter by procuring abortion; admitted).

[4] *Mass.* St. 1889, c. 100, Gen. L. 1920, c. 233, § 64 (dying declarations of a woman dying from abortion, admissible in prosecutions for the offence); 1893, Com. *v.* Thompson, 159 Mass. 56, 59, 33 N. E. 1111 (statute applied); *Mo.* St. 1907, p. 245, Mar. 6, Rev. St. 1919, § 4034 (in prosecutions for abortion, etc., the woman's dying declarations are admissible, provided she was "of sound mind when such declarations were made"; but "no conviction shall be based alone upon such declarations unless corroborated as to the fact that an abortion or miscarriage has taken place", and the privilege for communications to the attending physician shall not apply to his testimony); *N. Y.* St. 1875, c. 352 (similar); St. 1909, c. 66, § 1, p. 85 (reenacting St. 1875, c. 352, § 1, as C. Cr. P., § 398*a*); *Oh.* St. 1910, p. 210, May 13, Gen. C. Annot. 1921 (on a trial for violation of Gen. Code § 12412, the woman's dying declaration "as to the cause and circumstances of such miscarriage or attempt", to be admissible; enacting a new § 12412-1); *Pa.* St. 1895, June 26, Dig. 1920, § 10361 (similar, with peculiar and lengthy wording; the prosecution must first show the declarant's "sound mind", and there must be corroboration of the declaration); *S. D.* St. 1921, 230 (dying declarations admissible in cases of abortion and rape; quoted *ante*, § 1430).

[5] *Kansas:* 1914, Thurston *v.* Fritz, 91 Kan. 468, 138 Pac. 625 (cited *post*, § 1436); 1920, Vassar *v.* Swift & Co., 106 Kan. 836, 189 Pac. 943 (injury received by intestate in loading cars; his dying declaration as to circumstances of the injury, admitted; affirming Thurston *v.* Fritz).

[6] *North Carolina:* St. 1919, c. 29, amending Cons. St. 1919, § 160 (in actions for death by wrongful act, "the dying declarations of the deceased as to the cause of his death" are admissible under the same rules as in "criminal actions for homicide"); 1920, Latham *v.*

§ 1433. **Death in Question must be Declarant's.** Again, not any death may be the subject of the charge; the deceased declarant must be the person whose death is the subject of the charge:[1]

1875, KINGMAN, C. J., in *State* v. *Bohan*, 15 Kan. 418: "Mr. Redfield states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. . . . Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness of his crime, beyond the power of the Court by killing him, shall not thereby escape the consequences of his crime. . . . Necessity, then, being the only ground on which such testimony can be admitted, it remains to be seen whether that necessity exists so generally, or to so great an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of a rule admitting such testimony"; and in a trial for the murder of T. A., declarations were rejected of W. A., shot at the same time with T. A., but surviving him a few hours.

§ 1434. **Circumstances of Death related.** Finally, the declaration may not concern any and all topics. It must concern the facts leading up to or causing or attending the injurious act which has resulted in the declarant's death; for it is only as to such facts that the supposed necessity for the statements can exist.[1] Here again there is opportunity for prolific quibbling. The appli-

Andrews Mfg. Co., — N. C.—, 105 S. E. 423 (St. 1919, c. 29, admitting dying declarations "under the same rules" etc. as in criminal actions, applied to admit the dying statement of an employee in an action for wrongful death); 1921, Williams v. Randolph & C. R. Co., 182 N. C. 267, 108 S. E. 915 (death by wrongful act; decedent's dying declaration admitted under St. 1919, c. 29).

§ 1433. [1] *Excluded:* 1916, Allsup v. State, 15 Ala. App. 121, 72 So. 599 (another person killed in the same affray); 1916, Holland v. State, 126 Ark. 332, 190 S. W. 104 (declarations of D., killed in the same affray as B., excluded on trial for the murder of B.); 1893, Mora v. People, 19 Colo. 255, 262, 35 Pac. 179 (declarations by an accomplice resisting arrest); 1904, Taylor v. State, 120 Ga. 857, 48 S. E. 361 (like State v. Bohan, Kan., quoted *supra*); 1875, State v. Bohan, 15 Kan. 418 (quoted *supra*); 1867, State v. Fitzhugh, 2 Or. 227, 232 (declarations of F., killed in the same affray); 1873, Brown v. Com., 73 Pa. 329 (husband and wife murdered in different places about the same time; excluding at the trial for the killing of the former the latter's declarations); 1878, Poteete v. State, 9 Baxt. 270 (third person killed in the same affray); 1894, Radford v. State, 33 Tex. Cr. 520, 526, 27 S. W. 143 (husband and wife killed at the same time; on a charge of murder of the husband, the wife's declarations excluded).

Admitted: 1837, R. v. Baker, 2 Moo. & Rob. 53 (declarations of one poisoned at the same time as the person whose death was charged); 1871, State v. Wilson, 23 La. An. 559 (declarations of J. S., shot at the same time as W. D., for whose murder the accused was on trial); 1859, State v. Terrell, 12 Rich. L. S. C. 329 (declarations of one poisoned at the same time with him whose death was the subject of the charge).

§ 1434. [1] *Alabama:* 1849, McLean v. State, 16 Ala. 672, 676 ("whether he had forbade the prisoner walking the road that morning, immediately preceding the time that prisoner had shot him", admitted); 1860, Mose v. State, 35 Ala. 421; 1861, Ben v. State, 37 Ala. 105; 1881, Reynolds v. State, 68 id. 506; *California:* 1883, People v. Fong Ah Sing, 54 Cal. 253; 1881, People v. Taylor, 59 Cal. 640, 648; 1897, People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; *Florida:* 1901, Clemmons v. State, 43 Fla. 200, 30 So. 699 (the scope of the declarations is the 'res gestæ'); 1916, Malone v. State, 72 Fla. 28, 72 So. 415 (that deceased "shot her on account of a fight they had", excluded); *Georgia:* 1893, Wilkerson v. State, 91 Ga. 729, 739, 17 S. E. 990 (killing of a husband by the wife's paramour; the husband's declaration that he had found them in adultery, admitted); 1898, Perry v. State, 102 Ga. 365, 30 S. E. 903 (declarations as to the relations of deceased and defendant some time before, excluded); 1899, Bush v. State, 109 Ga. 120, 34 S. E. 298 (declarations as to defendant's threats immediately preceding, admitted); 1914, Harris v. State, 142 Ga. 627, 83 S. E. 514 (as to conversations prior to the homicide, admitted); *Indiana:* 1903, Seifert v. State, 160 Ind. 464, 67 N. E. 100 (death by abortion; deceased's declarations as to the defendant's incitement to the act and furnishing of an instrument, admitted); *Iowa:* 1903, State v. McKnight, 119 Ia. 79,

cation of the Opinion rule operates further (*post*, § 1447) to limit the scope of the narration otherwise admissible under the present principle.

§ 1435. **Further Limitations rejected.** The foregoing limitations, it will be observed, are logically required by the principle as introduced by Serjeant East (*ante*, § 1431). But two further and equally necessary results of it have never been accepted:

(1) If the killing was not secret, or if *other and adequate testimony* as to the circumstances of the death is at hand, nevertheless the dying declaration is admissible, even though in strictness it is not needed:[1]

1898, WILLIAMS, J., in *Com.* v. *Roddy*, 184 Pa. 274, 39 Atl. 211: "[The defendant] alleges that the Commonwealth was under no necessity to use the dying declarations, and therefore had no right to use them. This rests on a misapprehension of the rule relating to their

93 N. W. 63 (declaration as to prior assaults by the defendant on the deceased; excluded); 1922, State *v.* Brooks, 192 Ia. 1107, 186 N. W. 46 (remarks by declarant's wife, etc., held inadmissible as a part of the declaration); *Kansas:* 1899, State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970 (sundry statements as to prior relations of deceased and defendant, excluded); *Kentucky:* 1872, Leiber *v.* Com., 9 Bush 13; 1888, Peoples *v.* Com., 78 Ky. 500, 9 S. W. 509, 810; 1899, Redmond *v.* Com., — Ky. —, 51 S. W. 565 (that he had no pistol, admitted); 1899, Baker *v.* Com., 106 Ky. 212, 50 S. W. 54 ("I want all you people to swear the truth about this", excluded); 1913, Lucas *v.* Com., 153 Ky. 424, 155 S. W. 721 (declaration as to certain prior occurrences, excluded; the precision with which the admissible and inadmissible portions of the declaration are nicely dissected in this opinion shows the utterly unreasonble nature of this limitation); *Maine:* 1912, State *v.* Albanes, 109 Me. 199, 83 Atl. 548 (declarations as to threats of defendant reported to deceased on the day of the killing, admitted); *Michigan:* 1910, People *v.* Alexander, 161 Mich. 645, 126 N. W. 837 (statement as to prior trouble between the parties, excluded); *Missouri:* 1903, State *v.* Parker, 172 Mo. 191, 72 S. W. 650 ("I never made any threats against him in my life", "I never had a quarrel with him", excluded, though the defendant had introduced evidence of recent threats by the deceased; this ruling is absurd, and disfigures the law of evidence in Missouri, — the more emphatically because a new trial was ordered solely because of the admission of these parts of the declaration); 1909, State *v.* Kelleher, 224 Mo. 145, 123 S. W. 551 (declarations as to prior occurrences, excluded; unsound on the facts); *Montana:* 1911, State *v.* Crean, 43 Mont. 47, 114 Pac. 603; *New York:* 1902, People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (declaration as to an occurrence of three hours before the fatal injury, excluded; the ruling is unsound); *North Carolina:* 1899, State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648 (declarations about a precedent quarrel, etc., with defendant, whom deceased did not recognize at time of shooting, excluded); *Oklahoma:* 1921, Wratislaw *v.* State, — Okl. Cr. —, 194 Pac. 273 (recitals of circumstances too long prior to the killing excluded); *Oregon:* 1874, State *v.* Garrand, 5 Or. 216, 219; 1908, State *v.* Doris, 51 Or. 136, 94 Pac. 44 ("I never had any trouble with him before", excluded); 1908, State *v.* Fuller, 52 Or. 42, 96 Pac. 456 (abortion; admissible for facts "tending to establish every essential element of the crime"; here, for declarant's condition of health on the day when defendant operated); *Pennsylvania:* 1905, Com. *v.* Spohr, 211 Pa. 542, 60 Atl. 1084 (declarations stating the defendant's conversation just before shooting, in which he referred to his prior threats and arrest, admitted); *South Carolina:* 1895, State *v.* Petsch, 43 S. C. 132, 20 S. E. 993 (circumstances of preceding dispute, beginning two weeks before, *semble*, admissible); *Tennessee:* 1911, Still *v.* State, 125 Tenn. 80, 140 S. W. 298 (threat relating to a past occurrence, excluded); *Texas:* 1920, Hill *v.* State, 88 Tex. Cr. 179, 225 S. W. 521 (wife-murder; wife's declaration about prior beatings, etc., excluded); *Virginia:* 1912, Patterson *v.* Com., 114 Va. 807, 75 S. E. 737 (declarations as to prior conduct, excluded); 1921, Pendleton *v.* Com., — Va. —, 109 S. E. 201 (murder; dying declaration as to preceding circumstances, partly admitted, partly rejected); *Washington:* 1897, State *v.* Moody, 18 Wash. 165, 51 Pac. 356 (declaration as to a prior threat of defendant, excluded); 1919, State *v.* Swartz, 108 Wash. 21, 182 Pac. 954 (certain portions excluded, but too rigorously); *Wyoming:* 1903, Foley *v.* State, 11 Wyo. 464, 72 Pac. 627 (statement as to quarrels within the past two weeks, excluded).

§ 1435. [1] *Accord:* 1881, Reynolds *v.* State, 68 Ala. 506; 1903, Fuqua *v.* Com., — Ky. —, 73 S. W. 782; 1883, Payne *v.* State, 61 Miss. 163; 1857, Donnelly *v.* State, 26 N. J. L. 627; 1916, People *v.* Barrios, 23 P. R. 772; 1905, Lyles *v.* State, 48 Tex. Cr. 119, 86 S. W. 763.

admission. The 'necessity' to which the text-books and the cases refer is not the exigency of any particular case, but a public necessity, which civilized society feels the pressure of, for the protection of human life by the punishment of manslayers. . . . [The evidence] is competent, not in a particular case, where the defendant could not otherwise be convicted, but in all cases, no matter how ample the evidence of identification through other sources may be."

This again shows the historical unsoundness of the spurious principle; for, had it originated in the reason given, the first and fundamental rule would have been to distinguish between cases in which other evidence was or was not attainable.

(2) Where the fact of the killing is *conceded*, the dying declaration, under the spurious principle, is by hypothesis unnecessary; nevertheless, this result is not recognized; the declaration is admitted, even where the killing is conceded.[2]

§ 1436. **Foregoing Limitations Improper.** All of the foregoing limitations, except the death of the declarant, are unsound; and for the following reasons:

(1) The orthodox policy of the Hearsay exceptions in general (*ante*, § 1421) is to interpret the "necessity" for the evidence as meaning, not the absence of other evidence from *any* source, but merely the absence of other evidence from the *same* source, *i.e.* the declarant. (2) The spurious principle, even so far as carried out, rests on wrong assumptions; for it is of as much consequence to the cause of justice that robberies and rapes be punished and torts and breaches of trust be redressed as that murders be detected; the notion that a crime is more worthy the attention of Courts than a civil wrong is a traditional relic of the days when civil justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the king's name were zealously encouraged because of the fines which they added to the royal revenues. (3) The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same, the admissibility should be the same. (4) The spurious principle is recognized as unworkable in logical strictness, and, when fairly carried out, comes into conflict with convenience and good sense. (5) Its limitations are heresies of the last century, which have not even the sanction of antiquity. They should be wholly abolished by legislation.[1]

[2] 1886, State *v.* Saunders, 14 Or. 305, 12 Pac. 441. *Contra:* 1895, Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390.

§ **1436.** [1] Courts have here and there expressed dissatisfaction with these limitations: 1815, Taylor, C. J., in McFarland *v.* Shaw, 2 N. Car. L. Repos. 105; 1861, Davis, J., in Caujolle *v.* Ferrié, 23 N. Y. 94; 1869, McCay, J., in Wooten *v.* Wilkins, 39 Ga. 223; 1873, Barrows, J., in State *v.* Wagner, 61 Me. 195; 1917, Grace, J., in Ross *v.* Cooper, 38 N. D. 173, 164 N. W. 679.

In one jurisdiction the irrationality of these limitations has now been judicially recognized: 1914, Thurston *v.* Fritz, 91 Kan. 468, 138 Pac. 625 (action by an executor to recover the residue of a purchase price due to his testator; the sum paid was in dispute; the deceased had made a statement, when on the point of death, purporting to give "the truth about the sale of my farm to Mr. Fritz and Mr. Beal"; held admissible, Benson, J., diss.; liberal and rational opinion by West, J.; "we are confronted with a restrictive rule of evidence commendable only for its age"; the restrictions positively repudiated seem to be the restriction (1) to criminal cases, (2) to homicide issues, (3) to the details of a specific transaction).

Upon the policy of enlarging or retaining the present arbitrary limitations of the Exception, see the following interesting dis-

2. The Circumstantial Guarantee

§ 1438. **In general; Solemnity of the Situation.** All Courts have agreed, with more or less difference of language, that the approach of death produces a state of mind in which the utterances of the dying person are to be taken as freed from all ordinary motives to mis-state. The great dramatist expressed the common feeling long before it was sanctioned by judicial opinion.[1] In the following passages will be found the now classical sentences of the earlier English judges, as well as later ones pointing out clearly how the situation supplies a circumstantial guarantee of accuracy equivalent to that of the tests of oath and cross-examination:

1789, EYRE, C. B., in *Woodcock's Case*, Leach Cr. L., 4th ed., 500: "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a court of justice."

1837, ALDERSON, B., in *Ashton's Case*, 2 Lew. Cr. C. 147: "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are nevertheless open to observation. For, though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination."

1858, VOORHIES, J., in *State* v. *Brunetto*, 13 La. An. 45: "The reason for the rejection of hearsay evidence is that the party against whom it militates has not had the benefit of a cross-examination, and because the declarant did not speak under the sanction of an oath. An exception to this rule obtains in cases of dying declarations, the sense of impending dissolution being considered as offering the necessary guarantees that the declaration is in accordance with the truth."

1880, MULKEY, J., in *Tracey* v. *People*, 97 Ill. 106: "There are certain guarantees of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made, which in contemplation of law are supposed to compensate for the fact that they are not sanctioned by an oath and the party against whom they are used has had no opportunity to cross-examine."

1896, GRAY, J., in *People* v. *Craft*, 148 N. Y. 631, 43 N. E. 80 (the trial judge told the jury that a dying declaration "is given all the sanction which the law can give to evidence"): "Dying declarations are of the nature of hearsay, or second-hand, evidence. . . . It never has been, and it is not to be, supposed that they have all the guaranties which surround evidence given under oath in a court of justice. . . . It is, of course, true that such declarations are considered to be equal to an oath taken in a court of justice; but that is because

cussion: Mr. Wilbur Larremore, in American Law Review, XLI, 660 (Sept.–Oct., 1907); Mr. Wm. A. Purrington, in Bench and Bar, XI, 91 (Dec., 1907); Mr. Larremore again, in Bench and Bar, XII, 39 (Jan., 1908).

§ 1438. [1] About 1595: *King John*, V, 4:

Melun: "Have I not hideous death within my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here and live hence by truth?"

of the circumstances surrounding them when made. It is assumed that, being made in extremity, when the party is at the point of death, and believes that all hope in this world is gone, they have some guaranty for their truth, in view of the solemnity of the occasion, or as much as an oath in court would have. But it is clear that their value as evidence rests upon an assumption; and hence it is that, while the law recognizes the necessity of admitting such proof on a par with an oath in a court of justice, it does not and cannot regard it as of the same value and weight as the evidence of a witness given in a court of justice, under all the tests and safeguards which are there afforded for discovering the truth, the object of judicial inquiry;[2] for there the accused has the opportunity of more fully investigating the truth of the evidence by the means of cross-examination, and the jury have the opportunity of observing the demeanor of the person whose testimony is relied upon. The power of cross-examination is quite as essential, in the process of eliciting the truth, as the obligation of an oath; and where the life or the liberty of the defendant is at stake the absence of the opportunity for cross-examination is a serious deprivation; which differentiates in nature and in degree the evidence of a dying declaration from that which is direct and given upon the witness stand. . . . Speaking in a strict sense, the sanction of an oath and the sanction of such declarations are deemed to be the same, when the state of mind of the person is considered; but, as it was said by Baron Alderson, in Ashton's Case, 'though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination.'"[3]

Such being the nature of the guarantee, certain rules follow from the principle.

§ 1439. **Consciousness of the Approach of Death; Subsequent Confirmation.** As the guarantee consists in the subjective effect of the approach of death, the declarant should appear to have had a consciousness of the approach of death:

1829, PARK, J., in *R.* v. *Pike*, 3 C. & P. 598: "We allow the declaration of persons 'in articulo mortis' to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker."

1869, RAY, J., in *Morgan* v. *State*, 31 Ind. 199: "As this class of evidence forms an exception to the general rule; as there can be no cross-examination of the declarant; as the accused cannot often meet his accuser face to face; and as there must of necessity exist greater danger of abuse; it must clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come."

[2] *Accord:* 1905, People v. Thomson, 145 Cal. 717, 79 Pac. 435; 1905, Zipperian v. People, 33 Colo. 134, 79 Pac. 1018; 1904, Nordgren v. People, 211 Ill. 425, 71 N. E. 1042; 1911, People v. Falletto, 202 N. Y. 494, 96 N. E. 355; 1914, State v. Riley, 98 S. C. 386, 82 S. E. 621 ("There is no presumption that [the declarant or] any witness will speak the truth; . . . [the declarant] has in legal contemplation been sworn and no more").

On this point, see also a good opinion in Lambeth v. State, 23 Miss. 322, 358 (1852).

[3] Compare also: 1844, Forrest v. Kissam, 7 Hill N. Y. 474, Forrest, Sen.; 1852, Campbell v. State, 11 Ga. 374, Lumpkin, J.; 1855, Starkey v. People, 17 Ill. 20, 21, Skinner, J., Scates, C. J.; 1858, Godfrey v. State, 31 Ala. 323, Rice, C. J.; 1859, State v. Terrell, 12 Rich. L. 329, O'Neall, J.; 1864, People v. Sanchez, 24 Cal. 17, 24, Sanderson, C. J.; 1868, Whitley v. State, 38 Ga. 70, Harris, J.; 1871, Hill v. State, 41 Ga. 503, Lochrane, C. J.; 1871, Com. v. Roberts, 108 Mass. 301, Chapman, C. J.; 1872, State v. Williams, 67 N. C. 14, Rodman, J.; 1892, Mattox v. U. S., 146 U. S. 152, 13 Sup. 50, Fuller, C. J.

This consciousness must of course have been *at the time of making the declaration.*[1]

It follows, on the one hand, that a *subsequent change* of this expectation of death, by the recurrence of a hope of life, does not render inadmissible a prior declaration made while the consciousness prevailed,[2] although a repetition of the declaration during the subsequent inadequate state of mind would not be admissible;[3] and, on the other hand, that a declaration made during an inadequate state of mind may become admissible by a subsequent affirmance of it made when the realization of impending death had supervened.[4]

§ 1440. **Certainty of Death.** It follows, from the general principle, that the belief must be, not merely of the possibility of death, nor even of its probability, but of its *certainty*. A less stringent rule might with safety have been adopted;[1] but this is the accepted one.

The tests have been variously phrased; there must be "no hope of recovery"; "a settled expectation of death"; "an undoubting belief."[2] Their general

§ **1439**. [1] 1835, R. *v.* Spilsbury, 7 C. & P. 190; 1875, Walker *v.* State, 52 Ala. 195; 1876, May *v.* State, 55 Ala. 41; 1857, Donnelly *v.* State, 26 N. J. L. 618.

[2] 1881, R. *v.* Hubbard, 14 Cox Cr. 565; 1894, State *v.* Reed, 53 Kan. 767, 773, 37 Pac. 174; 1893, State *v.* Shaffer, 23 Or. 555, 560, 32 Pac. 545.

[3] 1896, Carver *v.* U. S., 160 U. S. 553, 16 Sup. 388; 1899, State *v.* Sadler, 51 La. An. 1397, 26 So. 390 (statements made the day after admissible statements; excluded, because consciousness of impending death was not shown to continue; an illiberal ruling).

[4] 1872, R. *v.* Steele, 12 Cox Cr. 168, 170; 1894, Johnson *v.* State, 102 Ala. 1, 16 So. 99 (even though it is not read over to him); 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138; 1901, Wilson *v.* Com., — Ky. —, 60 S. W. 400; 1902, Smith *v.* Com., 113 Ky. 19, 67 S. W. 32; 1920, Jackson *v.* Com., 189 Ky. 68, 224 S. W. 649; 1894, State *v.* Evans, 124 Mo. 397, 409, 28 S. W. 8; 1901, State *v.* Garth, 164 Ky. 553, 65 S. W. 275; 1910, State *v.* Peacock, 58 Wash. 41, 107 Pac. 1022 (but requiring great certainty in the declarant's reference to the prior statement).

Contra: 1901, Harper *v.* State, 79 Miss. 575, 31 So. 195 (no authority cited).

§ **1440**. [1] In the following cases a strong probability only was required: 1765, Lord Byron's Trial, 19 How. St. Tr. 1205, 1206, *semble;* 1840, R. *v.* Perkins, 9 C. & P. 395 (before thirteen judges).

[2] *Examples:* ENGLAND: 1826, R. *v.* Craven, 1 Lew. Cr. C. 77 ("I am afraid, doctor, I shall never get better"; admitted); 1831, R. *v.* Crockett, 4 C. & P. 544; 1829, R. *v.* Simpson, 1 Lew. Cr. C. 78 ("I fear I am in great danger"; admitted); 1837, Ashton and Thorneley's Case, 2 Lew. Cr. C. 147 ("I think I will not recover", after a similar statement by the surgeon; admitted); 1838, Errington's Case, 2 Lew. Cr. C. 149 ("I think myself in great danger"; excluded); 1881, R. *v.* Osman, 15 Cox Cr. 1, 3 ("a settled hopeless expectation of immediate death"); 1888, R. *v.* Gloster, 16 Cox Cr. 471, 476; 1909, Perry's Case, 2 Cr. App. 267, 2 K. B. 697 ("a settled, hopeless expectation of death").

UNITED STATES: *Alabama:* 1902, Milton *v.* State, 134 Ala. 42, 32 So. 653; 1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259; 1916, Lightner *v.* State, 195 Ala. 687, 71 So. 469; *California:* 1880, People *v.* Hodgdon, 55 Cal. 77; 1881, People *v.* Taylor, 59 Cal. 648; 1882, People *v.* Gray, 61 Cal. 175; *Colorado:* 1893, Graves *v.* People, 18 Colo. 170, 176, 32 Pac. 63 (inadmissible, if there is an expection of recovery); *Florida:* 1870, Dixon *v.* State, 13 Fla. 640; 1896, Lester *v.* State, 37 Fla. 382, 20 So. 232 ("no hope whatever", "entirely without hope"); 1901, Green *v.* State, 43 Fla. 552, 30 So. 798; *Illinois:* 1902, Collins *v.* People, 194 Ill. 506, 62 N. E. 902; *Kansas:* 1872, State *v.* Medlicott, 9 Kan. 288; *Kentucky:* 1904, Brown *v.* Com., — Ky. —, 83 S. W. 645; 1912, Biggs *v.* Com., 150 Ky. 675, 150 S. W. 803 ("he had a little hope"; excluded); *Louisiana:* 1904, State *v.* Harris, 112 La. 937, 36 So. 810 ("Bill Harris is my friend, and I don't want nothing done to him"; excluded); 1904, State *v.* Gianfala, 113 La. 463, 37 So. 30; *Maryland:* 1901, Worthington *v.* State, 92 Md. 222, 48 Atl. 355; *Massachusetts:* 1781, Com. *v.* Roberts, 108 Mass. 301; *Michigan:* 1896, People *v.* Beverly, 108 Mich. 509, 66 N. W. 379; 1896, People *v.* Weaver, 108 Mich. 649, 66 N. W. 567 ("I make these statements in full view of my probable death"; admitted); *Mississippi:* 1901, Harper *v.* State, 79 Miss. 575, 31 So. 195; 1912, Fannie *v.* State, 101 Miss. 378, 58 So. 2 ("make haste and get the doctor, I am going to die"; excluded); *New York:* 1903, People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; *South Carolina:* 1900,

effect is the same. The essential idea is that the belief should be a positive and absolute one, not limited by doubts or reserves; so that no room is left for the operation of worldly motives:

1851, PIGOT, C. B., in *R.* v. *Mooney*, 5 Cox Cr. 318: "These declarations would not be evidence unless she was under a clear impression that she was in a dying state."

1860, WILLES, J., in *R.* v. *Peel*, 2 F. & F. 22: "There must be a settled, hopeless expectation of death in the declarant."

1869, *R.* v. *Jenkins*, L. R. 1 Cr. C. R. 192; KELLY, C. B.: "The result of the cases is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die." BYLES, J.: "The authorities show that there must be no hope whatever."

1888, BEASLEY, C. J., in *Peak* v. *State*, 50 N. J. L. 222, 12 Atl. 701: "[The declarant] shall have a complete conviction that death is at hand. . . . Death, shortly to ensue, must be an absolute certainty, so far as the consciousness of the person making the declaration is concerned."

§ 1441. **Speediness of Death.** It follows, also, that the expectation must be of a *speedy* death. All men are mortal, and know it. An expectation of ultimate but distant death is obviously, in experience, not calculated to produce that sincerity of statement which is desired. Nevertheless, no definition of time can be fixed; the determination must vary with each case, after all the circumstances are considered:[1]

1829, HULLOCK, B., in *R.* v. *Van Butchell*, 3 C. & P. 631: "A man may receive an injury from which he may think that he shall ultimately 'never recover'; but still that would not be sufficient to dispense with an oath."

1869, BYLES, J., in *R.* v. *Jenkins*, L. R. 1 Cr. C. R. 193: "In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death."

But the *actual period of survival* after making the declaration is immaterial. The necessary element is a subjective one, — the declarant's expectation;

State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434; *Tennessee:* 1848, Smith *v.* State, 9 Humph. 17 ("fully conscious of that fact, not as a thing of surmise and conjecture or apprehension, but as a fixed and inevitable fact"); 1853, Brakefield *v.* State, 1 Sneed 218; *Texas:* 1905, Craven *v.* State, 49 Tex. Cr. 78, 90 S. W. 311.

Asking for a physician does not necessarily show that there is hope of recovery: 1844, R. *v.* Howell, 1 Denison Cr. C. 1; 1894, McQueen *v.* State, 103 Ala. 12, 15 So. 824; 1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101; 1904, State *v.* Bordelon, 113 La. 690, 37 So. 603; 1904, Hawkins *v.* State, 98 Md. 355, 57 Atl. 27; 1894, State *v.* Evans, 124 Mo. 397, 28 S. W. 8. *Contra*, but unsound: 1892, Matherly *v.* Com., — Ky. —, 19 S. W. 977.

§ **1441**. [1] *Eng.* 1881, R. *v.* Osman, 15 Cox Cr. 1, 3 ("immediate death"); 1888, R. *v.* Gloster, 16 Cox Cr. 471, 477 (same); *U. S. Ala.* 1858, McHugh *v.* State, 31 Ala. 323 ("that despair which is naturally produced by an impression of almost immediate dissolution"); 1898, Titus *v.* State, 117 Ala. 16, 23 So. 77 (that he "said he would die", insufficient; but "believed he would soon die", sufficient); *D. C.* 1893, U. S. *v.* Schneider, 21 D. C. 381, 404 ("speedily"); *Fla.* 1896, Lester *v.* State, 37 Fla. 382, 20 So. 232 ("imminent and inevitable"); *Ill.* 1905, Brom *v.* People, 216 Ill. 418, 74 N. E. 790 (statement excluded on the facts); 1911, People *v.* Cassesse, 251 Ill. 422, 96 N. E. 274 (excluded on the facts); *Kan.* 1920, Vassar *v.* Swift & Co., 106 Kan. 836, 189 Pac. 943 ("impending and certain"); *Ky.* 1895, Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390 ("I shall not get well"; excluded on the facts); *La.* 1898, State *v.* Ashworth, 50 La. An. 94, 23 So. 270 ("bound to die", "could not live much longer"; received); *Mo.* 1893, State *v.* Welsor, 117 Mo. 570, 579, 21 S. W. 443 ("immediate dissolution"); *R. I.* 1897, State *v.* Dalton, 20 R. I. 114, 37 Atl. 673 ("impending", not necessarily "immediate"); *P. I.* 1914, U. S. *v.* Mallari, 29 P. I. 14, 19 (three days; admitted); *S. C.* 1914, State *v.* Riley, 93 S. C. 386, 82 S. E. 621.

and the subsequent duration of life, whatever it may turn out to be, has no relation to his state of mind when speaking:

1857, POLLOCK, C. B., in *R.* v. *Reaney*, 7 Cox Cr. 209, 212: "In truth, the question does not depend upon the length of interval between the death and the declaration, but on the state of the man's mind at the time of making the declaration and his belief that he is in a dying state."

Accordingly, there seems to be no case in which the time of survival was deemed to exclude the declaration; and various periods have been passed upon as not too long.[2]

§ 1442. **Consciousness of approaching Death; how determined.** In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances.

It has been contended that only the *statements of the declarant himself* could be considered for this purpose; or, less broadly, that the *nature of the injury alone* could not be sufficient, *i.e.*, in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude:[1]

[2] 1834, R. *v.* Bonner, 6 C. & P. 386; 1869, R. *v.* Bernadotti, 11 Cox Cr. 316 (nearly three weeks' survival; admitted); 1893, Boulden *v.* State, 102 Ala. 78, 84, 15 So. 341 (two months' survival; admitted); 1880, Jones *v.* State, 71 Ind. 74; 1902, Burton *v.* Com., — Ky. —, 70 S. W. 831 (death eleven days later; admitted); 1920, Jackson *v.* Com., 189 Ky. 68, 224 S. W. 649 (27 days; admitted); 1879, State *v.* Daniel, 31 La. An. 95; 1862, Com. *v.* Cooper, 5 All. Mass. 497; 1871, Com. *v.* Roberts, 108 Mass. 301; 1879, Com. *v.* Haney, 127 Mass. 457; 1897, State *v.* Craine, 120 N. C. 601, 27 S. E. 72 (five months before death, admitted); 1896, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046 (five days before death; admitted); 1921, Walker *v.* State, 88 Tex. Cr. 389, 227 S. W. 308 (six weeks); 1875, Swisher's Case, 26 Gratt. Va. 971.

§ **1442**. [1] *Accord:* CAN. 1873, R. *v.* Smith, 23 U. C. C. P. 316; U. S. *Federal:* 1892, Mattox *v.* U. S., 146 U. S. 140, 151, 13 Sup. 50; 1897, Carver *v.* U. S., 164 U. S. 694, 17 Sup. 228 (the administration of extreme unction by a priest, admitted to show that the deceased knew she was dying); 1898, Re Orpen, 86 Fed. 760, 764; *Ala.* 1849, McLean *v.* State, 16 Ala. 672, 674; *Ark.* 1841, Dunn *v.* State, 2 Ark. 247; 1900, Newberry *v.* State, 68 Ark. 355, 58 S. W. 351; *Ariz.* 1897, Wagoner *v.* Terr., 5 Ariz. 175, 51 Pac. 145; *Cal.* 1882, People *v.* Gray, 61 Cal. 175; *Conn.* 1894, State *v.* Cronin, 64 Conn. 293, 302, 29 Atl. 536 ("Lord, have mercy"); *Del.* 1913, State *v.* Van Winkle, 4 Del. 132, 86 Atl. 310; *Fla.* 1896, Lester *v.* State, 37 Fla. 382, 20 So. 232; *Ga.* 1852, Campbell *v.* State, 11 Ga. 377; 1878, Dumas *v.* State, 62 Ga. 58; 1902, Young *v.* State, 114 Ga. 849, 40 S. E. 1000; 1920, Jones *v.* State, 150 Ga. 775, 105 S. E. 495; 1922, Thompson *v.* State, — Ga. —, 111 S. E. 651; *Haw.* 1893, Govt. *v.* Hering, 9 Haw. 181, 188; *Ill.* 1865, Murphy *v.* People, 37 Ill. 447, 456, *semble; Ind.* 1869, Morgan *v.* State, 31 Ind. 199; 1905, Gipe *v.* State, 165 Ind. 433, 75 N. E. 881; 1907, Williams *v.* State, 168 Ind. 87, 79 N. E. 1079; *Ia.* 1877, State *v.* Elliott, 45 Ia. 488; *Ky.* 1888, Peoples *v.* Com., 87 Ky. 496, 9 S. W. 509, 810; 1889, Com. *v.* Matthews, 89 Ky. 292, 12 S. W. 333; 1907, Kennedy *v.* Com., 30 Ky. L. 1063, 100 S. W. 242; 1915, Alsop *v.* Com., 164 Ky. 171, 175 S. W. 7 (quoting the above passage); 1918, Ulrich *v.* Com., 181 Ky. 519, 205 S. W. 586; *La.* 1857, State *v.* Scott, 12 La. An. 274; 1895, State *v.* Jones, 38 La. An. 792, 18 So. 515; *Mass.* 1871, Com. *v.* Roberts, 108 Mass. 301; *Mich.* 1882, People *v.* Simpson, 48 Mich. 477, 12 N. W. 662; *Miss.* 1895, Bell *v.* State, 7 Miss. 507, 17 So. 232; *Mo.* 1894, State *v.* Evans, 124 Mo. 397, 28 S. W. 8; *Mont.* 1893, State *v.* Russell, 13 Mont. 164, 168, 32 Pac. 854; 1911, State *v.* Crean, 43 Mont. 47, 114 Pac. 603; *Nebr.* 1895, Collins *v.* State, 46 Nebr. 37, 64 N. W. 432; *Nev.* 1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100; *N. J.* 1857, Donnelly *v.* State, 26 N. J. L. 500, 618; 1916, State *v.* Bovino, 89 N. J. L. 586, 99 Atl. 313; *N. M.* 1910, Terr. *v.* Eagle, 15 N. M. 609, 110 Pac. 862; *N. C.* 1855, State *v.* Shelton, 2 Jones L.

1789, EYRE, C. B., in *Woodcock's Case*, Leach Cr. L., 4th ed., 500: "My judgment is that inasmuch as she was mortally wounded and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations made under these circumstances ought to be considered by a jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death and must have considered herself as a dying woman."

1790, *R.* v. *John*, 1 East's Cr. L. c. 5, § 124, p. 358: all the judges agreed that "if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence."

1850, DARGAN, C. J., in *Oliver* v. *State*, 17 Ala. 594: "The Court must look to all the circumstances under which they were made; and if they be sufficient to induce the belief that the deceased made them under the sense of impending death, the declarations are admissible."

It must be said, however, that in ascertaining generally the existence of a knowledge of approaching death, Courts are now and then found making rulings at which common sense revolts. Moved either by a disinclination to allow the slightest flexibility of rule on applying principles to circumstances or by a general repugnance to exceptions to the Hearsay rule, they have recorded decisions which can only be derided by laymen and repudiated by the profession.[2] It is the narrow and over-cautious spirit of such decisions

360; *Or.* 1893, State *v.* Fletcher, 24 Or. 295, 297, 33 Pac. 575; 1903, State *v.* Gray, 43 Or. 446, 74 Pac. 927; *Pa.* 1858, Kilpatrick *v.* Com., 31 Pa. 215; 1922, Com. *v.* Puntario, 271 Pa. 501, 115 Atl. 831 (approving the text above); *Tenn.* 1848, Smith *v.* State, 9 Humph. 20; 1914, Jollay *v.* State, 130 Tenn. 286, 170 S. W. 58; *Tex.* 1916, McKinney *v.* State, 80 Tex. Cr. 31, 187 S. W. 960; *Va.* 1831, Vass' Case, 3 Leigh 863.

Contra, semble: 1875, R. *v.* Morgan, 14 Cox Cr. 337 (Denman, J., and Cockburn, C J., thought that "there was no case in which the judge had admitted the statement entirely upon an inference drawn from the nature of the wound itself and from giving the deceased credit for ordinary intelligence as to its natural results", and offered to reserve the case, but the evidence was withdrawn; here the man's head was all but cut off, the windpipe and chief blood-vessels severed; being unable to speak, he motioned for paper and wrote on it; he died in ten minutes after writing; query, whether any but two lawyers could have doubted that the man was aware of his horrible plight?).

So, also, if the statement is taken in *writing* (*post*, § 1450), the writing need not contain a statement of the expectation of death: 1847, R. *v.* Hunt, 2 Cox Cr. 239; 1897, People *v.* Yokum, 118 Cal. 437, 50 Pac. 686, *semble;* 1897, Austin *v.* Com., — Ky. —, 40 S. W. 905.

[2] 1851, R. *v.* Mooney, 5 Cox Cr. 318 (the evidence was that "the clergyman had warned her to prepare for death; she had not told any person that she knew she was dying; but she had been heard recommending her soul to God"; Pigot, C. B., held that the proof of her being aware that she was dying was not sufficient); 1852, R. *v.* Nicolas, 6 Cox Cr. 121 (testimony: "I believe he knew he was dying. I cannot recollect that he said anything about dying before he began his statement. As he finished it, he said, 'Oh, God! I am going fast; I am too far gone to say any more'"; Cresswell, J.: "It being possible that this man did not discover the extent of his weakness till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast, there is not, consequently, that clear ascertainment of his consciousness of his state, before he made it, to render it admissible"); 1904, State *v.* Knoll, 69 Kan. 767, 77 Pac. 580 (the deceased was assaulted on Feb. 19, died on Mar. 23, and declared on Mar. 7 "any hour, any day, he might die, and he had to die of the whipping of John K."; a priest administered the last rites; his declaration was excluded; "there is nothing indicating that he considered death imminent"; a brilliant 'tour de force' in judicial reasoning).

See also the following: 1835, R. *v.* Spilsbury, 7 C. & P. 190; 1848, Smith *v.* State, 9 Humph. Tenn. 22, 23; 1854, R. *v.* Peltier, 4 Low. Can. 22.

For an example of liberal treatment, see Peoples *v.* Com., 87 Ky. 495, 9 S. W. 509, 810 (1888).

which tends to stunt the free development and application of living principles, to hamper the administration of justice, and to undermine public confidence in legal procedure; and no opportunity ought to be omitted of protesting against the manifestations of this spirit.

No rule can here be laid down.[3] The circumstances of each case will show

[3] In the following cases various states of fact, useless as precedents, were passed upon; the profession should not have been burdened by a judicial opinion on them:

ENGLAND: 1865, R. *v.* Smith, 10 Cox Cr. 82, 95; 1866, R. *v.* Forester, ib. 368; 1868, R. *v.* Mackay, 11 Cox Cr. 148; 1887, R. *v.* Smith, 16 Cox Cr. 170.

CANADA: 1897, R. *v.* Woods, 5 Br. C. 585, 589; 1903, R. *v.* Louie, 5 Br. C. 1, 7; 1910, R. *v.* Walker, 15 Br. C. 100; 1906, R. *v.* Magyar, 7 N. W. Terr. 491; 1907, R. *v.* Sunfield, 15 Ont. L. R. 252.

UNITED STATES: *Alabama:* 1892, Justice *v.* State, 99 Ala. 180, 182, 13 So. 658; 1895, Cole *v.* State, 105 Ala. 76, 16 So. 762; 1895, Clark *v.* State, 105 Ala. 91, 17 So. 37; 1898, Fuller *v.* State, 117 Ala. 36, 23 So. 688; 1899, Dubose *v.* State, 120 Ala. 300, 25 So. 185; 1900, Gibson *v.* State, 126 Ala. 59, 28 So. 673; 1903, Smith *v.* State, 136 Ala. 1, 34 So. 168; 1904, Walker *v.* State, 139 Ala. 56, 35 So. 1011; 1907, McEwen *v.* State, 152 Ala. 38, 44 So. 619; 1909, Parker *v.* State, 165 Ala. 1, 51 So. 260; *Arkansas:* 1893, Evans *v.* State, 58 Ark. 47, 54, 22 S. W. 1026; 1907, Fogg *v.* State, 81 Ark. 417, 99 S. W. 537; 1921, Freeman *v.* State, 150 Ark. 387, 234 S. W. 267; *California:* 1899, People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693; 1901, People *v.* Lem Deo, 132 Cal. 199, 64 Pac. 265; 1903, People *v.* Dobbins, 138 Cal. 694, 72 Pac. 339; *Colorado:* 1905, Zipperian *v.* People, 33 Colo. 134, 79 Pac. 1018; 1918, Garcia *v.* People, 64 Colo. 172, 171 Pac. 754; *Florida:* 1900, Richard *v.* State, 42 Fla. 528, 29 So. 413; 1909, Copeland *v.* State, 58 Fla. 26, 50 So. 621; 1913, Bennett *v.* State, 66 Fla. 369, 63 So. 842; *Georgia:* 1898 Parks *v.* State, 105 Ga. 242, 31 S. E. 580; 1900, Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126; 1905, Anderson *v.* State, 122 Ga. 161, 50 S. E. 46; 1911, Glover *v.* State, 137 Ga. 82, 72 S. E. 926; *Idaho:* 1916, State *v.* Fong Loon, 29 Ida. 248, 158 Pac. 233; *Illinois:* 1894, Simons *v.* People, 150 Ill. 66, 73, 36 N. E. 1019; 1897, Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; 1901, Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242; 1908, Board *v.* Provident H. & T. S. Ass'n, 233 Ill. 216, 84 N. E. 218; 1920, People *v.* Haensel, 293 Ill. 33, 127 N. E. 181; 1922, People *v.* Savant, 301 Ill. 225, 133 N. E. 775; *Indiana:* 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637; *Iowa:* 1898, State *v.* Young, 104 Ia. 730, 74 N. W. 693; 1902, State *v.* Phillips, 118 Ia. 660, 92 N. W. 876; 1903, State *v.* Dennis, 119 Ia. 688, 94 N. W. 235; 1922, State *v.* Brooks, 192 Ia. 1107, 186 N. W. 46; *Kansas:* 1902, State *v.* Morrison, 64 Kan. 669, 68 Pac. 48; 1905, State *v.* Bonar, 71 Kan. 800, 81 Pac. 450, 484; 1918, State *v.* Smith, 103 Kan. 148, 174 Pac. 551; *Kentucky:* 1898, Jones *v.* Com., — Ky. —, 46 S. W. 217; 1901, Barnes *v.* Com., 110 Ky. 348, 61 S. W. 733; 1904, Martin *v.* Com., — Ky. —, 78 S. W. 1104; 1907, Com. *v.* Hargis, 124 Ky. 356, 99 S. W. 348; 1910, Tibbs *v.* Com., 138 Ky. 558, 128 S. W. 871; 1913, Daniel *v.* Com., 154 Ky. 601, 157 S. W. 1127; 1915, Alsop *v.* Com., 164 Ky. 171, 175 S. W. 7 (quoting the above passage); 1916, Allen *v.* Com., 168 Ky. 325, 182 S. W. 176; 1917, Postell *v.* Com., 174 Ky. 272, 192 S. W. 39; 1922 Spencer *v.* Com., 194 Ky. 699, 240 S. W. 750; *Louisiana:* 1896, State *v.* Smith, 48 La. An. 533, 19 So. 452; 1899, State *v.* Sadler, 51 La. An. 1397, 26 So. 390; 1904, State *v.* Brown, 111 La. 696, 35 So. 818; 1904, State *v.* Bordelon, 113 La. 690, 37 So. 603; 1905, State *v.* Daniels, 115 La. 59, 38 So. 895; *Maine:* 1919, State *v.* Bordeleau, 118 Me. 424, 108 Atl. 464; *Maryland:* 1904, Hawkins *v.* State, 98 Md. 355, 57 Atl. 27; *Massachusetts:* 1895, Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92; *Michigan:* 1899, People *v.* Lonsdale, 122 Mich. 388, 81 N. W. 277; 1914, People *v.* Christmas, 181 Mich. 634, 148 N. W. 369; *Mississippi:* 1895, Bell *v.* State, 72 Miss. 507, 17 So. 232; 1898, Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 230, 76 Miss. 223, 25 So. 158; 1898, Joslin *v.* State, 75 Miss. 838, 23 So. 515; 1905, Ashley *v.* State, — Miss. —, 37 So. 960; 1905, Pryor *v.* State, — Miss. —, 39 So. 1012; *Missouri:* 1893, State *v.* Umble, 115 Mo. 452, 461, 22 S. W. 378; 1893, State *v.* Johnson, 118 Mo. 491, 503, 24 S.W. 229; 1894, State *v.* Nocton, 121 Mo. 537, 549, 26 S. W. 551; 1899, State *v.* Garrison, 147 Mo. 548, 49 S. W. 508; 1905, State *v.* Brown, 188 Mo. 451, 87 S. W. 519; 1905, State *v.* Craig, 190 id. 332, 88 S. W. 641; 1907, State *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; 1910, State *v.* Colvin, 226 Mo. 446, 126 S. W. 448; 1915, State *v.* Thomas, — Mo. —, 180 S. W. 886; 1918, State *v.* Livingston, — Mo. —, 204 S. W. 262; 1920, State *v.* Rozell, — Mo. —, 225 S. W. 931; 1922, State *v.* Shannon, — Mo. —, 237 S. W. 466; 1922, State *v.* Gore, — Mo. —, 237 S. W. 993; *Montana:* 1910, State *v.* Byrd, 41 Mont. 585, 111 Pac. 407; *Nebraska:* 1895, Basye *v.* State, 44 Nebr. 261, 63 N. W. 811; *New York:* 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690; *North Carolina:* 1893, State *v.* Whitt, 113 N. C. 716, 720, 18 S. E. 715; 1896, State *v.* Finley, 118 N. C. 1161, 24 S. E. 495;

whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances.

§ 1443. **Revengeful Feelings; Theological Belief.** It remains to examine more closely the nature of the circumstantial guarantee of trustworthiness. It is separable (as may be seen from the judicial language already quoted) into three elements. (1) The declarant, being at the point of death, "must lose the use of all deceit" — in Shakspeare's phrase. There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future, — a physical revulsion common to all men, irresistible, and independent of theological belief. In view of these three elements, what may be laid down as to the condition of the declarant's mind at this moment before dissolution?

First, the declarant may exhibit such strong feelings of *hatred* or *revenge* that the effect of all the above influences appears to be lacking. If he is in such a frame of mind, the supposed guarantee of trustworthiness fails, and the declaration should not be admitted:[1]

1896, State *v.* Mace, 118 N. C. 1244, 24 S. E. 798; 1905, State *v.* Teachey, 138 N. C. 587, 50 S. E. 232; 1912, State *v.* Watkins, 159 N. C. 480, 75 S. E. 22; *Oklahoma:* 1909, Bilton *v.* Terr., 1 Okl. Cr. 566, 99 Pac. 163; 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561; 1915, Morehead *v.* State, 12 Okl. Cr. 62, 151 Pac. 1183; 1917, Paden *v.* State, 13 Okl. Cr. 585, 165 Pac. 1155; 1917, Williams *v.* State, 13 Okl. Cr. 189, 163 Pac. 279; 1919, Thompson *v.* State, 16 Okl. Cr. 716, 184 Pac. 467; 1920, Palmer *v.* State, — Okl. Cr. —, 187 Pac. 502; 1920, Williams *v.* State, — Okl. Cr. —, 188 Pac. 890; 1921, Canty *v.* State, — Okl. Cr. —, 201 Pac. 531; 1922, Dick *v.* State, — Okl. Cr. —, 205 Pac. 516; *Oregon:* 1874, State *v.* Garrand, 5 Or. 216, 218; 1904, State *v.* Gray, 43 Or. 446, 74 Pac. 927; *Pennsylvania:* 1894, Com. *v.* Silcox, 161 Pa. 484, 497, 29 Atl. 105; 1895, Com. *v.* Mika, 171 Pa. 273, 33 Atl. 65; *Philippine Islands:* 1906, U. S. *v.* Montes, 6 P. I. 443; 1908, U. S. *v.* Castellon, 12 P. I. 160; 1909, U. S. *v.* Gil, 13 P. I. 530; 1911, U. S. *v.* Jakan Tucko, 20 P. I. 235; 1912, U. S. *v.* Ramos, 23 P. I. 300, 307; *South Carolina:* 1880, State *v.* Belcher, 13 S. C. 459, 463; 1896, State *v.* Arnold, 47 S. C. 9, 24 S. E. 926; 1900, State *v.* Taylor, 56 S. C. 360, 34 S. E. 939; 1908, State *v.* McCoomer, 79 S. C. 63, 60 S. E. 237; 1908, State *v.* Gallman, 79 S. C. 229, 60 S. E. 682; 1908, State *v.* Franklin, 80 S. C. 332, 60 S. E. 953; 1916, State *v.* Thomas, 103 S. C. 316, 88 S. E. 20; 1918, State *v.* Brown, 108 S. C. 490, 95 S. E. 61; *South Dakota:* 1910, State *v.* Swenson, 26 S. D. 589, 129 N. W. 119; *Tennessee:* 1896, Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552; 1918, Dickason *v.* State, 139 Tenn. 601, 202 S. W. 922; *Texas:* 1894, Meyers *v.* State, 33 Tex. Cr. 204, 216, 26 S. W. 196; *Virginia:* 1901, O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; 1912, Patterson *v.* Com., 114 Va. 807, 75 S. E. 737; *Washington:* 1894, State *v.* Eddon, 8 Wash. 292, 298, 36 Pac. 139; 1901, State *v.* Power, 24 Wash. 34, 63 Pac. 1112; *Wisconsin:* 1901, Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

In the following courts the *determination of the trial judge* is said to control: 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138; 1907, Williams *v.* State, 168 Ind. 87, 79 N. E. 1079; 1899, Baker *v.* Com., — Ky. —, 50 S. W. 54; 1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; 1895, Basye *v.* State, 44 Nebr. 261, 63 Mo. 811; 1906, State *v.* Monich, 74 N. J. L. 522, 64 Atl. 1016 (the only question on review is whether there was any evidence to support the finding of admissibility).

§ 1443. [1] 1914, Reeves *v.* State, — Miss. —, 64 So. 836.

In Pendleton *v.* Com., — Va. — (1921), 109 S. E. 201, the Court takes occasion to correct a view expressed in Patterson *v.* Com., 114 Va. 816, 75 S. E. 740, where the above text was cited, but without foundation, in support of that view.

1880, MULKEY, J., in *Tracy* v. *People*, 97 Ill. 105: "The fact sought to be shown [profane language] was important in another point of view. It strikes at the very foundation of the reasons upon which dying declarations are admitted at all. There are certain guaranties of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made. . . . It was clearly the right of the accused to show . . . that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases, . . . that the deceased . . . was in a reckless, irreverent state of mind, and entertained feelings of ill-will and hostility towards the accused."

Secondly, if we suppose the second element to be essential, and not merely usual, then a *theological belief* of a particular sort — a belief in a punishment in a future state — must be required. Yet if (as seems better) the third element — the physical revulsion peculiar to the moment — is to be regarded as the essential element of the guarantee, then the theological belief is immaterial. This distinction has not been expressly passed upon by the Courts. The majority of the few cases hold that the theological belief is material.[2]

But this question must be distinguished from that of the declarant's capacity to take an oath. If in the jurisdiction a witness is no longer affected by the common-law rule requiring an oath and the capacity to take an oath, *i.e.* the possession of a specific theological belief (*post*, § 1829), the declarant's belief is immaterial in determining his oath-capacity. But even where this common-law rule is abolished, his belief may still become material, with reference to the admissibility of this specific class of declaration. In several cases, however, the Courts, ignoring this double aspect of the question, have been satisfied with pointing out the abolition of the common-law rule affecting capacity to take the oath, and have without further question admitted the declarations.[3] In a few cases it is said that the declarant's belief goes only to

[2] 1829, R. v. Pike, 3 C. & P. 598 (Park, J.: "As this child was but four years old, it is quite impossible that she, however precocious in her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. . . . [Her remark] does not show that she had any idea of a future state; indeed, I think that from her age we must take it that she could not possibly have had any idea of that kind"); 1880, Tracy v. People, 97 Ill. 105 (Mulkey, J.: "The vital inquiry before the Court was as to the real condition of the mind of the deceased when making the statement under consideration. . . . The use of profane language immediately preceding the statement is hardly to be reconciled with the assumption that he was at the time of sound mind and impressed with a sense of almost immediate death. . . . It is hard to realize how any sane man who believes in his accountability to God can be indulging in profanity when at the same time he really believes that in a few short hours at most he will be called upon to appear before Him to answer for the deeds done in the body").

Accord: 1840, R. v. Perkins, 9 C. & P. 395 (dying declaration of a child of ten received; here he said that he expected "to go to hell if he told a lie, and to heaven if he told the truth"); 1857, Donnelly v. State, 26 N. J. L. 507, 620; 1918, State v. Agnesi, 92 N. J. L. 53, 104 Atl. 299 (belief in a Supreme Being or in a future state, etc.; failure to prove lack of such belief does not exclude the declaration; State v. Donnelly approved); 1829, Phillips, Evidence, 7th Eng. ed., 236; 1843, ib. C. & H.'s Notes, No. 457, p. 611.

Contra: 1871, Nesbit v. State, 43 Ga. 249 (Lochrane, C. J.: "If a man . . . [dies] without belief in God or in the divine revelation . . . his declarations would be admissible"); 1897, Carver v. U. S., 164 U. S. 694, 17 Sup. 228, *semble* (disbelief in a future state of rewards and penalties does not exclude).

[3] 1872, People v. Sanford, 43 Cal. 34 (Wallace, C. J.: "The common-law rule in that respect [incompetence of a witness lacking a religious sense of accountability] has been abrogated. It mattered not, therefore, upon the point of the mere competency of the evi-

the weight of his statements; but the Courts here seem still to have had in mind only the question of common-law competency to take an oath.[4]

3. Testimonial Qualifications, and other Independent Rules of Evidence, as applied to this Exception

There remain certain rules which do not arise from the Hearsay exception as such (*ante*, § 1424), but are merely instances of general principles otherwise established.

§ 1445. **Testimonial Qualifications (Infancy, Insanity, Interest, Recollection, Leading Questions, Written Declarations, etc.).** In general, for testimonial qualifications, the rules to be applied are no more and no less than the ordinary ones, already examined (§§ 483–812), for the qualifications of other witnesses:

1857, OGDEN, J., in *Donnelly* v. *State*, 26 N. J. L. 620: "Whatever would disqualify a witness would make such [dying] declarations incompetent testimony."

1864, SANDERSON, C. J., in *People* v. *Sanchez*, 24 Cal. 26: "They stand upon the same footing as the testimony of a witness sworn in the case, and are governed by the same rules, except as to . . . leading questions."

1874, CAMPBELL, J., in *People* v. *Olmstead*, 30 Mich. 434: "They [the declarations] are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living."

1885, ELLIOTT, C. J., in *Boyle* v. *State*, 97 Ind. 322; 105 Ind. 470: "Dying declarations are admissible in a case where the evidence would be competent if the declarant were on the witness stand. . . . The question here is . . . whether the declarant's statement was one that a witness on the stand would have been allowed to make."

(1) *Insanity, Infancy, Interest.* If the declarant would have been disqualified to take the stand, by reason of infancy,[1] insanity,[2] or interest,[3] his extra-judicial declarations must also be inadmissible.

(2) *Knowledge.* The declarant must have had actual observation or opportunity for observation of the fact which he relates.[4]

dence, even had it appeared that the deceased had no religious belief"); 1877, State *v.* Elliott, 45 Ia. 489 (the declarant "believed in no God or future conscious state"); 1880, State *v.* Ah Lee, 8 Or. 218.

[4] 1886, Hill *v.* State, 64 Miss. 440, 1 So. 494; 1861, Goodall *v.* State, 1 Or. 335.

§ 1445. [1] 1784, R. *v.* Drummond, Leach Cr. L. 4th ed. 337; 1896, State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650; for the general rules, see *ante*, § 492.

Distinguish R. *v.* Pike, 3 C. & P. 598 (cited *ante*, § 1443, n. 1).

[2] 1898, Lipscomb *v.* State, 75 Miss. 559, 22 So. 188, 23 So. 210, 330, 76 Miss. 223, 25 So. 158 ("not insane or delirious, but spoke with discernment, reason, and intelligence"); 1897, State *v.* Reed, 137 Mo. 125, 38 S. W. 574 (possession of proper mental faculties need not be shown in advance); Tex. Rev. C. Cr. P. 1911, § 808 (quoted *ante*, § 1430); for the general rules, see *ante*, § 519.

[3] 1806, Jackson *v.* Vredenburgh, 1 John. 159, 163; for the general rules, see *ante*, § 576.

For *oath-capacity*, see *ante*, § 1443.

[4] 1882, Walker *v.* State, 39 Ark. 225; 1889, Jones *v.* State, 52 Ark. 347, 12 S. W. 704 (declarations rejected because it was impossible for the declarant to have seen who shot him, and he had therefore no adequate source of knowledge); 1901, Jones *v.* State, 79 Miss. 309, 30 So. 759 (declaration, by one shot in the back through a window at night, that J. shot her, because he had said that he was going to do so, held inadmissible because of lack of personal knowledge; yet the declaration as to J.'s threat should have been admitted, as concerning a part of the transaction); 1897, State *v.* Reed, 137 Mo. 125, 38 S. W. 574 (admissible as to whatever the deceased could testify to if on the stand); 1919, State *v.* Wilks, 278 Mo. 481, 213 S. W. 118 ("C. W. shot me, and Virgil and Bill hired him to do it", excluded because the declarant could not have spoken

(3) *Recollection.* The declarant's capacity of recollection, and his actual recollection, must have been sufficiently unimpaired to be trustworthy.[5] The allowance of *leading questions* to stimulate recollection is sometimes here said to be by way of exception to the general rule against leading questions (*ante*, § 769). But in truth there seems to be no exception. The situation is not that of a presumably partisan witness offered in court, and questions leading in form will often have to be asked in order to obtain the information from a dying person unable to express himself except by a brief "yes" or "no." The mere fact, then, that questions leading in form are asked does not infringe the principle which forbids the supplying of a false memory (*ante*, § 778). There is thus no general rule here against leading questions.[6] Nevertheless, where, in a particular case, the interrogators might seem to be really supplying a false memory, the answers should be excluded.[7]

(4) *Communication.* (*a*) Any adequate method of communication, whether by words or by *signs* or *otherwise*, will suffice, provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning:[8]

the latter clause from personal observation); Com. *v.* Roddy, 184 Pa. 274, 39 Atl. 211 (dying identification of murderer; declarant held qualified on the facts).

For the general rules, see *ante*, § 656.

Compare the cases cited *post*, § 1447, some of which can be supported on the present principle.

[5] 1880, Mockabee *v.* Com., 78 Ky. 379 (the declarant affirmed a paper previously written, and this was admitted on condition that his memory as to its contents was then clear); 1856, Brown *v.* State, 32 Miss. 448 (Smith, C. J.: "There are strong reasons for believing that the deceased did not fully understand the declarations as read to him, or that his faculties were so much impaired by the wounds under which he suffered that he was incapable of remembering with distinctness or stating with accuracy the facts and circumstances of the rencontre which resulted in his death"); 1831, Vass' Case, 3 Leigh Va. 863, *semble*.

For the general rules, see *ante*, § 725.

[6] 1835, R. *v.* Fagent, 7 C. & P. 238; 1892, Mattox *v.* U. S., 146 U. S. 152, 13 Sup. 50; 1849, McLean *v.* State, 16 Ala. 672, 675; 1918, Sparks *v.* State, 19 Ariz. 455, 171 Pac. 1182; 1864, People *v.* Sanchez, 24 Cal. 26; 1919, State *v.* Perretta, 93 Conn. 328, 105 Atl. 690, *semble;* 1906, Park *v.* State, 126 Ga. 575, 55 S. E. 489; 1898, State *v.* Ashworth, 50 La. An. 94, 23 So. 270 (mere asking of specific questions does not exclude); 1901, Worthington *v.* State, 92 Md. 222, 48 Atl. 355; 1916, Thompson *v.* State, 79 Tex. Cr. 478, 187 S. W. 204; 1885, People *v.* Callaghan, 4 Utah 49, 6 Pac. 49; 1908, State *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

Contra: Tex. Rev. C. Cr. P. 1911, §§ 788, 808 (see quotation *ante*, § 1430); 1908, Lockhart *v.* State, 53 Tex. Cr. 589, 111 S. W. 1024.

[7] 1892, R. *v.* Mitchell, 17 Cox Cr. 503, 507 (dying declarations made in answer to unrecorded questions, excluded, partly because the questions might have been leading); *U. S.* 1899, People *v.* Fuhrig, 127 Cal. 412, 59 Pac. 693 (long typewritten statement read over without stopping, and then assented to, excluded on the facts); 1915, People *v.* Kane, 213 N. Y. 260, 107 N. E. 655 (coroner's inquiries made by reading from a printed form the preliminary questions as to belief in impending death, etc., held not to exclude answers; but a warning is given against perfunctory methods); 1914, Jollay *v.* State, 130 Tenn. 286, 170 S. W. 58 (long written statement of a third person, read aloud by sentences; not decided).

Contra, semble: 1872, People *v.* Knapp, 26 Mich. 116 (Campbell, J.: "Where they are taken under suspicious circumstances, or drawn out by doubtful means, they are not excluded, but go to the jury for what they are worth").

The following case belongs here: 1912, State *v.* Law, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457 (statement made after the physician had refused to treat the deceased until she told what had happened to her, admitted).

[8] *Eng.* 1872, R. *v.* Steele, 12 Cox Cr. 168 (the deceased had told Dr. Patchett his story; then, when dying, and being asked what happened, he said, "Tell him, Patchett"; and P. repeated the story in the declarant's presence; P.'s statement was admitted; Lush, J.: "It is equivalent to saying it himself"); *Br. C.* 1903, R. *v.* Louie, 10 Br. C. 1, 3, 9 (nodding the head, held sufficient); *U. S. Ala.* 1858, McHugh *v.* State, 31 Ala. 323 (the attorney put questions, the attending friends made answers, and the deceased nodded his head to them;

1880, HINES, J., in *Mockabee* v. *Com.*, 78 Ky. 382: "Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye."

(*b*) When the declaration is in *writing*, the question may arise whether it is his narration at all (*ante*, § 799). If the declarant has written it, or has signed or otherwise approved it after reading it, or hearing it read aloud to him, it may be offered as his declaration.[9] Otherwise it is not his declaration; and it cannot in such a case be put in as being itself the dying person's declaration;[10] though it may of course be used to refresh the writer's recollection, or may be put in as embodying the writer's recollection (under the principles of §§ 744–764, *ante*).[11] Whether this writing *must* be offered, instead of an auditor's testimony by recollection, is a different question (examined *post*, § 1450).

§ 1446. **Testimonial Impeachment and Rehabilitation.** The dying declaration being in effect a testimonial statement made out of court (*ante*, § 1424), the declarant is open to impeachment and discrediting in the same way as other witnesses (*ante*, § 885), so far as such a process is feasible. Thus, impeachment by bad testimonial *character* (*ante*, § 922) is allowable,[1] or by

excluded, the Court not believing on the facts "that he either perfectly understood the language or was able to have detected the erroneous inference as to his meaning which his friends may honestly have drawn"); 1858, Godfrey *v.* State, 31 Ala. 321 (the declarant merely nodded his head to questions by friends, his mind being also weak and lethargic at the time; rejected, because it did not appear that he understood their words or could know what they understood as his meaning); *Ariz.* 1897, Wagoner *v.* Terr., 5 Ariz. 175, 51 Pac. 145 (when asked why the defendant shot him, the deceased said, "You know why"; held admissible, when interpreted by the circumstances as applying to his wife's adultery with the defendant); *Ky.* 1919, Jones *v.* Com., 186 Ky. 283, 216 S. W. 607 (murder; answers by shaking the head, for "no", admitted); *Mass.* 1853, Com. *v.* Casey, 11 Cush. 420 (pointing with a finger, so as to convey a meaning clearly, held sufficient); *N. Y.* 1911, People *v.* Madas, 201 N. Y. 349, 94 N. E. 857 (deceased had a tube in his windpipe and could not articulate; answers by nods, admitted).

Compare Luby *v.* Com., 12 Bush 6 (1876).

For the general rules, see *ante*, §§ 789, 811.

It has been ruled that the expressions must be in form *assertive*, *i.e.* that mere exclamations are not to be admitted: 1874, People *v.* Olmstead, 30 Mich. 435. But this is without reason. If a definite assertive effect is conveyed the form is immaterial.

[9] 1898, Perry *v.* State, 109 Ga. 365, 30 S. E. 903 (that it is reduced to writing by another and signed by the deceased, does not exclude); 1900, Freeman *v.* State, 112 Ga. 48, 37 S. E. 172 (the deceased's signature is not necessary); 1896, State *v.* Parham, 48 La. An. 1309, 20 So. 727 (written by a physician, signed by the deceased, and authenticated by a magistrate, admitted); 1913, Updike *v.* State, 9 Okl. Cr. 124, 130 Pac. 1107; 1885, People *v.* Callaghan, 4 Utah 49, 6 Pac. 49 (like the next case); 1897, State *v.* Carrington, 15 Utah 480, 50 Pac. 526 (not signed, but assented to on hearing it read over; admitted); 1896, State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650 (the statement as written down need not be in the deceased's exact language).

[10] 1875, State *v.* Frunburg, 40 Ia. 557 (a running memorandum of the statement written by a magistrate, and not read over or signed by the declarant, held not admissible); 1903, Foley *v.* State, 11 Wyo. 464, 72 Pac. 627 (a memorandum not read over or signed by the deceased, and therefore usable only to refresh the writer's recollection, held not technically itself admissible).

[11] 1903, Fuqua *v.* Com., — Ky. —, 73 S. W. 782 (writing not signed by the deceased, used to aid the writer's memory); 1910, State *v.* Byrd, 41 Mont. 585, 111 Pac. 407 (statement taken down by a hearer, and signed by the declarant, though not read over, admitted as the witness' report of it).

§ 1446. [1] 1897, Carver *v.* U. S., 164 U. S. 694, 17 Sup. 228; 1915, Carter *v.* State, 191 Ala. 3, 67 So. 981; 1896, Lester *v.* State, 37 Fla. 382, 20 So. 232; 1896, Redd *v.* State, 99

conduct showing a *revengeful* or *irreverent state of mind* at the time (*ante*, § 950),[2] or by *conviction of crime* (*ante*, § 980),[3] or by prior or subsequent *inconsistent statements* (*ante*, § 1017).[4] So also he may be corroborated by evidence of similar *consistent statements*, so far as this is allowable by the principles of that subject (*ante*, § 1122).[5]

Technically, the *victim of a crime* is never a party in the criminal prosecution; hence, the statements of the deceased, exculpating the accused, in a homicide charge, are not receivable as *admissions* (*ante*, § 1076), but must satisfy some hearsay exception, usually the present one; probatively, however, they have as much real value as any party's admissions and should be received.

§ 1447. **Rule against Opinion Evidence.** The Opinion rule has no application to dying declarations. The theory of that rule (*post*, § 1918) is that, wherever the witness can state specifically the detailed facts observed by him, the inferences to be drawn from them can equally well be drawn by the jury, so that the witness' inferences become superfluous. Now, since the declarant is here deceased, it is no longer possible to obtain from him by questions any more detailed data than his statement may contain, and hence his inferences are not in this instance superfluous, but are indispensable.

Nevertheless, most Courts accept the Opinion rule as applicable.[1] More-

Ga. 210, 25 S. E. 268; 1898, Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

So also for other impeaching qualities (*ante*, § 933): 1847, State *v.* Thawley, 4 Harringt. Del. 562 (admitting general evidence of his intemperate habits and of his low state of health at the time); 1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (declarant's character impeached by intemperate habits).

[2] 1897, Carver *v.* U. S., 164 U. S. 694, 17 Sup. 228 (that the deceased did not believe in future rewards and punishments, admitted); 1904, Nordgen *v.* People, 211 Ill. 425, 71 N. E. 1042 (wife-murder; deceased declarant's malice and revengefulness to the accused, admitted); 1899, State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970 (that the deceased "used profanity" just before his death, admitted); 1907, State *v.* Zorn, 202 Mo. 12, 100 S. W. 591 (whether the deceased's religious infidelity could be shown, not decided; that he did not want a minister to pray for him, held immaterial).

Contra: 1910, State *v.* Yee Gueng, 57 Or. 509, 112 Pac. 424 (that the deceased did not believe in future rewards and punishments, excluded).

Compare § 1443, *ante*.

[3] 1896, State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650; 1920, Liddell *v.* State, — Okl. Cr. —, 193 Pac. 52. Compare § 1445, note 1, *ante*.

[4] The authorities are collected *ante*, § 1033, where the special objection to this kind of evidence, that no prior question can be asked of the declarant, is discussed in detail.

So also impeachment by *contradiction* (*ante*, § 1000) may be allowable: 1900, State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263 (whether irrelevant facts in the declaration could be disproved for impeachment, as an exception to § 1003, *ante;* not decided).

[5] But the usual limitations seem to be not always strictly observed: 1858, People *v.* Glenn, 10 Cal. 32, 36 (even in chief, without any impeachment); 1879, State *v.* Blackburn, 80 N. C. 474, 478 (similar statements in support after impeachment by contradiction, admitted); 1897, State *v.* Craine, 120 N. C. 601, 27 S. E. 72 (an affidavit made on the same day, admitted).

§ 1447. [1] It must be noted that so far as the declarant's "opinion" is construable as a mere guess, not based on personal observation, it is inadmissible on other principles (*ante*, §§ 1445, 658), and this may account for some of the following rulings; others also may be supported on the rule (*ante*, § 1434), that the declarations must relate to the circumstances connected with the death: *Alabama:* 1893, Sullivan *v.* State, 102 Ala. 135, 142, 15 So. 264 ("he cut me for nothing", admitted; "I pray God to forgive him", excluded); 1901, Gerald *v.* State, 128 Ala. 6, 29 So. 614 ("he killed me for nothing", admitted); *Arkansas:* 1897, Berry *v.* State, 63 Ark. 382, 38 S. W. 1038 (that the whiskey which the defendant gave him was poisoned, excluded); 1908, Baker *v.* State, 85 Ark. 300, 107 S. W. 983; 1912, Rhea *v.* State, 104 Ark. 162, 147 S. W. 463 (as to who shot him; admitted on the facts): *Florida:* 1908,

over, the rule is by some Courts applied here with more than the ordinary absurdity of results found in the use of that rule; some of the rulings, in their pedantic technicality, are a scandal to any system of Evidence supposed to be based on reason and common sense.

Gardner *v.* State, 55 Fla. 25, 45 So. 1028 ("She shot me a purpose", excluded); *Georgia:* 1868, Whitley *v.* State, 38 Ga. 70; 1897, White *v.* State, 100 Ga. 659, 28 S. E. 423 ("he shot me down like a dog", received); 1897, Kearney *v.* State, 101 Ga. 803, 29 S. E. 127 (that the wound was accidentally inflicted by the defendant, excluded); *Indiana:* 1874, Binns *v.* State, 46 Ind. 311; 1885, Boyle *v.* State, 105 Ind. 469, 472, 5 N. E. 203 (that there was no cause for the killing, allowable); 1898, Lane *v.* State, 151 Ind. 511, 51 N. E. 1056 (that the deceased made no attempt to injure the defendant, admitted); 1906, Shankenberger *v.* State, 154 Ind. 630, 57 N. E. 519 (that she was "poisoned by my mother-in-law", admitted); *Iowa:* 1866, State *v.* Nettlebush, 20 Ia. 257; 1900, State *v.* Wright, 112 Ia. 436, 84 N. W. 541 (that the defendant did not intend to shoot him, and that the defendant was crazy, excluded); 1902, State *v.* Sale, 119 Ia. 1, 92 N. W. 680, 95 N. W. 193 (declaration of deceased that "he was to blame", excluded; this well shows the absurdity of applying the Opinion rule here); 1913, State *v.* Klute, 60 Ia. 170, 140 N. W. 864 ("He just deliberately shot me", etc., admitted); *Kansas:* 1899, State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970 (that the deceased and the defendant were the "best of friends", etc., excluded); *Kentucky:* 1876, Collins *v.* Com., 12 Bush 272; 1889, Com. *v.* Matthews, 89 Ky. 293, 12 S. W. 333; 1898, Jones *v.* Com., — Ky. —, 46 S. W. 217 (that the defendant had shot him "for nothing", excluded); 1903, Henderson *v.* Com., — Ky. —, 72 S. W. 781 ("I know that one of the two shot me", admitted); 1916, Cavanaugh *v.* Com., 172 Ky. 799, 190 S. W. 123 ("I was shot without cause", "he shot me just because he could", excluded); 1922, Rooney *v.* Com., 193 Ky. 723, 237 S. W. 403 (murder; "he shot me for nothing", held inadmissible); *Louisiana:* 1898, State *v.* Ashworth, 50 La. An. 94, 23 So. 270 ("that he was to blame with his own death", admitted, the accused offering them); *Mississippi:* 1883, Payne *v.* State, 61 Miss. 163; 1897, Powers *v.* State, 74 Miss. 777, 21 So. 657 ("You have killed me without cause", admitted); 1898, Lipscomb *v.* State, 75 Miss. 559, 22 So. 188, 23 So. 210, 76 Miss. 223, 25 So. 158 ("(1) I am going to die; I have been dead; the good Lord has sent me back to tell you that (2) Dr. L. has killed me, has poisoned me with a capsule he gave me to-night, (3) that G. J. had insured his life, and had hired Dr. L. to kill him"; these words were uttered between convulsions; held, by a majority that (1) and (3) could be separated, and that (2) was admissible, not being opinion evidence, Magruder, J., diss.; the dissenting opinion is a pitiable instance of the barren quibbling to which this question leads; and the reprehensible practice of allowing a minority judge to write the chief opinion makes it difficult to unearth the points decided; in 'Ex parte' Jack, Miss., 22 So. 188, a habeas corpus proceeding arising out of this death, the same declaration was used; see the comments of Mr. Blewett Lee, in "Psychic Phenomena and the Law", 34 Harvard Law Rev. 636); 1905, Walton *v.* State, 87 Miss. 296, 39 So. 689 (why the defendant shot the deceased; excluded); *Montana:* 1911, State *v.* Crean, 43 Mont. 57, 114 Pac. 603 (that the defendant shot without provocation, etc., allowed); *New York:* 1875, People *v.* Shaw, 63 N. Y. 40; 1878, Brotherton *v.* People, 75 N. Y. 159; *North Carolina:* 1872, State *v.* Williams, 67 N. C. 12, 17 ("It was E. W. who shot me, though I did not see him", excluded); 1896, State *v.* Mace, 118 N. C. 1244, 24 S. E. 798 ("They have murdered me", solemnly held not to be "an expression of opinion with respect to the degree of the homicide"); 1902, State *v.* Dixon, 131 N. C. 808, 42 S. E. 944 (that the assailant looked like defendant, allowed); 1912, State *v.* Watkins, 159 N. C. 480, 75 S. E. 22 ("I have done nothing to be shot for", admitted); 1914, State *v.* Williams, 168 N. C. 191, 83 S. E. 714 (that he was shot "without cause", admitted, Walker, J., diss.; the long opinions exhibit the profound mental slavery which the Opinion rule imposes on judicial action); *Ohio:* 1870, Wroe *v.* State, 20 Oh. St. 469; *Oklahoma:* 1910, Blair *v.* State, 4 Okl. Cr. 359, 111 Pac. 1003 (not decided); *Oregon:* 1886, State *v.* Saunders, 14 Or. 305, 12 Pac. 441 ("he shot me down like a dog", admitted); 1893, State *v.* Foot You, 24 Or. 61, 75, 32 Pac. 1031, 33 Pac. 537 (positive identification, admitted; opinion in general excluded); *South Carolina:* 1900, State *v.* Lee, 58 S. C. 335, 36 S. E. 706 ("he shot me for nothing", admitted); *Texas:* 1905, Wilson *v.* State, 49 Tex. Cr. 50, 90 S. W. 312 ("They killed me for nothing", admitted; prior rulings cited); 1908, Lockhart *v.* State, 53 Tex. Cr. 589, 111 S. W. 1024 ("He killed me for nothing", admitted, by a majority; Davidson, P. J., diss.); 1918, Davis *v.* State, 83 Tex. Cr. 539, 204 S. W. 652 ("He was to blame", admitted); *Utah:* 1897, State *v.* Kessler, 15 Utah 142, 49 Pac. 293 ("he shot me down like a rabbit", admitted); 1897, State *v.* Carrington, 15 Utah 480, 50 Pac. 526 (a statement as to the intent of a person performing an operation on the womb of a deceased, excluded on the principle of § 1964, *post*); *Virginia:* 1921, Pendleton *v.* Com., — Va. —, 109 S. E. 201

§ 1448. **Rule of Completeness.** The application of the doctrine of Completeness (*post*, § 2094) is here peculiar. The statement as offered must not be merely a part of the whole as it was expressed by the declarant; it must be complete as far it goes. But it is immaterial how much of the whole *affair of the death* is related, provided the statement includes all that the declarant wished or intended to include in it. Thus, if an interruption (by death or by an intruder) cuts short a statement which thus remains clearly less than that which the dying person wished to make, the fragmentary statement is not receivable, because the intended whole is not there, and the whole might be of a very different effect from that of the fragment; yet if the dying person finishes the statement he wishes to make, it is no objection that he has told only a portion of what he might have been able to tell:[1]

1873, BARRETT, J., in *State* v. *Patterson*, 45 Vt. 308, 313: "What we understand is . . . not that the declarant must state every thing that constituted the 'res gestæ' of the subject

(Sims, J.: "The true principle would seem to be that the dying declaration is not inadmissible in evidence merely because it states a conclusion of facts"); 1915, Pippin *v.* Com., 117 Va. 919, 86 S. E. 152 ("He done it a-purpose", admitted; approving the rule as stated in the text above); *Washington:* 1894, State *v.* Gile, 8 Wash. 12, 22, 35 Pac. 417 (that he was "butchered", admitted); *West Virginia:* 1900, State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983 (a declaration that "I think C. B. did the shooting, because he has threatened to do it", excluded as opinion: here properly excluded, on the principle of § 658, *ante*); *Wyoming:* 1912, Hollywood *v.* State, 19 Wyo. 493, 120 Pac. 471 ("Jack was not to blame; it was all my fault", excluded).

Are not some of these exclusion-rulings equal to any of the medieval witch-formulas and conjurers' spells, as a means of getting at the truth?

§ 1448. [1] *Accord: Ala.* 1849, McLean *v.* State, 16 Ala. 672, 675 ("the declaration in this case was complete, and it is not shown that he intended or desired to connect it with any other fact or circumstance explanatory of it"; admitted); *Ga.* 1906, Park *v.* State, 126 Ga. 575, 55 S. E. 489; *Ind.* 1846, Ward *v.* State, 8 Blackf. 101, 102 (the substance suffices); *Ia.* 1866, State *v.* Nettlebush, 20 Ia. 260; *La.* 1898, State *v.* Ashworth, 50 La. An. 94, 23 So. 270 (the statement must be complete "to the extent that the deceased desired to make it"; but that it consists of several remarks between which other conversation took place is immaterial); 1901, 1902, State *v.* Carter, 106 La. 407, 30 So. 895, 107 La. 792, 32 So. 183 ("a dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves, and if standing alone, would be inadmissible"); *Miss.* 1850, Nelms *v.* State, 13 Sm. & M. 505 (the substance of his statement suffices); 1906, Cooper *v.* State, 89 Miss. 351, 42 So. 666 (declaration reported in part only, excluded); *Mo.* 1893, State *v.* Johnson, 118 Mo. 491, 504, 24 S. W. 229 (obscure statement); 1922, State *v.* Brinkley, — N. C. —, 110 S. E. 783 (the deceased "became too weak to tell the whole story"; admitted); *Va.* 1831, Vass' Case, 3 Leigh 864; 1870, Jackson *v.* Com., 19 Gratt. 668.

Compare the cases cited *post*, §§ 2097, 2099.

If a part only is proved, the opponent may prove the *remainder:* 1892, Mattox *v.* U. S., 146 U. S. 140, 152, 13 Sup. 50; 1910, Beaty *v.* Com., 140 Ky. 230, 130 S. W. 1107; compare the cases cited *post*, § 2115.

If the statement was given by *answers to questions put*, it is not indispensable that the questions should be offered also; *Can.* 1903, R. *v.* Louie, 10 Br. C. 1, 8; 1906, R. *v.* Magyar, 7 N. W. Terr. 491 (questions and answers merged into narrative form, read over to deceased, and signed by him, admitted); *U. S.* 1900, Com. *v.* Birriolo, 197 Pac. 371, 47 Atl. 355 (a dying statement written down by another person may be used, though it contained the answers only and not the questions). But the questions *may* properly be included: 1919, State *v.* Parretta, 93 Conn. 328, 105 Atl. 690 ("The entire conversation, question and answer, should be given so far as possible").

The following belongs here: 1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525 (wife-murder by poison; her statement to the doctor "I have taken nothing except what you gave me", admitted; but the question by the doctor "I told her her husband was under suspicion, and it was her duty to tell me if she had taken anything herself", excluded; this seems unsound, because the answer was an implied adoption of the question, and the only doubt could be whether she was qualified to accuse the husband).

of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact."

§ 1449. **Rule of Producing Original of a Document.** The rule that, where a writing is desired to be proved, the original must be produced or else accounted for (*ante*, § 1179), applies here as everywhere, and is not disputed.[1] It must be noted, however, that this rule applies even where the document is not regarded (under the principle of the following section) as the exclusive evidence of the declaration. That is, if in such a jurisdiction a bystander's oral account of the declaration is offered, the writing need not be produced; but if it is the substance of the contents which he purports to give, the absence of the writing must first be accounted for; the general principle is explained *ante*, § 1231.

§ 1450. **Rule of Preferring Written Testimony.** The principles which determine whether a written report of another person's statement is to be preferred to oral testimony, and must therefore be produced, have already been examined in their general applications (*ante*, §§ 1326, 1332). It is, however, more convenient to consider here their application to dying declarations.

(*a*) Where an auditor of a dying declaration makes in written form a *note or report of the oral utterances*, this written statement of the auditor is not preferred evidence, and need not be produced; for there is not and never was any principle of evidence preferring a person's written memorandum of testimony to his or another's oral or recollection testimony.[1] Nor is the case different when the person thus making the written report was a *magistrate* having power to administer oaths or take testimony on a preliminary examination;[2] for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a magistrate's report could be preferred to other witnesses (*ante*, § 1236).

(*b*) Where a written memorandum or report thus made is *read over* to the declarant and *signed or assented to* by him, the writing thus becomes a second and distinct declaration by him. The first oral statement is not merged in

§ **1449**. [1] 1908, Gardner *v.* State, 55 Fla. 25, 45 So. 1028 (justice of the peace's copy of his original, held improperly used).

§ **1450**. [1] To the following add the cases in note 3, *infra*, as also involving the same ruling: 1885, Anderson *v.* State, 79 Ala. 5, 8 (declaration reduced to writing, but not read over to deceased or signed; writing not preferred); 1903, Jarvis *v.* State, 138 Ala. 17, 34 So. 1025 (similar); 1910, Mixon *v.* State, 7 Ga. App. 805, 68 S. E. 315 (bystander's written report, not preferred); 1879, State *v.* Sullivan, 51 Ia. 142, 146, 50 N. W. 572 (declaration reduced to writing but not signed; writing not preferred); 1885, State *v.* Holcomb, 86 Mo. 371, 377 (written down by another, writing not preferred); 1881, Allison *v.* Com., 99 Pa. 17, 33 (declaration reduced to writing, but not read over to the deceased nor signed; writing not preferred).

Contra: 1880, Epperson *v.* State, 5 Lea Tenn. 291, 297 (where there is but one declaration, and a bystander reduces it to writing, this is preferred; but perhaps not, in proving "an independent declaration at the same interview"). The question came up, but was avoided, in 1765, in Lord Byron's Trial, 19 How. St. Tr. 1222.

[2] 1907, Mitchell *v.* State, 82 Ark. 324, 101 S. W. 763; 1906, Brennan *v.* People, 37 Colo. 256, 86 Pac. 79; 1838, Beets *v.* State, Meigs Tenn. 106, *semble* (written notes of a dying declaration sworn to before a justice, not preferred).

Contra. 1722, R. *v.* Reason and Tranter, 16 How. St. Tr. 33 (assumed by all the judges as law, quoted in note 5, *infra*).

For the rule that the magistrate *must be called to the stand*, and not merely his writing used, see *post*, § 1667.

the later written one, because, since the transaction is not a contract or other legal act between two parties thereto, the rule of Integration, or Parol Evidence rule (*post*, § 2425), has no application. The first and oral declaration is therefore provable without producing the later written one.[3] Nevertheless, the majority of Courts, accepting the superficial analogy of the Parol Evidence rule or of Depositions (*ante*, §§ 799, 802), require the writing to be used, excluding testimony to the oral statement.[4] It may be noted that of course so far as the proponent is offering to prove the terms of the writing, not of the oral utterance, the writing must be produced (*ante*, § 1449).

(*c*) Where the declarant makes one oral statement, and afterwards *at another time a second statement*, the latter being in writing or reduced to writing, there are here two distinct statements, and either one may be offered without testifying to the other; for the principle of Completeness (*ante*, § 1448) requires only that the whole of a single utterance should be offered together, and in the present instance the declarant, though referring to the same occurrence, is nevertheless making distinct statements, each of which is independently admissible. It is thus clear (1) that separate oral utterances are admissible, even though the written one has been proved; (2) that, even before or without proving the written one, the separate oral ones are admissible, — though on the latter point the Courts are not always explicit.[5]

[3] 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (the writing not preferred, if not signed; repudiating the contrary intimation in Boulden *v.* State, *infra*, n. 4); 1894, State *v.* Reed, 53 Kan. 767, 37 Pac. 174; 1879, Com. *v.* Haney, 127 Mass. 455 (declarations reduced to writing and signed by deceased; the writer allowed to testify to oral declarations, using the writing to refresh his memory; Ames, J.: "The words used by the deceased were none the less primary evidence for having been taken down by a bystander in writing; they may be testified to by any one who heard and remembers them; the written statement was a contemporary memorandum of what he said"); 1892, State *v.* Whitson, 111 N. C. 695, 697, 16 S. E. 332 (declaration taken in writing by A, and used by A to refresh memory; writing not the preferred evidence, though signed and sworn to by deceased); 1838, Beets *v.* State, Meigs Tenn. 106, *semble* (cited in note 2, *supra*).

Not decided: 1906, Willoughby *v.* Terr., 16 Okl. 577, 86 Pac. 56.

That the writing may also be used, under the ordinary rules, to refresh *the witness' memory*, see *ante*, §§ 759 ff.

[4] 1835, R. *v.* Gay, 7 C. & P. 230, Coleridge, J. (declaration taken down, then signed by the declarant; the writing preferred to the writer's oral testimony); 1893, Boulden *v.* State, 102 Ala. 78, 84, 15 So. 341 (declaration "reduced to writing" in an unspecified way, preferred, if available); 1858, People *v.* Glenn, 10 Cal. 32, 37 (declaration reduced to writing and signed, preferred to oral testimony; oral declarations at a different time also allowed, the written one being first proved); 1860, State *v.* Tweedy, 11 Ia. 350, 359 (declaration reduced to writing at the time and signed; the writing preferred; but oral statements at other times admissible); 1895, Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390; 1892, King *v.* State, 91 Tenn. 617, 650, 20 S. W. 169; 1906, Phillips *v.* State, 50 Tex. Cr. 127, 94 S. W. 1051, *semble* (writing assented to; the opinion is faultily inconsistent); 1876, People *v.* Tracy, 1 Utah 343, 346 (called "the best evidence"; here signed by the declarant); 1908, State *v.* Clark, 64 W. Va. 625, 63 S. E. 402.

[5] ENGLAND: 1722, R. *v.* Reason, and Tranter, 16 How. St. Tr. 33 (Pratt, L. C. J.: "You know in the Court of Chancery, when the party is examined on his oath, he gives in a first answer, and on exceptions taken to it he gives in a second, and so a third; all these are taken but as one answer and entire confession of the party. . . . [Now in this case of alleged murder] this minister came to enquire of this [dying] gentleman about the circumstances of his death; after that, the same gentleman is present when the justices of the peace come; thereupon the justices of the peace desire him to take it in writing; he asks the same questions as he did before, and they are taken in writing; he takes it designing to make the first examination more authentic to charge the person that gives the examination. Now really, when all this is done, the examination

(*d*) That a magistrate's report of the declaration should be regarded as *conclusive*, so as to forbid a showing by other testimony of what was really said by the declarant, has already been noted as an unsound principle (*ante*, § 1349). It seems not to have been applied to dying declarations.

§ 1451. **Judge and Jury.** (*a*) That the judge is to pass on the preliminary conditions necessary to the admissibility of evidence is unquestioned (*post*, § 2550). It follows, as of course, that, since a consciousness of impending death is according to the foregoing principles legally essential to admissibility, the *judge must determine* whether that condition exists before the declaration is admitted.[1]

of him before the justice, taken in writing by the same person that enquired of him before, and all this done in order to perfect and consummate the examination, whether you will not take them both together as one entire account given by the deceased?"; Fortescue, J., thought differently: "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no justice of the peace then present, so that the examination stands distinctly by itself", and this opinion prevailed).

UNITED STATES: *Arkansas:* 1859, Collier *v.* State, 20 Ark. 36, 44 (declarations made on three different occasions, on the last two being reduced to writing; the first statements received, without producing the others); *California:* 1858, People *v.* Glenn, 10 Cal. 32, 37 (see note 4, *supra*); 1868, People *v.* Vernon, 35 Cal. 49; 1900, Morrison *v.* State, 42 Fla. 149, 28 So. 97 (any one of separate written statements, admissible without the others); *Illinois:* 1898, Dunn *v.* People, 172 Ill. 582, 50 N. E. 137 (statements at several times; reduction to writing on one occasion does not exclude oral testimony of the statements "on other occasions"); *Indiana:* 1898, Lane *v.* State, 151 Ind. 511, 51 N. E. 1056 (other and oral statements not excluded); 1860, State *v.* Tweedy, 11 Ia. 350, 359 (see note 4, *supra*); *Kentucky:* 1903, Hendrickson *v.* Com., — Ky. —, 73 S. W. 674 (other statements made "about or subsequent to the drafting" of the paper signed by the deceased, admitted); 1907, Cleveland *v.* Com., — Ky. —, 101 S. W. 93 (like Hendrickson *v.* Com.); *Louisiana:* 1904, State *v.* Gianfala, 113 La. 463, 37 So. 30; *Michigan:* 1882, People *v.* Simpson, 48 Mich. 474, 478, 12 N. W. 662 (oral declarations at different times, admissible, *semble*); *Oklahoma:* 1911, Morris *v.* State, 6 Okl. Cr. 29, 115 Pac. 1030; 1913, Addington *v.* State, 8 Okl. Cr. 703, 130 Pac. 311 (both are admissible); *Tennessee:* 1880, Epperson *v.* State, 5 Lea 291, 297, *semble* (see note 1, *supra*); *Texas:* 1902, Herd *v.* State, 43 Tex. Cr. 575, 67 S. W. 495 (other statements, made at the same time with one reduced to writing and signed, held admissible; Henderson, J., diss.); 1910, Hunter *v.* State, 59 Tex. Cr. App. 439, 129 S. W. 125 (cases reviewed); *Utah:* 1897, State *v.* Carrington, 15 Utah 480, 50 Pac. 526 (oral declarations, afterwards reduced to writing and assented to; all admissible); 1910, State *v.* Vance, 38 Utah 1, 110 Pac. 434 (an oral statement, made after the written one, also received).

§ **1451.** [1] *Eng.* A contrary ruling was made by L. C. B. Eyre, in 1790, R. *v.* Woodcock, Leach Cr. L., 3d ed., 563; but this was subsequently repudiated in England, and the principle as stated above does not seem to have been since doubted: 1816, R. *v.* Hucks, 1 Stark. 521 (Ellenborough, L. C. J., said this was the "unanimous opinion" of the judges here, on a consultation from Ireland; "it might as well," Mr. Starkie adds, "be left to a jury to say whether a witness ought to be sworn, or whether he is not incapacitated by ignorance or infamy or any other cause from giving evidence upon oath"); *Br. C.* 1904, R. *v.* Abo, 11 Br. C. 114 (but it is not incumbent on the judge to exclude the jury "during the inquiry as to admissibility"); *U. S. Ark.* 1916, Paul *v.* State, 125 Ark. 209, 188 S. W. 555; *Ill.* 1914, People *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; *Ind.* 1907, Williams *v.* State, 168 Ind. 87, 79 N. E. 1079; *Ky.* 1906, Coyle *v.* Com., 122 Ky. 781, 93 S. W. 584 (the judge alone passes on admissibility; good opinion, by Nunn, J.); *La.* 1916, State *v.* Buchanan, 140 La. 420, 73 So. 253 (and must listen to opposing evidence if offered); *Mass.* 1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; *Mo.* 1907, State *v.* Zorn, 202 Mo. 12, 100 S. W. 591 ("the jury have absolutely nothing to do with their admissibility"); 1908, State *v.* Crone, 209 Mo. 316, 108 S. W. 555 (State *v.* Zorn approved); 1915, State *v.* Thomas, — Mo. —, 180 S. W. 886; *N. J.* 1906, State *v.* Monich, 74 N. J. L. 522, 64 Atl. 1016 ("In our opinion the question admits of but one answer; . . . [the condition of admissibility] is not reviewable by the jury"; prior cases considered; lucid opinion by Pitney, J).; *N. Y.* 1887, People *v.* Smith, 104 N. Y. 491, 504, 10 N. E. 873 ("It cannot be left to the jury [in the first instance] to say whether the deceased thought he was dying or not, for that must be decided by the judge before he

(*b*) After a dying declaration, or any other evidence, has been admitted, the *weight* to be given to it is a matter exclusively for the jury. They may believe it or may not believe it; but, so far as they do or do not, their judgment is not controlled by rules of law. Therefore, though they themselves do not suppose the declarant to have been conscious of death, they may still believe the statement; conversely, though they do suppose him to have been thus conscious, they may still not believe the statement to be true. In other words, their canons of ultimate belief are not necessarily the same as the preliminary legal conditions of Admissibility, whose purpose is an entirely different one (*ante*, § 29). It is therefore erroneous for the judge, after once admitting the declaration, to instruct the jury that they *must* reject the declaration, or exclude it from consideration, if the legal requirement as to consciousness of death does not in their opinion exist. No doubt they *may* reject it, on this ground or on any other;[2] but they are not to be expected to follow a definition of law intended only for the judge. Nevertheless, this heresy has obtained sanction in some jurisdictions;[3] it is analogous to that already discussed in reference to a jury's use of confessions (*ante*, § 861).

permits the declaration to be given in evidence"); *Okl.* 1915, Morehead *v.* State, 12 Okl. Cr. 62, 151 Pac. 1183.

So also for the *opinion* rule: 1901, Jones *v.* State, 79 Miss. 309, 30 So. 759 (whether a declaration is matter of opinion is for the Court to determine before submission to the jury; State *v.* Williams, N. C., *infra*, note 2, distinguished).

For the *trial judge's discretion*, see *ante*, § 1442, n. 3, at the end.

The statement that the judge must be satisfied, as to admissibility, "beyond a reasonable doubt", is sometimes made: 1911, People *v.* White, 251 Ill. 67, 95 N. E. 1036. But this is thoroughly unsound.

[2] *Ark.* 1907, Fogg *v.* State, 81 Ark. 417, 99 S. W. 537; *Ga.* 1899, Bush *v.* State, 109 Ga. 120, 34 S. E. 298 (the jury, "in passing upon the value and weight of the evidence", are to consider whether declarant was at the point of death and conscious of it); *Ill.* 1911, People *v.* White, 251 Ill. 67, 95 N. E. 1036; *Ia.* 1902, State *v.* Phillips, 118 Ia. 660, 92 N. W. 876 (the jury are to reconsider it under all the circumstances); *Ky.* 1914, Com. *v.* Johnson, 158 Ky. 579, 165 S. W. 984; *Me.* 1919, State *v.* Bordeleau, 118 Me. 424, 108 Atl. 464 (question left undecided); *Mo.* 1898, State *v.* Sexton, 147 Mo. 89, 48 S. W. 452 (the judge passes on admissibility, but the jury may be allowed to weigh the value); 1907, State *v.* Zorn, 202 Mo. 12, 100 S. W. 591; *N. J.* 1907, State *v.* Barnes, 75 N. J. L. 426, 68 Atl. 145 (compare this with State *v.* Biango, *infra*, n. 3, handed down a week earlier: such inconsistency points to one-man opinions in this Court); 1910, State *v.* Leo, 80 N. J. L. 21, 77 Atl. 523 (judge passes upon admissibility); *N. C.* 1872, State *v.* Williams, 67 N. C. 12, 17 (the judge must pass on admissibility); *Okl.* 1921, Canty *v.* State, — Okl. Cr. —, 201 Pac. 531.

[3] *Cal.* 1905, People *v.* Thompson, 145 Cal. 717, 79 Pac. 435; 1920, People *v.* Rulla Lingh, 182 Cal. 457, 188 Pac. 987; *Ga.* 1876, Jackson *v.* State, 56 Ga. 235 (instruction to the jury to decide whether the statement was made at the point of death, held proper); 1878, Dumas *v.* State, 62 Ga. 58, 62 (same); 1899, Smith *v.* State, 110 Ga. 255, 34 S. E. 204 (instruction that, if jury thought the declarant not at point of death nor conscious of it, they must not consider the declaration, held proper); 1903, Anderson *v.* State, 117 Ga. 255, 43 S. E. 835; 1903, Smith *v.* State, 118 Ga. 61, 44 S. E. 817; 1906, Findley *v.* State, 125 Ga. 579, 54 S. E. 106; 1908, Jones *v.* State, 130 Ga. 274, 60 S. E. 840; 1920, Thomas *v.* State, 150 Ga. 269, 103 S. E. 244; *Mass.* 1895, Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92 (an instruction "You are not to consider the statement . . . unless you are satisfied . . . that he believed that there was no hope of life", held proper); *Nev.* 1914, State *v.* Scott, 37 Nev. 412, 142 Pac. 1053 (Talbot, C. J., diss.); *N. J.* 1907, State *v.* Biango, 75 N. J. L. 284, 68 Atl. 125, *semble*; *Or.* 1908, State *v.* Doris, 51 Or. 136, 94 Pac. 44; *Tex.* 1899, Hopkins *v.* State, — Tex. Cr. —, 53 S. W. 619 (the trial Court allowed to "submit the question to the jury"); 1921, Walker *v.* State, 88 Tex. Cr. 389, 227 S. W. 308; *W. Va.* 1921, State *v.* Long, 88 W. Va. 669, 108 S. E. 279.

A careful discussion of principle and precedents will be found in Professor V. H. Lane's article in 1 Michigan Law Review 624 (1903), "The Right of the Jury to review the Decision of the Court upon the Admissibility of Dying Declarations."

§ 1452. **Declarations usable by Either Party.** Owing to the present peculiar limitation of this evidence to public prosecutions for homicide, and the tenor of the declarations usually made by the dying person, it has sometimes been argued that the declarations cannot be used by the accused. But the argument has no foundation whatever, and has been generally repudiated.[1]

However, under the baleful operation of the Opinion rule (*ante*, § 1447) the accused often loses the benefit of an exonerating declaration.

§ **1452**. [1] 1892, Mattox *v.* U. S., 146 U. S. 151, 13 Sup. 50; 1848, Moore *v.* State, 12 Ala. 767; 1898, People *v.* Southern, 120 Cal. 645, 53 Pac. 214; 1914, People *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; 1907, Green *v.* State, 89 Miss. 331, 42 So. 797; 1886, State *v.* Saunders, 14 Or. 304, 12 Pac. 441; 1919, Com. *v.* Bednorciki, 264 Pa. 124, 107 Atl. 666 (but the accused is restricted by the same limitations as the prosecution).

Contra, semble: 1836, R. *v.* Scaife, 1 Moo. & Rob. 552, 2 Lew. Cr. C. 150 (a declaration was after doubt received in favor of the prisoner, but as influencing the amount of punishment); 1872, People *v.* McLaughlin, 44 Cal. 435, per Wallace, C. J. (the declarations cannot be offered by the accused).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC II: STATEMENTS OF FACTS AGAINST INTEREST

CHAPTER XLVIII.

§ 1455. **In general; Statutes.** This exception may be traced back as early as any of the others, namely, to the early 1700s. The historical development can be more particularly noted under certain details of the rule (*post*, §§ 1464, 1476).

The Exception presupposes, like most of the others, first, a Necessity for resorting to hearsay (*ante*, § 1421), *i.e.* the death of the declarant, or some other condition rendering him unavailable for testimony in court; and, secondly, a Circumstantial Guarantee of Trustworthiness (*ante*, § 1422), — in this instance, the circumstance that the fact stated, being against the declarant's interest, is not likely to have been stated untruthfully. There is also to be considered (*ante*, § 1424) the bearing of other independent rules of

Evidence; and finally, there are certain arbitrary limitations resting on no reason at all.

In a few jurisdictions *statutory enactments* purport to deal with this exception.[1] They are, however, for the most part obstructive or confusing rather than helpful; for they either merely restate, in a form too concise to be useful, the established common-law rule, or they mingle in inextricable confusion certain fragments of this and other exceptions. Their specific contributions to the details of the exception may be noted under the respective details.

There was a time when the present exception was by some supposed not to exist in this country at all;[2] but even at that time it had in fact received recognition in sundry rulings; and it is to-day everywhere fully accepted.[3]

1. The Necessity Principle

§ 1456. **Death, Absence, Insanity, etc., as making the Witness Unavailable.** The Necessity Principle (*ante*, § 1421), as here applied, signifies the impossibility of obtaining other evidence from the same source, the declarant being unavailable in person on the stand. Whenever the witness is practically unavailable, his statements should be received.

Death is universally conceded to be sufficient:[1]

§ 1455. [1] *Cal.* C. C. P. 1872, § 1946 ("The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein" are admissible "1, When the entry was made against the interest of the person making it"); § 1853 ("The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest"); § 1870, par. 4 ("The act or declaration of a deceased person, done or made against his interest in respect to his real property" is admissible); *Ga.* 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"); § 5768 ("The declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case"); § 5778 (admissions of strangers, receivable when they are "admissions made by a third person against his interest, as to a fact collateral to the main issue between the litigants, but essential to the adjudication of the cause"); *Ida.* Comp. St. 1919, § 7967 (like Cal. C. C. P. § 1946); *Ia.* Comp. Code § 7329, C. 1897, § 4622 (like Cal. C. C. P. § 1946); *Mont.* Rev. c. 1921, §§ 10514, 10531, par. 4, § 10594, par. 1 (like Cal. C. C. P. §§ 1853, 1870, par. 4, § 1946); *Nebr.* Rev. St. 1922, § 8855 (like Cal. C. C. P. § 1946); *Or.* Laws 1920, §§ 710, 727, par. 4 (like Cal. C. C. P. §§ 1853, 1870, par. 4); § 790 (like Cal. C. C. P. § 1946, inserting after "deceased", "or without the State", and after "writings", "of a like character"); *P. I.* C. C. P. 1901, § 282 (like Cal. C. C. P. § 1853); § 298, par. 4 (like Cal. C. C. P. § 1870); § 328 (like Cal. C. C. P. § 1946); *P. R.* Rev. St. & C. 1911, § 1403, par. 4 (like Cal. C. C. P. § 1870, par. 4); § 1461 (like Cal. C. C. P. § 1946); *Utah* Comp. L. 1917, § 7113 (like Cal. C. C. P. § 1946).

[2] Smith's Leading Cases, American notes, 1st ed., II, 233 (1844), 8th ed., II, 381. It was also ignored, not repudiated, in a few early cases, such as Longenecker *v.* Hyde, 6 Binn. Pa. 1 (1813). Compare the history of a *party's admissions*, which at the beginning was not differentiated (*ante*, § 1080).

[3] Except possibly in Maine; 1886, Libby *v.* Brown, 78 Me. 492, 7 Atl. 114.

§ 1456. [1] 1815, Manby *v.* Curtis, 1 Price 229; 1839, Phillips *v.* Cole, 10 A. & E. 106; 1825, Barrows *v.* White, 4 B. & C. 328; 1829, Spargo *v.* Brown, 9 B. & C. 936, *semble;* 1855, Papendick *v.* Bridgwater, 5 E. & B. 178; 1896, Bertrand *v.* Heaman, 11 Man. 205, 210; 1884, Trammell *v.* Hudmon, 78 Ala. 223; 1864, Mahaska Co. *v.* Ingalls, 16 Ia. 81; 1860, Currier *v.* Gale, 14 Gray 504; 1860, Webster *v.* Paul, 10 Oh. St. 536; 1846, Lowry *v.* Moss, 1 Strobh. 64; 1840, Davis *v.* Fuller, 12 Vt. 189.

In two early Nisi Prius rulings, long outlawed by time and later cases, the statements of living witnesses were admitted: 1795, Walker *v.* Broadstock, 1 Esp. 458; 1803, Doe *v.* Rickarby, 5 Esp. 4.

1833, WILLIAMS, J., in *Fitch* v. *Chapman*, 10 Conn. 11: "The cases where such evidence is admitted seem to proceed generally upon the principle that, by the decease of the person, better evidence cannot be had."

The principle of necessity is broad enough to assimilate other causes; but the rulings upon causes other than death are few. They are ill-judged, so far as they do not recognize the general principle of unavailability. *Illness*[2] and *insanity*[3] should be equally sufficient to admit the statements; as well as *absence from the jurisdiction*.[4] Supervening *incompetency through interest* stands on the same ground.

The written *receipt of a third person*, acknowledging payment of money, is undoubtedly a statement of a fact against interest (*post*, § 1461); but it cannot be received under the present principle, unless the receiptor is deceased or otherwise unavailable.[6]

[2] *Contra:* 1813, Harrison v. Blades, 3 Camp. 458 (the declarant had suffered an apoplectic fit and was by physicians said to be 'in extremis'; Ellenborough, L. C. J.: "No case has gone so far [as to admit such evidence] and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of the rules of evidence were permitted, there would be very sudden indispositions and recoveries").

[3] 1864, Mahaska Co. v. Ingalls, 16 Ia. 81, *semble;* 1915, Weber v. Chicago R. I. & P. R. Co., 175 Ia. 358, 151 N. W. 852 (personal injuries received in a derailment in March, 1905; defence, derailment by the criminal act of K., intentionally wrecking the train; the written statement of K., made 10 days after the derailment, confessing fully his act, was offered as a declaration of a fact against interest; K. had been convicted of the crime of derailment in 1906 or 1907, his conviction was set aside for errors, then he was in 1908 adjudged insane, and in 1909 he was released from the asylum as not a menace to the public in his mental condition, and at the time of this trial in 1910 he was at large in parts unknown; in 1907, while he was in prison, the now defendant had interrogated him on deposition as to the crime, but he had refused to answer; by a majority, two judges dissenting, K.'s statement of 1905 was held admissible; without elaborating this "very pretty question", as it is termed by a dissenting judge, suffice to note that any system of evidence which would refuse to permit a defendant to exonerate himself by showing the conviction of K. for the crime, his statement, his insanity, and all the rest of it, would be a system of mental slavery fit for the scrapheap of justice); 1881, Jones v. Henry, 84 N. C. 324.

[4] 1826, Shearman v. Atkins, 4 Pick. 293; 1903, Pound, C., in South Omaha v. Wrzensinski, 66 Nebr. 790, 92 N. W. 1045 (in a concurring opinion; admitting the letter of a city clerk absent from the jurisdiction). *Doubting:* 1851, Williams, J., in Geralopulo v. Weiler, 10 C. B. 690, 696.

Contra: 1831, Stephen v. Gwenap, 1 Moo. & Rob. 120 (flight of a bankrupt under a criminal charge); 1910, Moffit v. Canadian Pacific R. Co., 2 Alta. 483 (letter from a mother in Ontario acknowledging receipt of money, excluded; point not raised); 1864, Mahaska Co. v. Ingalls, 16 Ia. 81, *semble*.

[5] 1841, Pugh v. McRae, 2 Ala. 394; 1831, Dwight v. Brown, 9 Conn. 93; 1833, Fitch v. Chapman, 10 Conn. 11. *Contra*. 1825, Burton v. Scott, 3 Rand. 409.

[6] *Accord: Can.* 1844, Joplin v. Johnston, 2 Kerr N. Br. 541 (mortgagee's receipt for rent); *U. S. Ariz.* 1906, Matko v. Daley, 10 Ariz. 175, 85 Pac. 21; *Ark.* 1906, Walnut Ridge M. Co. v. Cohn, 79 Ark. 338, 96 S. W. 413 (on rehearing, reversing the original ruling, which was based on Greenleaf's statement quoted *infra*); *Conn.* 1839, Newell v. Roberts, 13 Conn. 63, 72; 1905, British Amer. Ins. Co. v. Wilson, 77 Conn. 559, 60 Atl. 293; *Md.* 1921, Myers v. State, 137 Md. 496, 113 Atl. 92 (larceny of an automobile; plea, title by purchase; a receipt signed by the purporting seller A. in New York, excluded); *Mass.* 1826, Shearman v. Atkins, 4 Pick. 283, 293 (assumpsit by guardians against the ward's estate for money spent; receipts for the sums in question were admitted; the referee allowing this only for such persons as were not "alive and within the Commonwealth"); 1896, Silverstein v. O'Brien, 165 Mass. 512, 43 N. E. 496 (receipts for rent, signed by tenants, to show that the offering party was owner, excluded); *Minn.* 1885, Ferris v. Boxell, 34 Minn. 262, 25 N. W. 592 (receipt of third person is not evidence, nor made so by a statute exempting it from authentication if properly recorded); *Mo.* 1921, State v. Howe, 287 Mo. 1, 228 S. W. 477 (receiving money earned by prostitution); *Nebr.* 1921, Hays v. Christiansen, 105 Nebr. 586, 181 N. W. 379 (foreclosure of mortgage; "receipts of third persons", held not admissible); *Pa.* 1818, Cutbush v. Gilbert, 4 S. & R. 551, 555 (receipts by third persons not called, excluded; "his oath is better"); 1825, Morton

2. The Circumstantial Guarantee

§ 1457. **General Principle.** The basis of the Exception is the principle of experience that a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting:

1861, BLACKBURN, J., in *Smith* v. *Blakey*, L. R. 2 Q. B. 326: "When the entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them."

1879, FITZGIBBON, C. J., in *Lalor* v. *Lalor*, 4 L. R. Ire. 681: "The interest against which the statement appears to be made . . . [is required] in order to supply that sanction which, after the death of the party, is accepted as a substitute for an oath."

1832, ROGERS, J., in *Gibblehouse* v. *Stong*, 3 Rawle 437: "The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest."

1841, GIBSON, C. J., in *Addams* v. *Seitzinger*, 1 W. & S. 244: "[It rests on] the principle which allows entries or memorandums which were prejudicial to the interest of the writer to be evidence, . . . thus substituting for the sanction of a judicial oath the more powerful sanction of a sacrifice of self-interest."

1879, COFER, J., in *Mercer's Adm'r* v. *Mackin*, 14 Bush 441: "Experience has taught us that when one makes a declaration in disparagement of his own rights or interests it is generally true, and because it is so the law has deemed it safe to admit evidence of such declarations." [1]

The specific applications of this broad principle to the different kinds of facts against interest come now to be considered.

§ 1458. **Statements predicating a Limited Interest in Property.** A statement predicating of oneself a *limited interest instead of a complete title to property* asserts a fact decidedly against one's interest, and has always been so regarded. In particular, assertions that one's estate is a leasehold, not a

v. M'Glaughlin, 13 S. & R. 107; *Wash.* 1904, Beebe *v.* Readward, 35 Wash. 615, 77 Pac. 1052.

Contra: Eng. 1914, R. *v.* Sagar, 3 K. B. 1112 (false pretences; the issue was whether defendant was carrying a business of dealing in cycles; certain receipts for payment to the R. Cycle Co., held admissible); *U. S.* 1915, People *v.* Davis, 269 Ill. 256, 110 N. E. 9 (on a charge of embezzlement, a principal's receipts admitted for the agent); N. Y. C. P. A. 1920, § 336 (payment by a municipal corporation may be evidenced by receipt on file if dated at least 6 years before); 1796, Alston *v.* Taylor, 1 Hayw. N. C. 381, 395 (counsel's receipt for a bond taken to sue upon, admitted as given in "the course of business"); 1853, Reed *v.* Rice, 25 Vt. 171, 186, per Redfield, C. J. (misunderstanding Gilson *v.* Gilson, 16 Vt. 464, where the receipt was by an agent of the party).

The following passage probably led to misunderstanding on this point: 1842, Greenleaf, Evidence, § 147, note 3: "In auditing the accounts of guardians, administrators, etc., the course is to admit receipts as 'prima facie' sufficient vouchers"; but the authorities cited do not bear this out as a general exception.

Of course, such receipts of a *party-opponent* would be receivable as admissions: *ante*, § 1049.

Distinguish the above question whether a *trustee's* or *administrator's* accounting may be sufficiently made by producing vouchers signed by third persons without calling those persons: 1917, Wylie *v.* Bushnell, 277 Ill. 484, 115 N. E. 618; N. C. Con. St. 1919, § 107 (in accountings by executors, etc.; "vouchers are presumptive evidence of disbursement, without other proof, unless impeached"; if lost, contents may be proved by affidavit).

§ 1457. [1] So also Blackburn, J., in R. *v.* Birmingham, 1 B. & S. 763; Somerville, J., in Humes *v.* O'Bryan, 74 Ala. 79.

freehold, or that one's possession is merely as agent or as trustee for another, are admissible :[1]

1861, BLACKBURN, J., in *R.* v. *Birmingham*, 1 B. & S. 763 : "Is such a statement [cutting down an interest in realty] admissible to the same extent and for the same purposes as where the effect of the statement is to charge the person with the receipt of money? I neither find any distinction taken between them in any of the cases, nor can I in principle see any. The probability that a man would speak truth (which is the reason assigned for admitting the evidence) is equally great whether the tendency of the declaration is to establish liability for money or to deprive a man of real estate."

Such statements may be used in so far as they tend to prove the matter against interest, for example, that some other person is the owner of the higher estate. But they could not be received to prove the matter as to which they were not against interest, — for example, the ownership of the limited estate asserted.[2]

§ 1458. [1] *Accord:* ENGLAND: 1795, Walker *v.* Broadstock, 1 Esp. 458; 1803, Doe *v.* Rickarby, 5 id. 4; 1808, Doe *v.* Jones, 1 Camp. 367 (whether a *locus* was part of a copyhold of the defendant; a writing by the deceased former owner of the copyhold, then occupying the *locus*, that he did not own it but paid rent for it, was admitted for the plaintiff); 1811, Peaceable *v.* Watson, 4 Taunt. 16; 1835, Carne *v.* Nicoll, 1 Bing. N. C. 430; 1845, Baron de Bode's Case, 8 Q. B. 243; 1847, Doe *r.* Langfield, 16 M. & W. 513; 1865, Smith *v.* Blakey, L. R. 2 Q. B. 326.

CANADA: 1862, Powell *v.* Wathen, 5 All. N. Br. 258 (deceased's disclaimer of title, admissible for one charged as executor 'de son tort' of the deceased).

UNITED STATES: *Federal:* 1913, In re Thompson, U. S. D. C. N. J., 205 Fed. 556 (bankrupt's statements, in possession of a dredge, that he was not owner of it, admitted); *Georgia:* 1873, Turner *v.* Tyson, 49 Ga. 165, 169 (admission by the heir, of the genuineness of an ancestor's divesting deed, received); 1892, Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92 (declarations by a possessor in apparent ownership, that the land had been purchased with trust funds from the sale of other land, admitted); *Indiana:* 1846, Doe *v.* Evans, 1 Blackf. 322 (by a possessor, that he was tenant only, admitted); *Iowa:* 1867, Robinson *v.* Robinson, 22 Ia. 427, 433 (trust declarations, admitted); *Louisiana:* 1918, Demarets *v.* Demarets, 144 La. 173, 80 So. 240 (transfer in fraud of wife; statements by the grantor held not against interest on the facts); *Maine:* 1902, Walsh *v.* Wheelwright, 96 Me. 174, 52 Atl. 649 ("declarations of a deceased occupant of land, made while occupying, in the course of his occupation, as to the character of his occupation, and against his own pecuniary interest, are admissible"); *Massachusetts:* 1860, Currier *v.* Gale, 14 Gray 504 (statements as to land, admitted); *New Hampshire:* 1843, Pike *v.* Hayes, 14 N. H. 20; 1845, Rand *v.* Dodge, 17 N. H. 359 (declarations indicating possession as agent or tenant merely, not owner, admitted); 1880, Perkins *v.* Towle, 59 N. H. 584; *New York:* 1894, Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189 (conditions of delivery of a deed; the deceased grantor's declarations, while in possession, that he had made and delivered the deed on certain conditions, admitted); 1907, Tompkins *v.* Fonda G. L. Co., 188 N. Y. 261, 80 N. E. 933 (declarations of a director of a corporation, admitting knowledge of the plaintiff's title to goods bought, received); 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 to her of an automobile; the deceased husband's declarations that he had given the automobile to her, held admissible); *North Carolina:* 1880, Melvin *v.* Bullard, 82 N. C. 37; 1906, Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275 (deceased life-tenant's declaration, while in possession, that "she had made a deed to Mr. M. for the lot", admitted); *Philippine Isl.* 1907, Leonards *v.* Santiago, 7 P. I. 401 (husband's statement disclaiming title to land held by him for his wife, admitted; applying C. C. P. § 282); *Vermont:* 1895, Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153 (as to land boundaries, admitted); *Virginia:* 1890, Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974 (deceased possessor's declarations that he had only a life-estate and could not transfer a fee, admitted); 1901, First National Bank *v.* Holland, 99 Va. 495, 39 S. E. 126 (husband's declarations of a gift to wife, made when free from debt, admitted).

[2] 1897, Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482 (declaration by a husband that he made a deed to his wife because he was in debt to her, excluded, as not against interest on the question whether the deed was for a valuable consideration).

§ 1459. **Same: Other Statements (Admissions, etc.), about Land, discriminated.** There has been in some jurisdictions much confusion through a failure to distinguish certain principles, distinct in themselves, but all finding an application to declarations about land-possession and having only that superficial feature in common: [1]

(1) If the issue involves a prescriptive title and adverse possession, the nature of the possession alleged is important, and under the doctrine of *Verbal Acts* (*post*, §§ 1778, 1779) the statements and conduct of the possessor are admissible as giving character to the possession and indicating whether it is adverse or not. Here the statements are not taken as assertions, and the Hearsay rule is not applicable. Their chief limitation is that they must accompany the possession which they are supposed to characterize; but the declarant's decease is not a condition.

(2) Under the principle of *Admissions*, the statements of a *party-opponent*, or his *predecessor in title*, acknowledging an inferior or different title, may be used (*ante*, § 1082). Here the main requirements are that the admitter must have had title at the time, and that the admission shall be used only against himself or his successors; but the admitter need not be deceased before the statement can be used. Here, too, no Hearsay exception is involved.

(3) In statements offered under the present exception to the Hearsay rule, the declarant must be *deceased*. Moreover, there must have been an interest at the time to say the contrary, but the statements may be used in any controversy, *without regard to the parties* concerned.

(4) Still dealing with Hearsay exceptions, there are, further, two American doctrines admitting declarations as to *boundaries* (treated *post*, §§ 1563–1570); by one of these, obtaining generally, the declarant must not have been an interested party (for example, an owner), and he need not have been in possession; but by the other, in vogue in a few Atlantic jurisdictions, he must have been an owner and must have been on the land at the time.

A more detailed analysis of the discriminations between these and other superficially related statements about land is elsewhere made (*ante*, § 1087, *post*, § 1780), as well as of the distinction of theory between statements against interests, admissions, and confessions (*post*, § 1475). There is also to be distinguished the doctrine of substantive law forbidding a tenant to dispute his landlord's title (*post*, § 1473).

§ 1460. **Statements predicating a Fact against Pecuniary Interest; Indorsements of Payments; Receipts.** Statements of a fact against pecuniary in-

In Crease *v.* Barrett, 1 C. M. & R. 931 (1835), and Pike *v.* Hayes, 14 N. H. 20 (1843), a declaration as to the extent of one's land was said to differ from a declaration as to the limits of one's interest in it, and to be inadmissible. But both must stand on the same footing; the former should be admitted as indicating that neighboring estates extended at least up to the point named. *Accord:* 1795, Walker *v.* Broadstock, 1 Esp. 458. A unique application of the principle is found in the following: 1855, Allegheny *v.* Nelson, 25 Pa. 334 ("It was against the interest of N. to expend his time and money in taking out a title for the land as an island, if it was not one. His application therefore was evidence that it was an island").

§ 1459. [1] *E.g.* 1845, Smith *v.* Martin, 17 Conn. 401; 1855, Plimpton *v.* Chamberlain, 4 Gray Mass. 321; 1898, Mutual Life Ins. Co. *v.* Logan, 31 C. C. A. 172, 87 Fed. 637.

terest furnish the greatest number of illustrations,[1] and of difficulties as well. Perhaps the oldest form was the account kept by a *steward or bailiff* of sums collected from tenants.[2] Another instance was the entry of receipt of a tithe-payment in a vicar's books.[3] *Money-receipts* in general have always been conceded to fall under the rule.[4]

Another typical instance was the *indorsement, on a note,* a *bill,* or a *bond,* of *payments* received; it would evidence the payment (under this rule), and the act of payment would serve as an acknowledgment of existing debt (or new promise) by the debtor, and this in turn would be sufficient to remove the bar of the statute of limitations. Other reasons, however (noted *post,* § 1466), impose special restrictions on the use of this class of statements.

§ 1461. **Statements of Sundry Facts against Interest.** There are many facts which in their ultimate effect may be against proprietary or pecuniary interest, though in their immediate and narrow aspect there may be no such clear character. These facts, however, may nevertheless be facts so decidedly against interest that no one would be inclined falsely to concede their existence. If so, on the general principle (*ante,* § 1457) they should therefore be admitted. No more precise test can well be formulated, except in the suggestion that the interest injured or the burden imposed by the fact stated should be one so palpable and positive that it would naturally have been present in the declarant's mind.[1]

§ 1460. [1] The following are miscellaneous instances: 1905, Massee-Felton L. Co. *v.* Sirmans, 122 Ga. 287, 50 S. E. 92 (sheriff's entry; cited *post,* § 1464); 1909, Kaleikini *v.* Waterhouse, 19 Haw. 359 (entries in an account book, "memorandum of my debts", etc., admitted); 1900, German Ins. Co. *v.* Bartlett, 188 Ill. 165, 58 N. E. 1075 (creditors' suit for property conveyed to wife by deceased husband; declarations by him before the transfer, that he was indebted to her, admitted); 1898, Keesling *v.* Powell, 149 Ind. 372, 49 N. E. 265 (statements by a deputy-treasurer that taxes had been paid in, admitted); 1911, Johnson *v.* Schoch, 85 Kan. 837, 118 Pac. 696 (by the holder of notes, that the notes were paid, admitted); 1890, Vogely *v.* Bloom, 43 Minn. 163, 45 N. W. 10 (consideration for a note; entry of a deceased payee of another note, as to its discharge and the making of a new note, admitted); 1903, Quimby *v.* Ayers, — Nebr. —, 95 N. W. 464 (deceased's statements that he was insolvent, admitted); 1874, Livingston *v.* Arnoux, 56 N. Y. 519 (receipt by a sheriff admitted).

[2] See the citations *post,* § 1476.

[3] 1810, Perigal *v.* Nicholson, 1 Wightw. 63.

[4] See the cases cited *ante,* § 1456.

§ 1461. [1] The following are sundry rulings applying the principle:

ENGLAND: 1861, Smith *v.* Blakey, L. R. 2 Q. B. 326 (a letter by a clerk, notifying the employer of the arrival of B.'s draft, "with three huge cases, at the office", and going on to state the terms of the contract with B., was rejected; Blackburn, J.: "It is no more than an admission that he has the care of the three chests which have arrived at the office, and the possibility that this statement might make him liable in case of their being lost is an interest of too remote a nature to make the statement admissible in evidence"); 1877, Sly *v.* Sly, L. R. 2 P. D. 91 (declaration by one raising a loan that his estate was a life interest under a will, admitted to show the existence of the will); 1891, Flood *v.* Russell, 29 L. R. Ire. 96 (declarations by a wife as to the existence of a will of her husband by which she profited less than by his intestacy, admitted); 1914, Lloyd *v.* Powell Duffryn S. C. Co., A. C. 733 (whether a workmen's compensation claimant was a dependent, the claimant being concededly an illegitimate child; the deceased's statements admitting his paternity, held admissible as "conduct"; per Earl Loreburn, L. C., also as a statement of a fact constituting a legal duty to support the child, and therefore *semble* a fact against interest).

CANADA: 1902, Yuill *v.* White, 5 N. W. Terr. 275, 291 (the mere statement of the terms of a contract is not of a fact against interest).

UNITED STATES: *Federal:* 1896, Lucas *v.* U. S., 163 U. S. 612, 16 Sup. 1168 (a statement that the declarant did not belong to the Choctaw Nation, excluded; but the sub-

It has by one Court been said that the liability involved in the fact stated must not be a mere *conditional* or contingent one.[2] But this limitation cannot be supported, and would, if consistently carried out, practically nullify the exception in this respect. The liability to pay conditionally is none the less a liability; moreover every contract is subject to some conditions imposed by implication of law. The incurring of a contract liability of any sort is on principle a fact against interest.[3]

ject is confused with that of Admissions); *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 as a son; the testator's declarations that he was the plaintiff's guardian, not admitted for the defendant; the reason for the ruling is questionable, because as guardian the testator was under liability to account, but not merely as adoptive father); *Georgia:* 1899, Georgia R. & B. Co. *v.* Fitzgerald, 108 Ga. 507, 34 S. E. 316 (wife's action for husband's death; the husband's statement of his careless conduct, admitted); 1908, Chandler *v.* Mutual L. & I. Ass'n, 131 Ga. 82, 61 S. E. 1036 (statement that the declarant had not made or authorized any application for insurance, held to be of a fact against interest); 1913, Murdock *v.* Adamson, 12 Ga. App. 275, 77 S. E. 181 (father's action for son's death; son's statements of his own negligence, received); *Idaho:* 1901, State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014 (declarations as to pregnancy, by one seeking an abortion, admitted, chiefly on this ground); 1909, Wheeler *v.* Oregon R. & N. Co., 16 Ida. 375, 102 Pac. 347 (child killed and grandmother injured; in the action for the child's death, the grandmother's statement that it was her fault was excluded; but here she was not deceased); *Iowa:* 1876, Ross *v.* McQuiston, 45 Ia. 147 (a testator's declaration, when sane, that he had not been in his right mind for twenty years, admitted); 1898, Moehn *v.* Moehn, 105 Ia. 710, 75 N. W. 521 (declaration by an indorser of a note, that it was not paid and that it belonged to his wife, held not against interest); 1906, Drefahl *v.* Security Sav. Bank, 132 Ia. 563, 107 N. W. 179 (contract by intestate to transfer funds to R., the intestate's statements that "R. was after her money, and she did not want him to have it", not admitted as statements against interest); 1915, Weber *v.* Chicago R. I. & P. R. Co., 175 Ia. 358, 151 N. W. 852 (action for personal injuries received by a negligent derailment; the defendant set up the criminal act of a third person K., intentionally wrecking the train; K.'s written statement fully admitting his act, received, as a statement of a fact making him civilly liable for damages; Deemer, C. J., diss.); *Kansas:* 1898, Walker *v.* Brantner, 59 Kan. 117, 52 Pac. 80 (action for the death of the plaintiff's husband, a railway engineer; declarations of the husband, after the injury, that he could have avoided it by keeping a lookout, admitted); *Massachusetts:* 1894, Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783 (admissions of paternity by a deceased person, not receivable for the defendant in bastardy); *Minnesota:* 1889, Hosford *v.* Rowe, 41 Minn. 247, 42 N. W. 1018 (Dickinson, J.: "Declarations by a person to show that he had executed a will, or that he had not executed a will, or that he had revoked his will, . . . are not to be regarded, in general, as declarations against interest, for the acts to which the declarations relate, and the consequences of such acts, are wholly within the control of the person whose declaration is in question"); 1902, Halvorsen *v.* Moon & K. L. Co., 87 Minn. 18, 91 N. W. 28 (deceased employee's statement that a fire in a room in his charge had been caused by an act of negligence on his part, admitted; good opinion); *Montana:* 1922, Gray *v.* Grant, — Mont. —, 206 Pac. 410 (accounting; or testator's declarations admitting a contract with one of the defendants, admitted under Rev. C. 1921, § 10514); *Texas:* 1904, Smith *v.* International & G. N. R. Co., 34 Tex. Civ. App. 209, 78 S. W. 556 (by the deceased, injured on a railroad track, that he was asleep when struck, admitted); *Utah:* 1908, Smith *v.* Hanson, 34 Utah 171, 96 Pac. 1087 (action for attorney's services to deceased; the latter's statement that he was "not going to sue", etc., held not to involve any fact of pecuniary or proprietary interest); *Virginia:* 1881, Tate *v.* Tate, Ex'r, 75 Va. 532 (a memorandum of the receipt of bonds deposited with the writer as bailee without reward, held not sufficiently against interest).

[2] 1843, R. *v.* Worth, 4 Q. B. 134 (the entry was: "April 4th 1824, W. Worsell came [as farm-hand]; and to have for the half-year 40s." Lord Denman, C. J.: "The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services had been performed").

[3] 1850, White *v.* Chouteau, 10 Barb. 209 (incurring an obligation to reimburse a surety); 1859, People *v.* Blakeley, 4 Park. Cr. C. 185 (executing a note); 1889, Hosford *v.* Rowe, 41 Minn. 247, 42 N. W. 1018 (a husband said that he had destroyed an antenuptial agreement reserving to himself power to will away from his wife more than the statute permitted).

§ 1462. **The Fact, not the Statement, to be against Interest.** It must be remembered that it is not merely the statement that must be against interest, but the fact stated. It is because the fact is against interest that the open and deliberate mention of it is likely to be true. Hence the question whether the *statement* of the fact could create a liability is beside the mark.[1]

§ 1463. **Facts may or may not be against Interest according to Circumstances or according to the Parties in dispute.** A fact thus stated may or may not be against interest according to the *circumstances*. For example, a statement that one is *not* a partner in a certain firm states a fact which favors one's interest if the firm is insolvent (and a deficit is therefore to be made up), but disfavors one's interest if the firm is solvent (and profits are thus to be shared); while a statement that one *is* a partner in the firm is for and against interest in just the reverse situations.[1]

Again, the same fact may or may not be against interest according to the *parties' situation in the case* in which it comes into dispute; it may be against interest in one aspect, but in favor of interest in another.[2]

§ 1464. **No Motive to Misrepresent; Preponderance of Interest; Credit and Debit Entries.** It has sometimes been said, loosely and in analogy to other Hearsay exceptions, that there must be *no motive to misrepresent;* this being put as an additional requirement.[1] But there is no such additional requirement. The real object of this mode of statement is to furnish a test for a not uncommon situation, — the situation in which, along with the disserving interest, there is also a more or less palpable interest to be served by the fact. The real question is: Shall we attempt to strike a balance between the two opposing interests and admit the statement only if on the whole the disserving interest preponderates in probable influence? Or shall we regard the disserving interest as sufficient to admit, and leave the other merely to affect the credit of the statement? The former alternative has by the Courts been generally followed.[2] It must be noted, however, that

§ **1462**. [1] This has been misunderstood in the following case: 1869, Western Maryland R. Co. *v.* Manro, 32 Md. 280 (Brent, J., rejecting a statement by a collector that he had received money from X. in payment of stock-subscriptions: "How the declaration offered was against the interest of M. [the collector], we have been unable to discover. It did not create a debt or establish a liability on his part to pay a sum of money to any person or body corporate. It did not furnish any ground, or pretext even, upon which he might have been sued or proceeded against either in law or equity").

§ **1463**. [1] 1857, Raines' Adm'r *v.* Raines' Cred'rs, 30 Ala. 428; 1883, Humes *v.* O'Bryan, 74 id. 79.

[2] 1912, Cryer *v.* McGuire, 148 Ky. 100, 146 S. W. 402 (adverse possession of E. C.; statements by E. B. C. held not of facts against interest, under the circumstances); 1883, Chase *v.* Smith, 5 Vt. 557 (the plaintiff sued for services rendered when a minor; the defendant offered an entry in his books crediting the plaintiff's services, but to his father, who owed the defendant money, and not to the plaintiff; it was rejected. Here the entry was against his interest so far as concerned the rendering of the services. But that was not disputed. As to whether the contract was with the plaintiff or his father, it was obviously the defendant's interest to attribute it to the father, against whom he had a set-off; hence on this point the entry was not against his interest).

§ **1464**. [1] 1833, Gleadow *v.* Atkins, 3 Tyrw. 301; 1837, Marks *v.* Lahee, 3 Bing. N. C. 408, Vaughan, J.; 1864, County of Mahaska *v.* Ingalls, 16 Ia. 81; 1831, Gilchrist *v.* Martin, 1 Bailey's Eq. 503.

[2] 1821, Short *v.* Lee, 2 Jac. & W. 477, 489 (entries by one of a college of vicars, who was also proctor or collector, of dues for the college, were objected to; Sir T. Plumer, M. R.:

so great a judge as Sir George Jessel has said that the latter alternative is the proper one, *i.e.* the counter-interest should affect only the weight of the evidence.[3]

A common illustration of this question is the use of a merchant's *credit entry* of payment received (thus against his interest) which at the same stroke has included (thus in favor of his interest) the *debit entry* of his claim leading to the payment; and, conversely, an agent's debit and credit account in which the receipts creating liability are on the whole equalled or exceeded by the payments or credits in his favor. When, in the former case, the entry of payment received, or, in the latter case, of an item creating liability, is sought to be used, the argument has been made that since, taking both sides of the account together, the writer is not left with any liability and perhaps appears to have a claim for a balance, the matter cannot be said to be against his interest. This argument, accepted at Nisi Prius in Doe *v.* Vowles,[4] has since been repudiated. The answer to it is that the entrant's interest in making the favoring items does not really affect, as a counter-motive, his interest against the individual charging-items; the entries of the latter, taken by themselves, are to be trusted:[5]

1828, *Rowe* v. *Brenton*, 3 M. & Ry. 266; it was objected by Mr. Brougham, against a tool-keeper's book, that "where in the same document in which the charge appears, a discharge also appears, which squares the account, or it may be leaves a balance in his favor, then taking the whole together — both sides of the account, the charge and the discharge, — the reason fails, because it no longer is a declaration of a party against his own interest; it may be a declaration for his own interest"; the argument was disapproved. LITTLEDALE, J.: "A man is not likely to charge himself for the purpose of getting a discharge." TENTERDEN, L. C. J.: "Almost all the accounts that are produced are accounts on both sides. That objection would go to the very root of that sort of evidence."

"Though the proctors were members of the body of vicars, that does not affect the ground on which such entries are admitted: there being evidently a balance of interests, and the interest in making the entry the smallest. . . . If we look to the set-off of the opposite interests, the preponderance being against making false charges, reduces him to the situation of any other proctor or collector"). *Accord:* 1841, Clark *v.* Wilmot, 1 Y. & C. 54; 2 Y. & C. 259, *note;* 1862, Ganton *v.* Size, 22 U. C. Q. B. 483; 1886, Confederation Life Ass. *v.* O'Donnell, 13 Can. Sup. 225, 229; 1895, Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; 1905, Massee-Felton L. Co. *v.* Sirmans, 122 Ga. 297, 50 S. E. 92 (sheriff's entry of a sale of land under a fi. fa., admitted to prove the fact of an execution and levy, though it also recited his discharge from liability by payment).

Compare Massey *v.* Allen, L. R. 13 Ch. D. 562 (1879).

[3] 1876, Taylor *v.* Witham, L. R. 3 Ch. D. 605 (Jessel, M. R.: "It must be 'prima facie' against his interest; that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove 'aliunde' that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether: but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony"). *Accord:* 1857, Raines' Adm'r *v.* Raines' Cred'rs, 30 Ala. 428.

[4] 1833, Doe *v.* Vowles, 1 Moo. & R. 261 (a receipt for payment for work done was objected to because the single entry of the claim and the release could not be against interest, as "this left the writer just in the same situation as before"; this objection was sustained).

[5] *Accord:* 1838, Williams *v.* Greaves, 8 C. & P. 592; 1843, Coleridge, J., in R. *v.* Worth, 4 Q. B. 134 ("Accounts are evidence, though the writer upon the whole discharges himself"; here admitting an entry of payment after an

§ 1465. **Statement admissible for All Facts Contained in it; Separate Entries.** Since the principle is that the statement is made under circumstances fairly guaranteeing the declarant's sincerity and accuracy (*ante*, § 1457) it is obvious that the situation guarantees the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to *every fact contained in the same statement.*[1] As for the limits which it thus becomes necessary to set, these must be largely a matter of judgment in each case. For the phrasing of a rough general test, different language has been used by different judges:[2]

1851, POLLOCK, C. B., in *Percival* v. *Nanson*, 7 Exch. 1: "If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement."

1861, BLACKBURN, J., in *Smith* v. *Blakey*, L. R. 2 Q. B. 326: "[It is] admissible as evidence not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement."

1869, HAYES, J., in *R.* v. *Exeter*, L. R. 4 Q. B. 344: "The principle that a declaration against interest was evidence as to all that formed an essential part of it was long since settled"; here the entry "Paid Brook balance of a quarter's rent due on 24 June last, 3 *l.*" was against proprietary interest, and was admitted to show the payment.

It may be doubted, however, whether for really difficult cases any additional light is gained from such phrases as "all matters knit up with or involved in the statement", or "all that forms an essential part of it." These tests give more or less arbitrary results. Going back to the living principle, a more useful test appears to be this: All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest. This being the fundamental principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement.[3]

entry of hiring and agreeing to pay): 1876, Taylor *v.* Witham, L. R. 3 Ch. D. 605, per Jessel, M. R. The language of Gibbs, C. B., in Bullen *v.* Michel, 2 Price 413 (1816) is indecisive as to the general principle.

§ 1465. [1] The leading case is Higham *v.* Ridgway, 10 East 109 (1808): an entry of services rendered as man-midwife, followed by a note "pd. 25th Oct., 1768", was admitted to show the date of the child's birth: Ellenborough, L. C. J.: "It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers; we must therefore look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there was virtually incorporated with and made a part of the other entry, of which it is explanatory."

[2] Further examples are as follows: 1792, Stead *v.* Heaton, 4 T. R. 670 (the receipt was acknowledged, in a town account-book, of money paid by parties disputing a customary payment; a preceding entry on the same page, describing the apportionment of the customary dues, was admitted); 1824, Doe *v.* Cartwright, Ry. & M. 62; 1840, Davies *v.* Humphreys, 6 M. & W. 153; 1861, R. *v.* Birmingham, 1 B. & S. 763 (to prove the amount of rent, a declaration that the declarant was a tenant at the rent of £20 per year was admitted); 1905, Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969 (statement admitting a debt, received also to show the facts of a conveyance, etc., stated at the same time); 1906, Knapp *v.* St. Louis T. Co., 199 Mo. 640, 98 S. W. 70 (testamentary insanity; an entry in a deceased physician's book of accounts "By Cash paid, $2.", held to admit the preceding entry of the disease for which the visit was made); 1906, Smith *v.* Moore, 142 N. C. 277, 55 S. E. 275 (obscure).

[3] As was said by Coleridge, J., in Doe *v.* Wittcomb, 15 Jur. 778 (1851): "It was a short mode of re-entering it, exactly the same as if it had all been written over again."

In any case, the line of distinction clearly excludes entries made at a *subsequent and separate* occasion, when the original entry was complete, even though the subsequent entry was made in the same place: [4]

1849, COLTMAN, J., in *Doe* v. *Beviss*, 7 C. B. 504 (the account-roll of a bailiff was offered; the entries charging himself were admitted; the entries discharging himself by payments were rejected): 'The reeve has no interest in speaking falsely when he is charging himself; but it is obviously his interest to falsify the account quoad the discharging part of it. . . . Where the charging part of the account refers to the discharging part, it may be necessary to read the whole. So where the latter contains anything explanatory of the former, that may render the whole account admissible. But that is not the case here." MAULE, J.: "It may be that a person, in charging himself, makes a declaration which is not intelligible without looking at the other side of the account; and in that case recourse must necessarily be had to both sides. . . . But the items of discharge in the accounts in question which were not referred to in, or necessary to explain, the items of charge which were admitted and read were properly rejected. The presumption that those entries are false is at least as strong as the presumption that the others are true." CRESSWELL, J.: "If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part, it may be evidence."

§ 1466. **Against Interest at the Time of the Statement; Creditor's Indorsement of Payment of Note or Bond; Statute of Limitations.** The fact stated must of course have been against interest *at the time of the statement;* else the influence for correctness would not operate.[1]

1. The chief application of this corollary is to *creditor's indorsements of payment* on bonds or notes (*ante*, § 1460). The creditor's receipt of payment, in part or in whole, is a fact against his interest; hence his memorandum indorsing upon the instrument the fact of his receipt of payment would be a statement of a fact against his interest (*ante*, § 1460); the fact of payment, thus evidenced, would be by implication an acknowledgment (or a new promise) by the debtor; and this would at common law suffice to give a new beginning to the period of the statute of limitations: [2]

1841, GIBSON, C. J., in *Addams* v. *Seitzinger*, 1 W. & S. 244: "It is impossible to conceive of a motive for fabricating such a memorandum while the right of action remains unimpaired. To suppose that a creditor would set about the commission of what is at least a moral forgery, to obviate the anticipated consequences of his own apprehended supineness,

[4] *Accord:* 1830, Doe *v.* Tyler, 4 Moo. & P. 381 (a steward rendered an account showing a balance due his employer; at the foot was a further and subsequent entry of the payment of the balance by him; held, per Tindal, C. J., that the former part could not bring in the last entry, which was the evidential one desired); 1840, Knight *v.* Waterford, 4 Y. & C. 294 (a steward made a debit-entry of rent received and afterwards on the opposite page a credit-entry of a sum paid the tenant as poor-rates; the latter entry was rejected).

§ 1466. [1] *Eng.* 1829, Middleton *v.* Melton, 10 B. & C. 317; 1851, Percival *v.* Nanson, 7 Ex. 1, per Parke, B.; 1879, Lalor *v.* Lalor, 4 L. R. Ire. 681, per Fitzgibbon, L. J.

[2] 1728–29, Searle *v.* Lord Barrington, 2 Stra. 826, 3 Bro. P. C. 593; 1916, Murdock *v.* Taylor, 128 Md. 633, 98 Atl. 149 (promissory note by deceased payor; payee's indorsement of "$500 pd. on this note", admissible "as tending to show the amount still due thereon"; not clear); 1900, Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2 (mortgagee's indorsement on an original mortgage note, showing discharge, admitted).

A credit in an *account-book* has been held not to have this effect: 1836, Hancock *v.* Cook, 18 Pick. 32; 1886, Libby *v.* Brown, 78 Me. 792, 7 Atl. 114. Compare § 1466, *post.*

Distinguish an indorsement by the *payor himself*, which may be an admission: 1916, Stretch *v.* Stretch, 191 Mich. 416, 158 N. W. 185.

when he might by bringing immediate suit prevent the occurrence of those consequences altogether, is absurd. . . . It is not to be supposed that a creditor could so far mistake his interest as to sacrifice a part of his debt to save the residue when no part of it was in danger. It is possible that a weak man might do so; but it is inconsistent with the ordinary course of human action."

But, obviously, if the debt has matured and also the statutory period has elapsed *before the date* of the supposed payment, the creditor's interest has now changed; his superior interest from that time onwards is to revive the remainder of the debt at the cost only of acknowledging the receipt of a part of it. Thus a partial payment after that time is on the whole a fact in his interest, and not against it. Hence it has always been conceded that such an indorsement, to be admissible, must appear to have been made *before the statutory period has elapsed:*[3]

1809, ELLENBOROUGH, L. C. J., in *Rose* v. *Bryant*, 2 Camp. 322: "I think you must prove that these indorsements were on the bond at or recently after the times when they bore date, before you are entitled to read them. Although it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. . . . I am of opinion they cannot be properly admitted unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest."

2. But this crucial importance of the date of the indorsement plainly holds out a temptation to the creditor (the instrument being in his possession) to forge or antedate the indorsement; and doubtless such misdealing has been observed. Accordingly, in some jurisdictions the possibility of the abuse, by creditors, of the present sort of evidence has led to its prohibition by the Legislature. This prohibition, however, does not imply a repudiation of the principle; it means rather that, since the effect of the indorse-

[3] Cases cited *supra*, n. 2, and the following: 1739-40, Turner *v.* Crisp, 2 Str. 827; 1750, Glynn *v.* Bank of England, 2 Ves. 43; 1821, Short *v.* Lee, 2 Jac. & W. 488; 1833, Gleadow *v.* Atkins, 3 Tyrwh. 301; *U. S.* 1903, Small *v.* Rose, 97 Me. 286, 54 Atl. 726 (deceased payee's entry of part payment in a cash account, dated after the statute had begun to run, excluded under Pub. St. 1883, c. 81, § 100, *infra*); 1869, Carter *v.* Carter, 44 Mo. 195 (admitted; mode of authenticating the actual time of indorsement, considered); 1819, Roseboom *v.* Billington, 17 Johns. N. Y. 185 (excluded, because not shown to have been made before the time of limitation); 1871, Bland *v.* Warren, 65 N. C. 373; 1841, Addams *v.* Seitzinger, 1 W. & S. Va. 244 (quoted *ante*, § 1460); 1855, Allegheny *v.* Nelson, 25 Pa. 334; 1823, Gibson *v.* Peebles, 2 McCord S. C. 419. *Contra:* 1873, Phillips *v.* Mahan, 52 Mo. 197 (excluded, not citing Carter *v.* Carter, *supra*, and misunderstanding Roseboom *v.* Billington, N. Y.).

Distinguish the following: 1892, Arbuckle *v.* Templeton, 65 Vt. 205, 208, 25 Atl. 1095 (action on a note, by T. and M.; indorsement by the plaintiff before statutory bar, of $50 received from T., excluded, because not made on personal knowledge).

Where the obligee is *not deceased*, the indorsement can of course not be put in, by reason of the principle of § 1456, *ante;* this was the case in Gupton *v.* Hawkins (1900), 126 N. C. 81, 35 S. E. 229. But this decision exhibits the fallacy of ignoring the principle of this section; for the Court declares the indorsement of a deceased obligee admissible when offered by the obligor as being "a declaration against interest", and yet inadmissible from the obligee because a "declaration in his favor." Now the time to be considered is the time of making, and if it is then a declaration against interest (as it is when the statute has not run), it is always admissible. Admissibility does not here depend on whether the obligor or the obligee happens afterwards to be the offering party. The obligee cannot offer it if he is living, for the reason of § 1456, *ante;* but if he is deceased his representative may do so; and if that had not been the case, many of the foregoing precedents on this subject would not be in existence.

ment, to be against interest at the time, depends on whether it was made before the statutory period expired, and since the opportunity for antedating is so likely to be abused without possibility of exposure, the whole practice is dangerous:

1882, BERRY, J., in *Young* v. *Perkins*, 29 Minn. 173, 176, 12 N. W. 515: "The holder of a note, or any person interested in it, can manufacture false evidence of part payment as well after as before the statute of limitations has in fact run against the note, and in this way he can make out a case for himself to which the maker or his representatives must yield, unless he or they can overcome it by opposing evidence. This seems to us to be giving the holder an advantage to which he is not entitled, either in reason or in sound policy or by any analogy of the law of Evidence."

Such statutes therefore prohibit the use of indorsements *in the creditor's hand*.[4] The indorsement may, under these statutes, usually be employed if the debtor assented to it; but in that case it is dealt with directly as an acknowledgment by the debtor himself, and not as the creditor's entry against interest.

3. From the foregoing type of statute, however, must be distinguished

[4] ENGLAND: 1828, St. 9 Geo. IV, c. 14, § 3 ("No indorsement or memorandum of any payment written or made [hereafter] . . . upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment is made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of said statutes [of limitation]");

CANADA: *B. C.* Rev. St. 1911, c. 145, § 14 (similar); *Newf.* Consol. St. 1916, c. 90, § 7 (similar); *N. Sc.* Rev. St. 1900, c. 167, § 8 (similar); *Ont.* Rev. St. 1914, c. 75, § 58 (similar);

UNITED STATES: *Arkansas:* Dig. 1919, § 6977 (sealed instruments; like Eng. St. 9 Geo. IV);
Colorado: Comp. L. 1921, § 6414 (like the Massachusetts statute);
Indiana: Burns Ann. St. 1914, § 303 (similar to Massachusetts);
Maine: Rev. St. 1916, c. 86, § 103 (like the English statute, with the words "or purports to be made" inserted after the words "payment is made"); this statute began as Rev. St. 1841, c. 146, § 23, and changed the rule as laid down in 1835, in Coffin *v.* Bucknam, 12 Me. 471;
Massachusetts: Gen. L. 1920, c. 260, §§ 13, 14 (the acknowledgment or promise must be "in some writing signed by the party chargeable"; yet this shall not "alter the effect of a payment of principal or interest"; but "no indorsement . . . by the party to whom such payment has been made . . . shall be deemed sufficient proof of the payment"); this statute began as St. 1834, c. 182, § 3, and changed the rule as recognized in 1836, in Hancock *v.* Cook, 18 Pick. 32 (where the rule was not directly involved, and the entry was dated in 1816);
Michigan: Comp. L. 1915, § 12331 (like Mass. Gen. L. c. 260, § 14);
Minnesota: Here the same object has been attained by the judicial construction of a permissive statute: Gen. St. 1913, § 8449 ("An indorsement of money received, on any promissory note, which appears to have been made when it was against the interest of the holder to make it, is 'prima facie' evidence of the facts therein contained"); 1882, Young *v.* Perkins, 29 Minn. 173, 12 N. W. 515 (under the above statute, there must be other evidence than the mere purport of the indorsement that it was actually made at the time when it was against interest; quoted *supra*);
New Jersey: Comp. St. 1910, Limit. of Actions, § 11 (like Mass. Gen. L. 1920, c. 260, § 14);
Vermont: Gen. L. 1917, § 1868 (the indorsement must be in payor's hand; applicable to all writings); 1881, Bailey *v.* Danforth, 53 Vt. 504 (in spite of the statute, providing that an indorsement, etc., shall not be "sufficient proof", an indorsement of payment by the payee, whether made before or after the statute has run, is admissible; the opinion cites no precedents, and does not fairly consider the inadmissibility of an indorsement made after statute run); 1903, McDowell *v.* McDowell's Estate, 75 Vt. 401, 56 Atl. 98 (Bailey *v.* Danforth approved and followed);
Wisconsin: Stats. 1919, § 4247 (like the English statute).

Note that these statutes merely forbid the use of the indorsement as showing acknowledgment sufficient to take the debt out of the *statute of limitations*.

Its use to indicate a part-payment which relents the *presumption of payment* after a certain lapse of time (*post*, § 2517) seems still to remain.

two others; all of them aiming to relieve the debtor by dealing with the conduct which removes the bar of the limitation period:

(*a*) A statute generally in vogue forbids the limitation to be removed except by an *express acknowledgment* or *new promise in writing by the debtor;* the effect is to cut off entirely the use of the implied acknowledgment found in a payment by the debtor. Thus indirectly it results equally in the exclusion of the creditor's entry.[5]

(*b*) In some jurisdictions the statute which thus requires writing for an express acknowledgment or promise makes special provision for the survival of the common-law rule as to *implying* an acknowledgment or promise from a *payment;* thus the creditor's entry may still become available at common law to evidence the payment.[6]

(*c*) Finally, some of these statutes (par. *b*) take the step described above (par. 2), by forbidding the use of creditors' indorsements, while allowing the act of payment to be given effect if evidenced in some other way.[7]

§ 1467. **Statement to be made 'Ante Litem Motam'.** It is sometimes said that the statement (as in other hearsay exceptions) must have been made

[5] *Ariz.* Rev. St. 1913, Civ. C. § 726; *Cal.* C. C. P. 1872, § 360 (new promise or acknowledgment must be "in some writing signed by the party to be charged"); *Fla.* Rev. G. S. 1919, § 2930; *Ga.* Rev. C. 1910, § 4383; *Ida.* Comp. St. 1919, § 6631; *Ill.* Rev. St. 1874, c. 83, § 16; *Kan.* G. S. 1915, § 6913, St. 1909, c. 182; *La.* Rev. Civ. C. 1920, § 2278; *Miss.* Code 1906, § 3118, Hem. § 2482; *Mo.* Rev. St. 1919, § 1338; *Nev.* Rev. L. 1912, § 4985; *N. Mex.* Annot. St. 1915, § 3356; *P. I.* Civ. C. § 1229 (like P. R. Rev. St. & C. § 4303); *P. R.* Rev. St. & C. 1911, § 5032; *Tex.* Rev. Civ. St. 1911, § 5705; *Utah:* Comp. L. 1917, § 6489; *W. Va.* Code 1914, c. 104, § 8.

[6] CANADA: *New Brunswick:* Consol. St. 1903, c. 138, § 5; UNITED STATES: *Ala.* Code 1907, § 4850; *Alaska:* Comp. L. 1913, § 854; *Col.* (Dist.) Code 1919, § 1271 (acknowledgment or promise shall be signed, etc.; but this shall not "lessen the effect of any payment of any principal or interest made by any person whatsoever"); *Conn.* Gen. St. 1918, § 5738 (like Mass. Rev. L. c. 260, §§ 13, 14, first two parts, omitting the third part); *Mont.* Rev. C. 1921, § 9062; *Minn.* Gen. St. 1913, § 7712 (new promise must be in writing signed; "but this section shall not alter the effect of a payment of principal or interest"); *N. C.* Com. St. 1919, § 416 (new promise must be in writing signed; "but this section does not alter the effect of any payment of principal or interest"); *N. D.* Comp. L. 1913, § 7394 (the acknowledgment or new promise must be in writing; "but this section shall not alter the effect of any payment of principal or interest"); *Oh.* Gen. Code Ann. 1921, § 11223 ("if payment has been made", or a written promise signed, the period runs again); *Or.* Laws 1920, § 24 (new promise must be in writing, etc.; "but this section shall not alter the effect of any payment of principal or interest"); *S. Car.* Code 1922, C. C. P. § 328 (the acknowledgment or new promise must be in writing; but "payment of any part of principal or interest is equivalent to a promise in writing"); *S. Dak.* Rev. C. 1919, § 2275 ("no acknowledgment or promise" suffices to remove the bar of the statute, unless in writing signed by the party; "but this section shall not alter the effect of any payment of principal or interest"); *Wash.* R. & B. Code 1909, § 176 ("this section shall not alter the effect of any payment of principal or interest").

In *Porto Rico* the following provision, from the Spanish law, seems to bear on the present kind of evidence: Rev. St. & C. 1911, § 4303 ("A note written or signed by a creditor at the end, in the margin, or on the back of an instrument held by him constitutes evidence in all that may be favorable to the debtor. The same shall be understood of a note written or signed by the creditor, on the back, in the margin, or at the foot of the duplicate of an instrument or receipt which the debtor may hold. In either case the debtor who wishes to avail himself of what may be favorable to him shall have to abide by what is prejudicial"). So also in *Louisiana:* Rev. Civ. C. 1920, § 2250 (creditor's indorsement of payment on an instrument is "good evidence when it tends to establish the discharge of the debtor").

[7] The Massachusetts statute, *supra*, n. 4, is of this type.

§ 1467. [1] Ga. Rev. Code 1910, § 5768 (quoted *ante*, § 1455); 1864, Mahaska Co. *v.* Ingalls, 16 Ia. 81; 1922, Jelser *v.* White, — N. C. —, 110 S. E. 849 (after controversy arisen).

before litigation began.[1] But this is only saying that the declarant's partisan attitude during litigation must be regarded as counterbalancing the interest prejudiced by the fact stated (*ante*, § 1464). This, however, might not be so in a given instance, and each case should be judged on its merits.

§ 1468. **Disserving Interest to be shown by Independent Evidence.** The fact that the matter stated was against interest must be shown by independent evidence,[1] — like every fact preliminary to the introduction of testimony.

§ 1469. **Statement may be Oral as well as Written.** An *oral* statement of fact against interest is admissible.[1] It was early held in Massachusetts that a statement against pecuniary interest must be written, not oral, and furthermore must be in the form of account entries or formal documents, not mere letters.[2] But this distinction is wholly devoid of support in either principle or precedent, and no attempt has elsewhere been made to introduce the distinction. Moreover, oral declarations against proprietary interest are freely admitted in the same jurisdiction of Massachusetts.[3]

3. Testimonial Qualifications, and Other Independent Rules of Evidence and Substantive Law

§ 1471. **Testimonial Qualifications.** (*a*) The qualifications of the declarant (*ante*, § 1424) with reference to Testimonial *Knowledge of the fact* stated are those of the ordinary witness; the phrases of different judges vary.[1] It has once or twice been loosely said that the declarant must have "peculiar knowledge"; but so far as this may mean a knowledge better than that ordinarily required of witnesses, *i.e.* the usual knowledge by personal observation (*ante*, § 656), it is not law. (*b*) The statement must also, comformably with the principles of Testimonial *Narration* (*ante*, §§ 766, 789, 811), distinctly import the fact of which it is offered as an assertion.[2]

§ 1468. [1] 1831, Davies *v.* Morgan, 1 C. & J. 591.

§ 1469. [1] 1861, R. *v.* Birmingham, 1 B. & S. 768.

[2] 1824, Framingham Mfg. Co. *v.* Barnard, 2 Pick. 532 (Parker, C. J.: "The case of verbal declarations or of letters is totally different [from book-entries], the first being easily misapprehended and misrepresented, and the second being too easily fabricated, to make them safe sources of evidence"); 1840, Lawrence *v.* Kimball, 1 Metc. 527. See, also, Phillips on Evidence, Cow. & H.'s Notes, 260 (1843). The doubt on this point in the English case of Fursdon *v.* Clogg (1842), 10 M. & W. 572, never had any foundation.

[3] 1851, Marcy *v.* Stone, 8 Cush. 9; 1852, Stearns *v.* Hendersass, 9 id. 502; 1860, Currier *v.* Gale, 14 Gray Mass. 504.

§ 1471. [1] 1812, Ellenborough, L. C. J., in Doe *v.* Robson, 15 East 34 ("a competency in them to know it"); 1821, Plumer, M. R., in Short *v.* Lee, 2 Jac. & W. 488 ("persons having a competent knowledge, or whose duty it was to know"); 1826, Eldon, L. C., in Barker *v.* Ray, 2 Russ. 76 ("persons who have a complete knowledge of the subject"); 1829, Parke, J., in Middleton *v.* Melton, 10 B. & C. 317 ("a party cognizant of a fact"); 1833, Gleadow *v.* Atkins, 3 Tyrw. 302 (Bayley, B., "a person having peculiar means of knowledge"; Vaughan, B., "having peculiar knowledge of the fact at the time", "with perfect cognizance of the fact"); 1837, Marks *v.* Lahee, 3 Bing. N. C. 420 (Park, J., "means of knowledge"; Vaughan, J., ("full knowledge of the transaction"); 1851, Parke, B., in Percival *v.* Nanson, 7 Ex. 1 ("peculiar means of knowing a fact"); 1864, Dillon, J., in Mahaska Co. *v.* Ingalls, 16 Ia. 81 ("a matter concerning which the declarant was immediately and personally cognizable [*sic?*]"). In Bird *v.* Hueston, 10 Oh. St. 428 (1859) the declarations were rejected of one who was H.'s son, attorney, and business agent, because the statements concerned services rendered H. as manager of a farm and distillery; the ruling is far-fetched.

[2] 1810, Haddow *v.* Parry, 3 Taunt. 303 (a bill of lading signed "contents unknown" was rejected as being in effect no declaration of

§ 1472. **Authentication, etc.** The principles of Authentication (*post*, §§ 2129–2169) must appear to have been satisfied. In particular, (*a*) a written entry must be shown to have been executed by the person alleged to be the declarant.[1] Either the signature or the body of the entry must be in the declarant's handwriting; but not necessarily both.[2] (*b*) Documents thirty years old may be assumed, under the usual conditions (*post*, § 2137), to be authentic.[3]

So, too, the rule about Producing Originals (*ante*, § 1179), and all other rules applicable to proof of writings, may be invoked.

§ 1473. **Tenant's Statements used against Landlord's Title.** The rule of substantive law, that a tenant may not dispute by plea or by claim the superior right of his landlord, has occasionally been erroneously applied in the domain of Evidence, and has been supposed to forbid, as a rule of evidence, the use of a tenant's declarations against his proprietary interest, so far as they tend to cut down the landlord's right.[1] It is difficult to see how such an application can be invoked. The inexpediency of allowing tenants to litigate against titles which they have, by implication, agreed to accept as good, has nothing to do with the desirability of using the evidence of a deceased tenant, in a litigation to which he is not a party and on a matter as to which he has knowledge and has made a trustworthy statement.[2]

§ 1474. **Principal's Statements used against Surety.** It was once ruled that the statements of a deceased principal debtor against his interest could not be used against the surety.[1] This came from a confusion of the rule concerning Admissions, which may be used only against parties or privies in interest, with the present Hearsay exception, which has in fact nothing to do with such restrictions. But the error has been corrected by the repudiation of the earlier ruling.[2]

what the chests contained); 1829, Plaxton *v.* Dare, 10 B. & C. 19 (payment indicated by crosses placed against names); 1847, Doe *v.* Langfield, 16 M. & W. 514 (the assertion of an estate "by life-interest" only was regarded as ambiguous and inadmissible). In Doe *v.* Burton, 9 C. & P. 254 (1840), an entry of payment from B. for building a cottage was held not receivable to prove that B. built the cottage.

§ 1472. [1] 1821, Short *v.* Lee, 2 Jac. & W. 467 (Plumer, M. R.: "In all these cases [of books by bailiffs, etc.], the first point is to prove the character of the individual who wrote them; if you fail in this they cannot be evidence. . . . In all the private relations of life you do not presume the existence of the particular character, nor does a person's acting in that character prove that he possessed it. . . . It would let in a dangerous latitude if the Court were once to dispense with that which is an essential preliminary before any writing, not verified on oath, can be made evidence, and which must be established 'aliunde.'") In general, add: 1808, Doe *v.* Lord Thynne, 10 East 209; 1815, Manby *v.* Curtis, 1 Price 228; 1816, Bullen *v.* Michel, 2 Price 427; 1835, Baron de Rutzen *v.* Farr, 4 A. & E. 56; 1849, Doe *v.* Beviss, 7 C. B. 486. Compare the cases cited *post*, § 2144.

[2] 1792, Barry *v.* Babbington, 4 T. R. 514 (Kenyon, L. C. J.: "If the entry be not in the handwriting of the steward, undoubtedly it must be signed by him: but here all these entries were written by the steward himself"). *Accord:* 1833, Doe *v.* Stacey, 6 C. & P. 139; 1831, Dwight *v.* Brown, 9 Conn. 93.

[3] 1821, Wynne *v.* Tyrwhitt, 4 B. & Ald. 376.

§ 1473. [1] 1855, Papendick *v.* Bridgwater, 5 E. & B. 176.

[2] 1894, Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189 (Papendick *v.* Bridgwater commented on).

§ 1474. [1] 1821, Goss *v.* Watlington, 4 B. & B. 138.

[2] 1829, Middleton *v.* Melton, 10 B. & C. 317; 1864, Mahaska Co. *v.* Ingalls, 16 Ia. 81; 1833, Hinkley *v.* Davis, 6 N. H. 210; 1811, Assignees of S. *v.* Boucher, 2 Wash. C. C. 473.

§ 1475. Distinction between Statements against Interest, Admissions, and Confessions. (1) A statement of a fact against interest is receivable on the ground that such a statement is one which would not be made unless truth compelled it, and that it is therefore as trustworthy as if made on the stand under cross-examination (*ante*, § 1457).

(2) But is not a statement by a *party-opponent* credited for substantially the same reason? Such certainty is the fact, in most instances of the sort (*ante*, §§ 1048, 1049). Why, then, is not a party's admission merely one sort of the statements against interest receivable under the Hearsay exception? Such is the notion often found judicially advanced, especially in the earlier rulings, when the principle of the present exception was not fully established.

But there are two decisive answers which demonstrate its fallacy. (*a*) In the first place, under modern law, the party-opponent in a civil case may be summoned as a witness; if, then, the Hearsay exception be invoked, the opponent's extrajudicial statements are inadmissible, unless he is shown to be deceased or otherwise unavailable, — as every other declarant must be, in order that his statements against interest may be received (*ante*, § 1456). But this is never required as preliminary to using an opponent's admissions (*ante*, § 1049); hence, it is clear, they enter independently of the present Hearsay exception. (*b*) Secondly, an opponent's admission is receivable even though the fact as stated by him was then not against his interest, *i.e.* even though he was then making a claim in his favor. This principle (*ante*, § 1048) shows clearly that opponents' admissions, though they are usually of facts then against their interest, need not be; and thus, again, their use rests on a principle distinct from that of the present exception to the Hearsay rule.

(3) The statements of an *accused in a criminal* case may be either confessions, in the narrow sense, or admissions, in the broader sense; the distinction has already been examined (*ante*, §§ 816, 1650). So far as they are admissions (*i.e.* of facts not necessarily against interest, but merely inconsistent with his present defence), they enter like the admissions of a civil opponent; the first distinction above (*a*) does not apply, because the accused cannot be called to the stand by the prosecution; but the second distinction (*b*) does apply, for exculpatory statements of facts not at the time against his interests are nevertheless admissible (*ante*, § 821). But so far as his statements are direct confessions of crime, they fulfil both the main requirements of the present exception; the declarant is not available as a witness for the prosecution, and the fact of the crime as confessed is directly against his interest. Thus, the direct confessions of an accused person are receivable, not only as included in the general principle of Admissions (*ante*, § 1048) but also as covered by the doctrine of the present exception to the Hearsay rule. This particular aspect of them, as the chief source of their credit, has often been dwelt upon by judges and jurists.[1] It is worth emphasizing here,

§ 1475. [1] The following are only a few of many instances: 1726, Gilbert, Evidence 137 ("As persons interested are utterly removed from being evidence for want of integrity, so

because it shows the fallacy of the supposed exclusion (*post*, § 1476), under the present exception, of statements of facts against penal interest.

4. Arbitrary Limitations

§ 1476. **History of the Exception; Statement of Fact against Penal Interest, excluded; Confessions of Crime by a Third Person.** It is to-day commonly said, and has been expressly laid down by many judges, that the interest prejudiced by the facts stated must be *either a pecuniary or a proprietary interest*, and not a *penal interest*. What ground in authority there is for this limitation may be found by examining the history of the Exception at large.

The Exception appears to have taken its rise chiefly in two separate rivulets of rulings, starting independently as a matter of practice, but afterwards united as parts of a general principle. On the one side, it early became customary, shortly after the Hearsay rule was established (*ante*, § 1364) to receive in evidence the account-entries of a deceased person (particularly a bailiff or steward) charging himself with the receipt of money.[1] No distinct reason appears to have been expressed; but the practice was well-established, and its traces as an independent doctrine are found at a late period.[2] Analogous to this, and yet in origin probably independent, were the practices, already referred to (*ante*, § 1460), of receiving entries in a vicar's tithe-book and indorsements of payments on notes and bonds. On the other side, a practice obtained, in an independent series of rulings, of receiving declarations, usually oral, in disparagement of one's proprietary title.[3] The use of a party's admissions was also developing (*ante*, § 1080).

These lines of precedent proceeded independently till about the beginning of the 1800s, when a unity of principle for some of them came gradually to be perceived and argued for.[4] This unity lay in the circumstance that all

on the other side the voluntary confession of the party in interest is reckoned the best evidence; for if a man's swearing for his interest can give no credit, he must certainly give most credit when he swears against it"); 1791, Lambe's Case, 2 Leach, Cr. L., 3d ed., 628 (Grose, J., for the twelve judges: "Confessions of guilt . . . are at common law received in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true"); 1846, State *v.* Kirby, 1 Strobh. 156 (Evans, J.: "There is no legal principle better established than that a free and voluntary confession is deserving of the highest credit; for it is not to be presumed that one will falsely accuse himself of a crime especially when he knows that a conviction of it will incur a forfeiture of his life"); 1847, State *v.* Cowan, 7 Ired. N. C. 246 (Ruffin, C. J., "[We may] proceed upon the common experience of men's motives of action and of the tests of truth. Now few things happen seldomer than that one in the possession of his understanding should of his own accord make a confession against himself which is not true"); 1875, Levison *v.* State, 54 Ala. 525 (Brickell, C. J.: "The confession is admissible on the presumption that a person will not make an untrue statement criminating himself and militating against his own interest").

§ **1476.** [1] 1737, Manning *v.* Lechmere, 1 Atk. 453 (rental-roll receipts by bailiffs); 1792, Barry *v.* Bebbington, 4 T. R. 514 (steward's receipts); 1792, Stead *v.* Heaton, 4 T. R. 670 (town account-books).

[2] 1811, Holladay *v.* Littlepage, 2 Munf. Va. 320; 1815, Manby *v.* Curtis, 1 Price 229; 1832, Wart *v.* Pomfret, 5 Sim. 475.

[3] 1787, Davies *v.* Pierce, 2 T. R. 54 (declarations of tenancy by lessees); 1808, Doe *v.* Jones, 1 Camp. 367 (charging one's self with rent due).

[4] The case by which the argument was inspired was Warren *v.* Greenville, 2 Strs. 1129 (1740); to show the fact of a surrender of a life-

such statements, in that they concerned matters prejudicial to the declarant's self-interest, were fairly trustworthy and might therefore (if he were deceased) be treated as forming an exception to the Hearsay rule.

This broad principle made its way slowly. There was some uncertainty about its scope; but it was an uncertainty in the direction of breadth; for it was sometimes put in the broad form that any statement by a person "having no interest to deceive" would be admissible. This broad form never came to prevail (*post*, § 1576). But acceptance was gained, after two decades, for the principle that *all declarations of facts against interest* (by deceased persons) were to be received. What is to be noted, then, is that from 1800 to about 1830 this was fully understood as the broad scope of the principle. It was thus stated without other qualifications; and frequent passages show the development of the principle to this point.[5]

But in 1844, in a case in the House of Lords, not strongly argued and not considered by the judges in the light of the precedents, a backward step was taken and an arbitrary limit put upon the rule. It was held to exclude the statement of a fact subjecting the declarant to a *criminal liability*, and to be confined to statements of *facts against either pecuniary or proprietary interest*.[6]

estate, the books of a deceased attorney, charging for services in drawing and engrossing the surrender, and acknowledging payment therefor, were admitted; "it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender; and not [to] be suspected to be done for this purpose; that if E. was living he might undoubtedly be examined to it, and this was now the next best evidence." But the broad argument seems not to have been deliberately recognized until 1808, in Ivat *v.* Finch, 1 Taunt. 141; here, the plaintiff's acquisition of ownership from the deceased W. being in issue, W.'s declaration that she had given the property to him was admitted; Mansfield, C. J.: "The evidence ought to have been received. . . . The admission, supposed to have been made by Mrs. W., was against her own interest."

[5] In 1808, Lord Ellenborough speaks (Higham *v.* Ridgway, 10 East 109) of "the broad principle on which receivers' books have been admitted, namely, that the entry made was in prejudice of the party making it." In Roe *v.* Rawlings, 7 East 290 (1806), the same judge had said that "there are several instances in the books where the declaration of a person having no knowledge of a fact and no interest to falsify it, has been admitted as evidence of it after his death." He then goes on to point out that in the case in hand there was even an interest that would be injured by the fact stated. But he makes no distinct separation, as a class, of statements against interest. Yet in 1811 (Stanley *v.* White, 14 East 341) he appears to recognize such a class. In 1812 again (Doe *v.* Robson, 15 East 34), he phrases it that "the ground upon which this evidence has been received is that there is a total absence of interest . . . to pervert the fact." Bayley, J., in the same case, however, puts it as "an established principle of evidence", that the entries are admissible "because it is against his own interest." But the broadest form never obtained acceptance. In 1826, in Barker *v.* Ray, 2 Russ. 76, where the counsel had argued as if the rule required merely "total absence of interest" (in Lord Ellenborough's words), Lord Eldon said: "The only doubt I have entertained was as to the position that you are to receive evidence of declarations where there is no interest. At a certain period of my professional life, I should have said that the doctrine was quite new to me. I do not mean to say more than that I still doubt concerning it."

Thenceforward, however, and up to the fourth decade of the century, the phrase "against interest" was used without limitation. Bayley, B., says, in 1829 (Middleton *v.* Melton, 10 B. & C. 317): "It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest." Littledale, J., in the same case, speaks of "this general principle, that when a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at that time, it is evidence of the fact as between third persons after his death." Parke, J., uses identical language.

[6] 1844, Sussex Peerage Case, 11 Cl. & F. 109 (declarations of a clergyman that he had performed a marriage which would subject him to a prosecution were rejected; Lyndhurst, L. C.:

Thenceforward this rule was accepted in England;[7] although it was plainly a novelty at the time of its inception; for in several rulings up to that time such statements had been received.[8]

The same attitude has been taken by most American Courts,[9] excluding

"A is indicted for murder; B, who is dead, made while living a declaration that he was present at the murder; that declaration is against his own interest, and would, had he lived, have subjected him to a prosecution. It is in principle the very case supposed in the argument, and it is not possible to say that such a declaration would have been receivable in evidence").

[7] 1844, Davis *v.* Lloyd, 1 C. & K. 276, Lord Denman, C. J.; 1855, Papendick *v.* Bridgwater, 5 E. & B. 180, Erle, J. ("It is contended that there is a wide and universal principle that the declaration of a dead person, made against his interest, is admissible. No doubt many judges do use that language; but I think that the principle must be limited [giving the above limits]. . . . The argument in support of the evidence has almost gone the length of asserting that the declaration becomes admissible where any hope or fear might have prompted a contrary assertion; but it was admitted that the rule could not go so far; and in the case in the House of Lords . . . it was said that the interest, to make the declaration admissible, must be either pecuniary or proprietary").

[8] These rulings were not considered in the Sussex Peerage Case: 1660, Hulet's Trial, 5 How. St. 1185, 1192 (charged as being the executioner of King Charles; it was disputed — and has never been clearly known — whether Gregory Brandon, the common hangman, officiated on that occasion, the executioner being masked; the defendant Hulet tried to prove that Brandon did the deed; Witness: "When my lord Capell, duke of Hamilton, and the earl of Holland, were beheaded in Palace-Yard, in Westminster, my lord Capell asked the common hangman, said he, 'Did you cut off my master's head?' 'Yes,' saith he. 'Where is the instrument that did it?' He then brought the ax. . . . My lord Capell took the ax, and kissed it, and gave him five pieces of gold. I heard him say: 'Sirrah, wert thou not afraid?' Saith the hangman, 'They made me cut it off; and I had thirty pounds for my pains'"); 1680, Hale, Pleas of the Crown, I, 306 ("In relation to the manner of their testimony, . . . if it be a hearsay from the offender himself confessing the fact, such a testimony upon hearsay makes a good witness within the statute [of treason]"); 1791, Standen *v.* Standen, Peake 32 (a marriage-register entry recited the publication of banns; the clergyman's confession that he had married without banns, received; Kenyon, L. C. J., pointing out that a false entry was a felony: "He put himself in a dangerous situation by making such a confession"); 1833, Powell *v.* Harper, 5 C. & P. 590 (libel, charging the plaintiff with being a receiver of stolen goods; the declarations of A that he had stolen them, received).

[9] The following rulings to this effect are further commented on *post*, § 1477:

CANADA: 1842, Blair *v.* Hopkins, 1 Kerr N. Br. 540 (confession of a third person that he and the plaintiff committed the felony, excluded; here the third person was not accounted for).

UNITED STATES: *Federal:* 1913, Donnelly *v.* U. S., 228 U. S. 243, 33 Sup. 449 (murder; confession by J. D., since deceased, that he was the one who had killed the victim, excluded; Holmes, Lurton, and Hughes, JJ., diss.; the dissenting opinion, by Holmes, J., concisely expresses the whole doctrine); 1918, Royal Ins. Co. *v.* Taylor, 4th C. C. A., 254 Fed. 805 (fire policy; defence, that W. had set the fire at plaintiff's instigation; W. had been convicted and was therefore disqualified under the local statute; he had made a confession, but after the conspiracy was ended; held, that W.'s confession was not admissible as a declaration against interest, following Donnelly *v.* U. S.; a judgment for the plaintiff was affirmed; which shows the practical possibility of injustice to a meritorious defence in the application of the irrational limitation of Donnelly *v.* U. S.; the rule is an intellectual disgrace to our system of Evidence);
Alabama: 1846, Smith *v.* State, 9 Ala. 995 (declarant not deceased); 1887, Snow *v.* State, 58 Ala. 375; 1884, West *v.* State, 76 Ala. 99; 1892, Welsh *v.* State, 96 Ala. 92, 11 So. 450 (confession of L., not accounted for, excluded); 1916, Spicer *v.* State, 198 Ala. 13, 73 So. 396 (wife murder; G.'s statement that he was the guilty one, having shot the wife by mistake, held inadmissible; here G. was a servant of defendant and had been shot to death by the defendant, an hour after the wife's death, as her assassin; of course G.'s statement should have been listened to, in any system of Evidence that was not satisfied with burning joss-sticks of precedent; Mayfield, J., diss.);
Arkansas: 1914, Tillman *v.* State, 112 Ark. 236, 166 S. W. 582 (murder; rule affirmed);
California: 1892, People *v.* Hall, 94 Cal. 595, 30 Pac. 7 (confession of K., killed while escaping from arrest for the same charge, excluded);
Connecticut: 1889, Benton *v.* Starr, 58 Conn. 285, 20 Atl. 450 (bastardy; confessions of paternity by a third person, excluded; here his absence was unaccounted for); 1886, State *v.* Beaudet, 53 Conn. 536 (assault with intent to

confessions of a crime, or other statements of facts against penal interest,

murder: said 'obiter' that admissions of guilt by third persons are inadmissible); 1916, State *v.* Mosca, 90 Conn. 381, 97 Atl. 340 (assault with intent to murder; evidence that one S., now in Italy, had there confessed that he was the perpetrator, together with evidence of S.'s presence at the time of the assault, excluded; "S. is alive, and his place of residence was known to the accused and his counsel; . . . his deposition might have been taken");
Georgia: 1857, Lyon *v.* State, 22 Ga. 399 (declarant not accounted for; treated in terms of admissions); 1880, Daniel *v.* State, 65 Ga. 199 (declarant not accounted for); 1889, Kelly *v.* State, 82 Ga. 441, 9 S. E. 171 (like the Lyon case); 1896, Delk *v.* State, 99 Ga. 667, 26 S. E. 752; 1897, Lowry *v.* State, 100 Ga. 574, 28 S. E. 419 (the third person here not accounted for); 1901, Robinson *v.* State, 114 Ga. 445, 40 S. E. 253 (joint indictment of R. and H.; before trial, H. disappeared; his declaration confessing the killing and exonerating R., not received); 1906, Perdue *v.* State, 126 Ga. 112, 54 S. E. 820 (here offered to impeach the witness);
Indiana: 1878, Jones *v.* State, 64 Ind. 473, 484 (declarant not accounted for; treated on the principle of admissions); 1897, Hank *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465 (abortion; a letter of the deceased asserting that she had herself attempted to produce it, excluded); 1860, Reilley *v.* State, 14 Ind. 217 (receiving stolen goods; the thief's confession, not admitted to show the theft; "it would seem to be the dictate of natural reason, but the authorities are otherwise"); 1905, Miller *v.* State, 165 Ind. 566, 76 N. E. 245 (Reilley *v.* State, approved);
Iowa: 1902, State *v.* Sale, 119 Ia. 1, 92 N. W. 680, 95 N. W. 193 (murder; deceased's statement that "he was to blame", excluded, ignoring the present point of view); 1915, Weber *v.* Chicago R. I. & P. R. Co., 175 Ia. 358, 151 N. W. 852 (stated more fully *ante*, § 1461, n. 1; the majority opinion apparently does not sanction the extension of the exception to statements of facts solely against penal interest; see the further comment *ante*, § 1456);
Kentucky: 1893, Davis *v.* Com., 95 Ky. 9, 23 S. W. 585 (confession of P., deceased, excluded);
Louisiana: 1893, State *v.* West, 45 La. An. 928, 929, 13 So. 173 (the confession of B., killed while resisting arrest from the charge, excluded); 1901, State *v.* Young, 107 La. 618, 31 So. 993 (confessions of one G., not accounted for, held inadmissible); 1911, State *v.* Jones, 127 La. 694, 53 So. 959 (arson; written and oral admissions by E. W., that he had done the burning, excluded; E. W. was not accounted for);
Maine: 1855, Pike *v.* Crehore, 40 Me. 503, 511 (to disprove the receipt of money sent by mail, the alleged payee offered the confession of the letter-carrier in that town, made while in prison, that he had taken the money; excluded, the letter-carrier being presumably available as a witness);
Maryland: 1880, Munshower *v.* State, 55 Md. 1, 18 (not admissible, even to discredit the declarant testifying for the State); 1920, Baehr *v.* State, 136 Md. 128, 110 Atl. 103 (bastardy; issue whether the woman had had intercourse with other men about the period of conception; the woman's admission of such intercourse with D. having been received, D.'s statement that he had had such intercourse with her was excluded, even after an offer to show that D. could not after search be found; the opinion approves the reason given in Munshower *v.* State, *supra*, that this would "effect a dangerous innovation . . . and open the door to the most fraudulent practices", etc.);
Massachusetts: 1804, Com. *v.* Chabbock, 1 Mass. 144 (declarant not shown to be deceased); 1866, Com. *v.* Densmore, 12 All. 537 (Bigelow, C. J., excluding declarations of the deceased offered by the defence on a trial for manslaughter: "We are not aware that the exception [against interest] has ever been extended further, so as to render competent declarations which are not otherwise against the interest of the party who made them except that they tend to throw on himself some degree of blame or criminality in relation to the particular transaction and to exonerate others therefrom"); 1894, Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783 (bastardy; admission of paternity by another person not accounted for, excluded); 1899, Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551; 1855, Com. *v.* Elisha, 3 Gray 460 (record of conviction of the stealer, on his plea of guilty, not receivable against the receiver of stolen goods, with certain limitations); 1918, Com. *v.* Wakelin, 230 Mass. 567, 120 N. E. 209 (homicide; a confession by D., who had occupied a cell with the witness, made before defendant's arrest, and admitting the killing of the person whose death was here charged, D. having since been executed, excluded; the opinion calls the rule "salutary"; it should have termed it "abominable");
Michigan: 1882, People *v.* Stevens, 47 Mich. 411, 11 N. W. 220 (one defendant in court admitted his guilt and offered to withdraw his plea of not guilty, yet apparently did not go on the stand; excluded); 1904, People *v.* Hutchings, 137 Mich. 527, 100 N. W. 753 (testimony of an accomplice in the police court, the accomplice claiming privilege on the trial, excluded);
Mississippi: 1890, Helm *v.* State, 67 Miss. 572, 7 So. 487 (declarations of the deceased, on a trial for murder, inculpating himself, were offered as declarations against interest, but rejected on precedent and also on the rather curious ground that "how any declarant can be

made by third persons; although there is not wanting authority in favor of admitting such statements.[10]

§ 1477. **Same: Policy of this Limitation.** It is plain enough that this

said to be against the interest of a man already passed into the other world . . . is wholly incomprehensible by us");
Missouri: 1874, State v. Evans, 55 Mo. 460 (declarant not accounted for); 1893, State v. Duncan, 116 Mo. 288, 311, 22 S. W. 699 (declaration of S., admitting the shooting, excluded); 1898, State v. Hack, 118 Mo. 92, 98, 23 S. W. 1089 (confession of a co-defendant, not accounted for, excluded);
Nebraska: 1904, Mays v. State, 72 Nebr. 723, 101 N. W. 979 (written confession of a fugitive from justice, excluded; no authority cited);
New York: 1881, Greenfield v. State, 85 N. Y. 75, 86, 88 (declarant in court and not called);
North Carolina: 1833, State v. May, 4 Dev. 332 (larceny; declarant absconded); 1846, State v. Duncan, 6 Ired. 239 (declarant not shown deceased); 1873, State v. White, 68 N. C. 158 (like State v. May); 1874, State v. Haynes, 71 N. C. 84 (same); 1875, State v. Bishop, 73 N. C. 44 (same);
Oklahoma: 1913, Davis v. State, 8 Okl. Cr. 515, 128 Pac. 1097 (confession of two persons, not accounted for, that they were the thieves, excluded: "it would be impossible to convict any thief [if such evidence were admissible] because he could always find witnesses who would testify that they had heard some one who was absent confess to being guilty of the crime"); 1915, Dykes v. State, 11 Okl. Cr. 602, 150 Pac. 84 (murder in an affray; an alleged confession by C., an accomplice, that he was the one firing the fatal shots, excluded; following Donnelly v. U. S., but not citing Davis v. U. S.; here C. was not accounted for in any way); 1917, Williams v. State, 13 Okl. Cr. 189, 163 Pac. 279 (testimony of "a couple of irresponsible jailbirds" to a confession of guilt by a third person unspecified, excluded);
Oregon: 1893, State v. Fletcher, 24 Or. 295, 300, 33 Pac. 575 (murder; confession of a third person, who had fled, excluded);
South Carolina: 1912, Fonville v. Atlanta & C. A. L. R. Co., 93 S. C. 287, 75 S. E. 172 (action for death caused by derailment; to disprove negligence defendant offered the confession of A. that he had thrown the switch and caused the wreck; A. had been convicted of murder on this charge, was serving a life sentence, and was disqualified thereby to testify; excluded; Woods, J., diss.; the decision illustrates in an extreme way the absurdity of the exclusionary rule; the majority opinion unsuccessfully attempts to distinguish Coleman v. Frazier, *infra*, n. 10);
Tennessee: 1836, Wright v. State, 9 Yerg. 344 (declarant not deceased); 1837, Rhea v. State, 10 Yerg. 260 (same); 1870, Sible v. State, 3 Heisk. 137 (larceny; confessions of a co-indictee, incompetent as a witness, not admitted for the defendant); 1887, Peck v. State, 86 Tenn. 259, 6 S. W. 389 (confession of a person not accounted for, excluded);
Vermont: 1900, State v. Totten, 72 Vt. 73, 47 Atl. 105 (indefinite confession by a third person, not accounted for, excluded); 1921, Flemming v. State, — Vt. —, 113 Atl. 783 (breach of the peace; S. was assaulted by a man in the dark; the assailant was identified by his clothes, etc., as the defendant; but the defendant denied his identity; for defendant was offered the statement of a third person, unidentified, who was overheard by the witness to speak as the committer of the offence; the third person had since disappeared; held that the presence of the third person in the vicinity was admissible, but not his statement admitting the offence; this ruling shows the injustice as well as the irrationality of the present law);
Wyoming: 1896, Reavis v. State, 6 Wyo. 240, 44 Pac. 62 (perjury in testifying that C. did not commit an assault; confession of C., unaccounted for, not admitted for the prosecution; treated on the principle of admissions).

[10] 1913, Donnelly v. U. S., 228 U. S. 243, cited *supra*, n. 9 (the three judges dissenting); 1846, Smith v. State, 9 Ala. 995, cited *supra*, (Goldthwaite, J., dissenting: "When the other facts and circumstances connect the party with the act, and the confession is made under circumstances which repel the suspicion of any motive, I can see no reason why a doubtful crime may not be thus fixed on the confessing person, though the fact of that confession may tend to exculpate another, to whom the circumstances equally point as the guilty person"); 1898, Masons' F. A. A. v. Riley, 65 Ark. 261, 45 S. W. 684 (policy on accidental death; confession of S., shortly after the death, that he had killed the deceased, admitted, perhaps on the 'res gestæ' grounds, *post*, § 1747); 1850, Coleman v. Frazier, 4 Rich. L. 152 (a third person's statement that he had stolen money was admitted; O'Neall, J.: "This is not of a matter of business, like those spoken of in that case, but was a criminal act. . . . The admission of such testimony arises from necessity, and the certainty that it is true from the want of motive to falsify. Both these are apparent here. . . . Here we have every guaranty of its truthfulness — the grave consequences of infamy, and at the least ten years' imprisonment, would certainly insure the truth of the speaker"); 1894, Martin v. State, 33 Tex. Cr. 317, 26 S. W. 400 (perjury in falsely testifying to larceny by S. and P.; confessions of B. and B. that they committed the larceny, admitted).

limitation, besides being a fairly modern novelty, is inconsistent with the broad language originally employed in stating the reason and principle of the present exception (*ante*, §§ 1457, 1476) as well as with the settled principle upon which Confessions are received (*ante*, § 1475).[1]

But, furthermore, it cannot be justified on grounds of policy. The only plausible reason of policy that has ever been advanced for such a limitation is the possibility of procuring fabricated testimony to such an admission if oral.[2] This is the ancient rusty weapon that has always been drawn to oppose any reform in the rules of Evidence, viz. the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.

The only practical consequences of this unreasoning limitation are shocking to the sense of justice; for, in its commonest application, it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent:

§ 1477. [1] The limitation is apparently supported by the doctrine (*ante*, §§ 1076, 1079) that the *confessions of an accomplice* are not to be used by the prosecution against the accused except so far as they are the admissions of a co-conspirator; for A's confession implicating himself and B, the accused, is at least against his own penal interest, and therefore might seem to fall under the present supposed principle. But (1) the interest of A in obtaining a pardon by confessing and betraying his co-criminals is in such cases usually so important that, according to the doctrine of preponderance of interest (*ante*, § 1464), the statement would not even under the present exception be admissible; (2) the question has usually been dealt with according to the doctrine of Admissions (Tong's Case, quoted *infra*, note 3), and the present aspect has not been considered; (3) the accomplice must, according to the present exception, be shown deceased or otherwise unavailable, and this showing has usually not been attempted in such cases; the following case shows its application: 1832, R. *v.* Turner, 1 Lew. Cr. C. 119 (the confession of one of the other prisoners, on examination before a magistrate, it was objected to, "secondly, that it was not the best evidence that the circumstances of the case admitted of, inasmuch as the prisoner whose examination it purported to be was not attaint [he had pleaded guilty, but sentence had not been passed], and might therefore be put into the box and examined as a witness, which would give the prisoner's counsel an opportunity of cross-examining her on oath"; the confession was rejected, without indicating the grounds).

[2] 1857, McDonald, J., in Lyon *v.* State, 22 Ga. 399, 401: "All one defendant would have to do would be to admit that his guilty accomplice was innocent and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and after his acquittal appear, demand his trial, and prove by the evidence of the acquitted party that he was in fact the guilty person." That any judge could believe such a scheme to be within the possibilities of successful accomplishment seems curious.

The following press dispatch (the year of which has inadvertently not been preserved) illustrates the possibilities of using this exception: "Columbia, Miss., March 10. — A death-bed confession by Joseph Beard, a farmer, announced today by the sheriff's office, cleared of suspicion William Purvis, who twenty-five years ago escaped death by hanging, after conviction for murder, only because the noose about his neck slipped when the scaffold trap was sprung.

"Purvis was found guilty of killing from ambush William Buckley. When he fell from the scaffold unharmed, spectators, who thought it an intervention of Providence, induced the authorities to put him back in jail, and an appeal to the governor brought a commutation of sentence. Several years later Purvis was pardoned. He now lives in Lamar County.

"Beard, dying of pneumonia, confessed that he and two other men killed Buckley."

1913, HOLMES, J., diss., in *Donnelly* v. *United States*, 228 U. S. 243, 33 Sup. 449: "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a Court of justice believe that Donnelly did not commit the crime. (I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick.) The rules of Evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this Court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length."

The rulings already in our books cannot be thought to involve a settled and universal acceptance of this limitation. In the first place, in almost all of the rulings the declarant was not shown to be deceased or otherwise unavailable as a witness, and therefore the declaration would have been inadmissible in any view of the present exception (*ante*, § 1456). Secondly, in some of the rulings (for example, in North Carolina) the independent doctrine (*ante*, §§ 139–141) was applicable that, in order to prove the accused's non-commission of the offence by showing commission by another person, not merely one casual piece of evidence suffices but a 'prima facie' case resting on several concurring pieces of evidence must be made out. Finally, most of the early rulings had in view, not the present exception to the Hearsay rule, but the doctrine of Admissions (*ante*, §§ 1076, 1079) that the admissions of one who is not a co-conspirator cannot affect others jointly charged.[3]

It is therefore not too late to retrace our steps, and to discard this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice. Those who watched (in 1899) with self-righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own Courts, the spectacle would have been no less shameful if we, following our own supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit, — the authenticated confession of the escaped Major Esterhazy, avowing himself the guilty author of the treason there charged.

[3] 1663, Tong's Case, Kelyng 18 ("Such confession [before a justice of a privy councillor on examination] so proved is only evidence against the party himself who made the confession, but cannot be made use of as evidence against any others whom on his examination he confessed to be in the treason").

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC III: DECLARATIONS ABOUT FAMILY HISTORY (PEDIGREE)

CHAPTER XLIX.

§ 1480. **In general; Statutory Provisions.** This is one of the oldest of the exceptions. In the 1800s, little difficulty was made about accepting reputation-evidence generally. It could hardly be otherwise when the jury-practice had just been freed (*ante*, § 1364) from the traditional notion that the jury themselves represented the reputation or community-knowledge of the neighborhood. Soon, however, the use of reputation became limited to what had doubtless been its commonest instances, — matters of prescriptive possession and of pedigree or genealogy. From the former was then developed the exception for Reputation to Land-Boundaries (*post*, § 1582); from the latter, the present exception. Here the notion of general reputation as the distinguishing form of the evidence has long since disappeared. The evidence may be in the form of individual declarations; though it may also

be in the form of family reputation. In general, the scope of the present exception has been much enlarged during the past century in this country. Occasionally a statute has attempted to define its terms.[1]

1. The Necessity Principle

§ 1481. **Death, etc., of Declarant or of Family.** The Necessity principle (*ante*, § 1421) is here satisfied by the general difficulty of obtaining any other than traditionary evidence in matters of family history. The following passages illustrate the accepted judicial attitude:

1806, L. C. ERSKINE, in *Vowles* v. *Young*, 13 Ves. 140: "Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property regulated, [by] requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence, — the best the nature of the subject will admit, establishing the descent from the only sources that can be had."

1811, LAWRENCE, J., in *Berkeley Peerage Case*, 4 Camp. 409: "From the necessity of the thing, the declarations of members of the family in matters of pedigree are generally admitted, . . . [the rejection of which] would often be the rejection of all the evidence that could be offered." MANSFIELD, C. J.: "In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted."

1836, STORY, J., in *Ellicott* v. *Pearl*, 10 Pet. 434: "In cases of pedigree, [hearsay] is admitted upon the ground of necessity, or the great difficulty and sometimes the impossibility of proving remote facts of this sort by living witnesses, . . . there being no 'lis mota' or other interest to affect the credit of their statement."

1886, WOODS, J., in *Fulkerson* v. *Holmes*, 117 U. S. 389, 29 Sup. 915: "This exception has been recognized on the ground of necessity; for as, in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion failure of justice."

1891, PECKHAM, J., in *Eisenlord* v. *Clum*, 126 N. Y. 552, 27 N. E. 1024: "In many cases it will readily be seen such evidence may under the circumstances be the only evidence

§ 1480. [1] *Cal.* C. C. P. 1872, § 1852 ("The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible"); § 1870, par. 4 ("the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person" is admissible); § 1870, par. 13 ("entries in family Bibles or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree", are admissible; see also ib. § 1870, par. 11, cited *post*, § 1597, under Reputation); *Ga.* Rev. C. 1910, § 5764 ("Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, inscriptions, 'family trees', and similar evidence"); *Mont.* Rev. C. 1921, §§ 10513, 10531, par. 4, 11, 13 (like Cal. C. C. P. §§ 1852, 1870); *Or.* Laws 1920, §§ 709, 727, par. 4, 11, 13 (like Cal. C. C. P. §§ 1852, 1870); *P. I.* C. C. P. 1901, § 281 (like Cal C. C. P. § 1852, omitting after "evidence" and inserting "of [*sic?* if] pedigree or relationship or family genealogy are questions at issue"); § 298, par. 4 (like Cal. C. C. P. § 1870, inserting, after "deceased person", the words "or a person not in the Philippine Islands"); § 298, par. 11, 13 (like Cal. C. C. P. § 1870); *Porto Rico:* Rev. St. & C. 1911, § 1403, par. 4 (like Cal. C. C. P. § 1870, par. 4); § 1403, par. 9 (like Cal. C. C. P. § 1870, par. 11); par. 11 (like ib. § 1870, par. 13).

which can be obtained. . . . Traditional declarations become the best evidence sometimes, when those best acquainted with the fact are dead."

It will be noticed that the language here used offers opportunity for choice between three distinct and competing rules in the application of the Necessity principle.

(1) First, there are references to "past generations", "many years before", "lapse of time", "after one generation has passed away", and the like. These imply that the exception comes into play only where the matter is "*ancient*", *i.e.* of a past generation; and that therefore, on the one hand, matters of recent occurrence may not be so proved, whether or not there are living witnesses, and, on the other hand, that matters of a time whose witnesses are likely to have passed away may be so proved, whether or not living witnesses are available. But there appears to be in fact no rule of such a form, in spite of the implication of the above language. The tendency is against such a narrowness for the rule.[1]

(2) Secondly, a similar but slightly broader rule may be seen indicated by the phrases, "no living witnesses can be had", "the great difficulty of procuring living witnesses", and by the statements that such evidence is admissible because living witnesses can "often" or "usually" not be had. The implication is that where *any living witness to the same matter*, particularly a member of the family, can be had, no hearsay statement of any deceased persons can be received. This form of rule, which has had some support in decisions,[2] is perhaps appropriate enough where the evidence is

§ 1481. [1] 1870, Scharff *v.* Keener, 64 Pa. 379 (*semble*, that the recent date of the occurrences is immaterial).

[2] *Ala.* 1847, White *v.* Strother, 11 Ala. 724 (excluded, where other members of the family were alive); 1916, Duncan *v.* Watson, 198 Ala. 180, 73 So. 448 (family repute from a witness 22 years old, as to marriage of an aunt, etc., etc., not admitted without showing that "the declarants from whom the information came were not living at the time of the trial"); *Ga.* 1890, Traveler's Ins. Co. *v.* Sheppard, 85 Ga. 751, 779, 12 S. E. 18 (insurance claim; family reputation as to the fact of death, the time being less than a year before, the members of the family still surviving, excluded); *Haw.* 1910, Makekau *v.* Kane, 20 Haw. 203 (family repute heard from a grandfather and a grandmother, the former being shown deceased; admitted, without showing the latter's decease); *Ia.* 1884, Ross *v.* Loomis, 64 Ia. 432, 20 N. W. 749 (present reputation at M.'s place of residence "among the relatives and family" of M., as to his decease, the wife being alive, excluded); *Pa.* 1846, Covert *v.* Hertzog, 4 Pa. St. 146 (hearsay declarations were rejected as evidence of "a comparatively recent marriage", where "there was abundance of such evidence by living witnesses"); *Tex.* 1859, Campbell *v.* Wilson, 23 Tex. 252 (unidentified entries in a family Bible were rejected, where the father was dead but the mother was alive and in the jurisdiction); *Vt.* 1896, Hurlburt's Estate, 68 Vt. 366, 35 Atl. 77 (H. went to Dakota in 1882; reputation in the family, consisting of sister, mother, and brother, the father alone being dead, as to the fact of H.'s death, excluded; "when all the facts relative to a question of pedigree are within the knowledge of living witnesses, and none of such facts are derived from the declarations of deceased members of the family, there is no necessity for resorting to so-called 'family reputation', created wholly by the living, any more than in any other kind of case not involving pedigree").

In the following cases peculiar modifications of this rule were laid down: 1883, Harland *v.* Eastman, 107 Ill. 538 (several members of the family were living and available; Dickey, J.: "They are all living and their sworn testimony is better than their unsworn statements. It follows that the witness cannot properly be allowed to state his conclusion from such unsworn statements, unless all of them taken together, with their surroundings, enable him to say such was the accepted state of the case in the family or such was the uncontradicted repute in the family"); 1818, Crouch *v.* Eveleth, 15 Mass. 305 (family hear-

offered in the shape of *family reputation;* for there is in strictness no necessity for resorting to the hearsay of the family as such, until it appears that members of the family cannot be had to testify on the stand.

(3) But where the evidence offered is the *declaration of an individual member* of the family, the necessity for this person's hearsay lies merely in the impossibility of procuring the declarant himself to testify on the stand; *i.e.* the death, absence, insanity, or the like, of the *declarant alone* suffices. Such is the rule dictated by the analogies of the other Hearsay exceptions admitting individual statements (for example, Dying Declarations, Statements against Interest, Regular Entries). In the exception for Reputation (*post*, § 1580) there is some support for the notion that the necessity must consist in the lack of other evidence of any sort; but where individual declarations are receivable, no claim can be made for such a broad idea of necessity. Accordingly the only sound rule for the use of individual declarations is that the declarant himself must be shown to be unavailable.[3]

It should be noted that since entries in a *family Bible*, or the like (*post*, § 1495), may usually be treated as representing either the entrant's individual assertion or the family's reputation, it should therefore be enough, if the entrant is identified, to show the entrant alone to be unavailable, and not to show also the unavailability of other members of the family.

(4) Supposing the evidence offered to be the declaration of an individual, it is clear that at least *the declarant must be shown unavailable*, by decease or otherwise.[4] Here the analogies of the other exceptions, as well as the nature

say of the existence of children as heirs was rejected because no effort had been made to obtain the record of marriage and no showing that it was lost; this would hardly be followed).

If a person's testimony as to his *own age* is to be treated as a report of family hearsay (*post*, § 1495), this rule would require that the members of his family be accounted for. *Contra:* 1880, Cherry *v.* State, 68 Ala. 30 (a person's statement as to his age was treated as based on pedigree hearsay; but no specific decease was required to be shown). In the same State the ruling of Rogers *v.* De Bardelaben Co., 97 Ala. 154, 12 So. 81, that a brother and a brother-in-law could not testify *on the stand* to the plaintiff's age, because third persons whose declarations are offered must be deceased, is incomprehensible.

[3] 1912, Jarchow *v.* Grosse, 257 Ill. 36, 100 N. E. 290 (where the declarant is deceased, the matter need not be an ancient one, and other members of the family may still be living); 1860, Crauford *v.* Blackburn, 17 Md. 54 (Bartol, J.: "This exception to the general rule had its origin in the necessity of the case. . . . It is objected that . . . the necessity did not exist [for a husband's declarations as to the marriage], there being a party to the alleged marriage [the wife] living and competent to testify. . . . This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but . . . by the established rule of law, which, though said to have its origin in necessity, is universal in its application").

[4] ENGLAND: 1859, Butler *v.* Mountgarret, 6 H. L. C. 648; CANADA: 1848, Doe *v.* Servos, 5 U. C. Q. B. 284, 288; UNITED STATES: *Ala.* 1920, Sheffield Iron Co. *v.* Dennis, 204 Ala. 530, 86 So. 467 (employment of minor; affidavit of parents, still living, not admissible under hearsay exception, but only as testimonial contradiction); *Cal.* 1897, People *v.* Mayne, 118 Cal. 516, 50 Pac. 654 (a family-Bible entry, made by the mother; excluded, the mother being alive and available); 1899, James' Estate, 124 id. 653, 57 Pac. 579, 1008; *Conn.* 1817, Chapman *v.* Chapman, 2 Conn. 349; *Ia.* 1870, Greenleaf *v.* R. Co., 30 Ia. 303; 1904, State *v.* Trusty, 122 Ia. 82, 97 N. W. 989; *Kan.* 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (age of a child; copy of a Russian parish record, made by the priest at the father's instance and brought over with the family, excluded, on the ground that the father was still living); *Me.* 1918, Eagle Lake *v.* Ft. Kent, 117 Me. 134, 103 Atl. 10 (pauper settlement; father's declarations excluded, because living and unaccounted for; son's testimony to father's birthplace, construed as

of the necessity-principle itself, indicate that not only *death*, but other circumstances — such as *insanity*, absence from the jurisdiction, and the like — may create such a necessity. On this point, however, the rulings are few.[5]

2. The Circumstantial Guarantee

§ 1482. **General Principle.** The circumstantial guarantee for trustworthiness (*ante*, § 1422) has been found in the probability that the "natural effusions" (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life. The sentence of Lord Eldon's in Whitelocke *v.* Baker has become the classical passage on this subject:

1790, ASHHURST, J., in *R.* v. *Eriswell*, 3 T. R. 720: "It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspicious kind; it is generally brought from remote times, when no question was depending or even thought of, and when no purpose would apparently be answered."

1807, L. C. ELDON, in *Whitelocke* v. *Baker*, 13 Ves. 514: "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." [1]

1811, *Berkeley Peerage Case*, 4 Camp. 406, 409, 420. LAWRENCE, J.: "Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, . . . we may reasonably suppose that he neither stops short nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family." WOOD, B.: "The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree is an exception to the general

testimony to the father's statement); *Mo.* 1919, State *v.* Bowman, 278 Mo. 492, 213 S. W. 64 (rape under age; a list of the children's birth dates, written down by the grandmother, at the mother's dictation, before controversy arisen, excluded, the mother being alive and having testified in the case; obviously, a technically correct ruling; but, obviously also, precisely the useful kind of evidence to which the hearsay rule should show flexibility); *N. H.* 1828, Waldron *v.* Tuttle, 4 N. H. 378; 1854, Mooers *v.* Bunker, 29 N. H. 432; 1854, Emerson *v.* White, 29 N. H. 491; *N. Y.* 1829, Leggett *v.* Boyd, 3 Wend. 379; 1851, Robinson *v.* Blakely, 4 Rich. 588 (a father's entry in a family register, and a father's declarations, the father being still alive and in the jurisdiction, excluded); *Okl.* 1922, Campbell *v.* State, — Okl. Cr. —, 206 Pac. 622 (statutory rape; family Bible not admitted, the mother and the father being present and testifying); *Tex.* 1912, Bigliben *v.* State, 68 Tex. Cr. 530, 151 S. W. 1044 (family-Bible entry, made by the father, still living; excluded); *W. Va.* 1884, Peterson *v.* Ankrom, 25 W. Va. 56, 62.

Contra: 1914, State *v.* Goddard, 69 Or. 73, 133 P. 90, 138 Pac. 243 (holding exceptionally that the death of the entrant in a family Bible need not be proved, because L. O. L. § 727, subsect. 13, makes such entries admissible unqualifiedly).

[5] *Can.* 1897, May *v.* Logie, 27 Can. Sup. 443, 445 (statements of a father, living in England, excluded, since his deposition might have been obtained); *U. S.* 1919, Paulsen's Estate, 179 Cal. 528, 178 Pac. 143 (letters etc. from relatives in Denmark, telling of B.'s death, admitted); 1884, Ross. *v.* Loomis, 64 Ia. 432, 20 N. W. 749 (statements as to M.'s decease, by M.'s wife, living in another jurisdiction, excluded); 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 (declarant residing without the State; admitted); 1919, Garvin *v.* Western Cooperage Co., 94 Or. 487, 184 Pac. 555 (letter from a brother in Austria, admitted); 1859, Campbell *v.* Wilson, 23 Tex. 252, *semble* (absence from the jurisdiction suffices); and the Codes quoted *ante*, § 1480.

§ 1482. [1] Approved by Lord Cranworth in Butler *v.* Mountgarret, 6 H. L. C. 644 (1859).

law of evidence; and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to have been made. But declarations, to be receivable in evidence, . . . must have been the natural effusions of the mind of the party making them, and must have been made on an occasion when his mind stood in an even position, without any attempt to exceed or fall short of the truth." ELDON, L. C.: "If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child."

1840, VERPLANCK, Sen., in *People* v. *Fire Ins. Co.*, 25 Wend. 220: "In order to adhere as closely as possible to the policy of shutting out all vague, second-hand, and unauthenticated evidence, such exception is made in favor of proof of declarations and reputation [of family history] only where the persons whose opinion and declarations are relied upon, besides being those most likely to be well informed as to the facts, were also, so far as appears, free from all possible inducement to misrepresent the truth themselves or from any danger of being misled by others so interested. . . . It is then received . . . because ordinarily they could have no temptation to falsehood or misrepresentation on such a subject."

1849, PEARSON, J., in *Moffitt* v. *Witherspoon*, 10 Ired. 192: "[Pedigree] is a matter about which they [the members of a family] are presumed to be particularly interested to ascertain and declare the truth. Every one from a feeling of nature endeavors to know who his relations are and will seldom declare those to be his kinsmen who are not."

In applying this principle, what specific rules have been deduced?

§ 1483. **Declarations must have been made before Controversy.** First, declarations made during the course of a controversy are to be regarded as lacking in the guarantees of trustworthiness. In the traditional phrase, the declarations, to be receivable, must have been made 'ante litem motam':

1811, HEATH, J., in *Berkeley Peerage Case*, 4 Camp. 413: "When the contest has originated, people take part on one side or the other; their minds are in a ferment, and if they were disposed to speak the truth, facts are seen by them through a false medium. . . . It would hold out an invitation to fabricated testimony if declarations could be received in evidence which have been made when the contest was actually begun."

1831, L. C. BROUGHAM, in *Monkton* v. *Attorney-General*, 2 Russ. & M. 160: "If there be 'lis mota', or anything which has precisely the same effect upon a person's mind with 'litis contestatio', that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable or that it may hereafter become evidence for him or for those in whom he takes an interest after his death, it is excluded. . . . The question then always will be, . . . Was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?"

On two occasions, judges have doubted the expediency of this limitation;[1]

§ 1483. [1] 1811, Graham, B., in Berkeley Peerage Case, 4 Camp. 408; 1821, Boudereau v. Montgomery, 4 Wash. C. C. 190 (Washington, J., admitting depositions in a previous cause: "It is not without great diffidence that I venture to dissent from the reasoning of the judges in the Berkeley Peerage Case. But it seems to be rather artificial than solid, when directed against the *admissibility* of the evidence; although I acknowledge that the possibility of an undue bias having been produced by the existence of a controversy might

but it is entirely in analogy to the limitations in other exceptions, and, so long as the Hearsay rule is enforced in its present form, this limitation has a legitimate place.[2]

Principle requires, however, that the dispute, if it is to exclude the statements, should have been more or less over *the precise point to which the statements refer;* else no bias could be supposed to affect it. There is opportunity for much latitude in applying this limitation. Judges' opinions have differed;[3] but it should be a matter for the trial Court's discretion whether under the circumstances of each case bias can be supposed to have existed:

1840, VERPLANCK, Sen., in *People* v. *Fire Ins. Co.*, 25 Wend. 215, 224: "If the rule that actual litigation or litigious controversy without actual suit always vitiates the hearsay declaration of those in whose family it existed be narrowed down to controversies upon the very point afterwards sought to be ascertained, and strictly and legally involving it, the reason of the rule is lost sight of. The result would be to exclude such family traditions when the parties had an accurate knowledge of their legal rights or the legal grounds of their claim, whilst it would admit them in cases where the claim pursued with equal ardor and interest is erroneously understood by the parties themselves, and where, for that very reason, they and their friends are more disposed to see the whole question and its evidence through a false medium, and to suffer their wishes and feelings to disturb or discolor their recollections or relations of facts. The spirit and reason of the rule in my judgment, therefore, apply to every ancient controversy involving or affected by the question afterwards in litigation or supposed at the time to be involved in it or affected by it."

On the other hand, it is not necessary that *litigation should actually have begun* at the time of the declaration. The element to be avoided is a bias in the mind of a declarant; and this is sufficiently probable if a dispute or controversy is actually in progress, even though it may not have reached the stage of legal proceedings:

1831, L. C. BROUGHAM, in *Monkton* v. *Attorney-General*, 2 Russ. & M. 160: "Prove that . . . the person concocting or making the declaration took part in the controversy. Show

with propriety be urged against the credit to be given to the evidence, where the proofs in the cause are contradictory and to be weighed. I am apprehensive that great mischief and injustice might be the consequence of excluding the only species of evidence which circumstances not within the control of the parties interested may have left to them, on the ground of a presumed bias created by an existing or even presumed controversy").

[2] Limitation recognized: *Eng.* 1816, Freeman *v.* Phillipps, 4 M. & S. 397; 1881, Dysart Peerage Case, L. R. 6 App. Cas. 489, 503; *U. S.* 1839, Stein *v.* Bowman, 13 Pet. 209, 220; 1817, Chapman *v.* Chapman, 2 Conn. 349; 1915, Mobley *v.* Pierce, 144 Ga. 327, 87 S. E. 24; 1859, Collins *v.* Grantham, 12 Ind. 444; 1881, De Haven *v.* De Haven, 77 Ind. 236, 237; 1840, People *v.* Fire Ins. Co., 25 Wend. N. Y. 210; 1911, Rollins *v.* Wicker, 154 N. C. 559, 70 S. E. 934 (deceased declarant's testimony at a former trial of similar issue, held inadmissible as 'post litem motam'); 1922, Jelser *v.* White, — N. C. —, 110 S. E. 849 (before controversy arisen); 1825, Morgan *v.* Purnell, 4 Hawks 97; 1900, Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943; 1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (recitals in a petition concerning confiscated lands, excluded).

[3] The following cases apply the rule: 1816, Freeman *v.* Phillipps, 4 M. & S. 397; 1857, Gee *v.* Ward, 7 E. & B. 511; 1860, Shedden *v.* Patrick, 2 Sw. & Tr. 170, 188 ("if a controversy exist, it must be on the very point in respect of which the declarations are sought to be used"; here there had been controversy about the legitimacy of children, but not about a cohabitation or a deathbed marriage, with which the admitted letter dealt); 1828, Elliott *v.* Peirsol, 1 Pet. 337; 1919, Garvin *v.* Western Cooperage Co., 94 Or. 487, 184 Pac. 555 (letter from a brother of deceased, after his death, lent before controversy arisen as to the precise issue, viz. the mother's identity, admitted).

me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall hold that it comes within the rule which rejects evidence fabricated for a purpose by a man who has an interest of his own to serve."

1859, WILLES, J., in *Butler* v. *Mountgarret*, 6 H. L. C. 641: "The 'lis' would surely have dated at least from the time when the parties had respectively assumed a hostile attitude. . . . A suit is not necessary to constitute 'lis.'" [4]

The fact that no controversy existed, being preliminary to the admission of the evidence, must be shown by the party offering it.[5] But, as this is in effect proving a negative, slight evidence should suffice.

§ 1484. **No Interest or Motive to Deceive.** The existence of a controversy is only one circumstance (though the most common one) likely to produce a bias fatal to the trustworthiness of the declaration. Judicial opinion seems to hold, and properly, that other considerations may under certain circumstances operate to exclude the declarations. In general, they would be excluded where there is any specific and adequate reason to suppose the existence of a motive inconsistent with a fair degree of sincerity. In Lord Eldon's words, they must appear to be the "natural effusions of a party standing in an even position":[1]

[4] Compare the opinions of the other law lords, and the opinion of Greene, B., in the same case below, in 6 Ir. C. L. 94.

It was once said by Baron Alderson (1834, Walker *v.* Beauchamp, 6 C. & P. 561) that it was sufficient if at the time of the declaration the *state of facts existed* (for example, the birth of a child) as to which the controversy afterwards arose. This, however, obviously cannot be sound; for it is to the controversy, and to nothing else, that the bias is to be attributed. Mr. Baron Alderson's opinion has been more than once repudiated, and has apparently never been confirmed: 1843, Reilly *v.* Fitzgerald, 6 Ir. Eq. 344 (Sugden, L. C.: "The point of inquiry respecting the admissibility of such evidence is, not the existence of a state of facts out of which a claim has arisen, but the existence of a controversy or dispute respecting that claim"; here the question depended on whether a child was born alive or not, but no one supposed till several years afterwards that anything depended on the child's birth). *Accord:* 1856, Pigot, C. B., in Butler *v.* Mountgarret, 6 Ir. C. L. 107; 1836, Shadwell, V. C., in Slaney *v.* Wade, 7 Sim. 615; 1860, Shedden *v.* Patrick, 2 Sw. & Tr. 170, 187; 1919, Estill *v.* Estill, 149 Ga. 384, 100 S. E. 365 (inheritance under a will to children of M. W. E.; written and oral declarations of M. W. E., now deceased, that the claimant was M. V. E. his daughter, admitted under Civ. C. 1910, § 5764; in this case the will left the income of certain property to M. W. E., and the principal to his children if any, and if none, the principal to other distributees; on the ground that this furnished a motive of interest in M. W. E. to secure the principal for a child and for his widow, and that the result of such inheritance had been discussed by him, Hill, J., dissented, applying the principle of 'post litem motam'; but this interpretation is far-fetched and is not justified by the authorities).

[5] 1825, Morgan *v.* Purnell, 4 Hawks N. C. 97; 1890, Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364; 1906, Gorham *v.* Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665.

It has been held that the existence of a controversy between certain members of the family is sufficient to condemn declarations by a member who was himself *ignorant of the controversy* and therefore quite unbiassed: 1811, Berkeley Peerage Case, 4 Camp. 417 (Mansfield, C. J.: "I have now only to notice the observation that to exclude declarations you must show that the 'lis mota' was known to the person who made them. There is no such rule. . . . If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced"). But this is against the reason of the rule, and cannot be supported: 1860, Shedden *v.* Patrick, 2 Sw. & Tr. 170, 187 (Cresswell, J.: "We must judge of the feelings of the party from what he knew at the time").

§ 1484. [1] *Accord:* 1828, Doe *v.* Randall, 2 Moo. & Rob. 25; 1831, Monkton *v.* Attorney-General, 2 Russ. & M. 147; 1843, Reilly *v.* Fitzgerald, 6 Ir. Eq. 345; 1817, Chapman *v.* Chapman, 2 Conn. 349; 1828, Waldron *v.* Tuttle, 4 N. H. 378; 1895, Byers *v.* Wallace, 87 Tex. 503, 29 S. W. 760 (excluding the statements of one asserting the death of a nephew whose sole heir he was; superseding Fowler

1861, CHANNELL, B., in *Plant* v. *Taylor*, 7 H. & N. 237: "Perhaps the learned judge was right in rejecting the evidence on the ground that any declaration made by Thomas Taylor, the father, . . . would be a declaration by a person whose mind could not be free from bias. It was manifestly in many ways directly for his interest to make a declaration tending to disavow his first marriage, or having a tendency to show that it was an illegal marriage and consequently did not invalidate the second. No case has been cited in which the declaration of a deceased person obviously for his interest has been received."

But this principle must not be pushed too far. Cautions have more than once been given to avoid excluding evidence merely because there *might* have been a bias:[2]

1847, L. C. J. DENMAN, in *Doe* v. *Davies*, 10 Q. B. 325: "[A declaration in a deed] was objected to on account of the interest they had had in making out things to be as there represented, and at least this intention of disposing of property was said to be equivalent to a 'lis mota.' But we think this objection also fails. . . . The parties did what they had a right to do if members of the family. Almost every declaration of relationship is accompanied with some feeling of interest, which will often cast suspicion on the declarations, but has never been held to render them inadmissible."

1840, WALWORTH, C., in *People* v. *Fire Ins. Co.*, 25 Wend. 215: "The declarations of deceased relatives are not to be absolutely rejected because there is room for a suspicion that they may have been made for a sinister purpose, if the party making them has no interest in their truth."

In particular, as to the entry of a birth declared to be legitimate, the mere circumstance that the entry was made *with a view to perpetuating evidence* of legitimacy or of the date of birth should not exclude the entry; otherwise very few such entries would be receivable, and the chief and honorable purpose of making them would be defeated:[3]

1801, MANSFIELD, C. J., in *Berkeley Peerage Case*, 4 Camp. 418 (for all the Judges, respecting an entry in a family Bible): "The father is proved to have declared that he made such entry for the express purpose of establishing the legitimacy of his son and the time of birth, in case the same should be called in question after the father's death. The opinion of the Judges is that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled."

Finally, the offeror of the evidence must perhaps show the absence of motive to deceive;[4] but slight evidence should suffice.

v. Simpson, 79 id. 611, 614, 15 S. W. 682); 1899, Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358 (same; sister's declarations as to brother's death, excluded); 1899, Lewis *v.* Bergess, 22 id. 252, 54 S. W. 609 (same; mother's declarations excluded).

Compare the cases cited *post*, §§ 1492, 1493, which are sometimes wrongly placed on this principle.

[2] *Accord:* 1831, Shields *v.* Boucher, 2 Russ. & M. 147, per Brougham, L. C.; 1919, Estill *v.* Estill, 149 Ga. 384, 100 S. E. 365 (cited more fully *ante*, § 1483, n. 4).

[3] *Accord:* 1777, Goodright *v.* Moss, 2 Cowp. 594, *semble*, Lord Mansfield, C. J.; 1857, Gee *v.* Ward, 7 E. & B. 511; 1840, People *v.* Fire Ins. Co., 20 Wend. 211, Cowen, J. *Contra:* 1817, Chapman *v.* Chapman, 2 Conn. 349 (Swift, C. J.: "When they are made for the express purpose of being given in evidence on a question of pedigree, they will not be received. If a person were to take up a Bible, and, having the idea that it was afterwards to be produced in evidence, were to write down at once the births and deaths of his children, such an entry would not be admissible").

[4] 1854, Emerson *v.* White, 29 N. H. 491; and cases *supra*, *semble*, §§ 1482, 1483.

3. Testimonial Qualifications, and Other Independent Rules of Evidence

§ 1485. (1) **Testimonial Qualifications.** As in the other exceptions to the Hearsay rule (*ante*, § 1424), there are here found certain requirements resting upon the general principles of Testimonial Qualifications which are applicable to all testimonial statements and have been already examined for testimony in general. Chiefly there arise here questions as to the means of Knowledge (*ante*, § 656) of the declarant, and the form of Communication (*ante*, § 766) of his knowledge.

§ 1486. (*a*) **Sufficiency of the Declarant's Means of Knowledge; General Principle.** The ordinary principle applicable to the situation would be (*ante*, §§ 654, 656) that the declarant must appear to have had fair knowledge, or fair opportunities for acquiring knowledge, on the subject testified to. This principle, as applied to the facts of family history, indicates that the qualified persons will be found chiefly, if not exclusively, within the family circle; for they alone may be expected to have fairly accurate information. It is of course not to be expected that *personal observation* shall be demanded, *i.e.* that only from those who were present at the birth, wedding, or death, shall hearsay statements be received; this would be to misconceive the theory of the exception. That theory is that the constant (though casual) mention and discussion of important family affairs, whether of the present or of past generations, puts it in the power of members of the family circle to be fully acquainted with the original personal knowledge and the consequent tradition on the subject, and that those members will therefore know, as well as any one can be expected to know, the facts of the matter. It is not that they have, each and all, a knowledge by personal observation, but that they at least know the fact as accepted by family understanding and tradition, and that this understanding, based as it was originally on observation, is 'prima facie' trustworthy. This has always been accepted as the sufficient reason for predicating testimonial qualifications: [1]

§ 1486. [1] *Personal knowledge* of the facts is therefore *not* requisite: 1831, Monkton *v.* Attorney-General, 2 Russ. & M. 165 (Brougham, L. C.: "The declarations tendered may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit."). *Accord:* 1879, Van Sickle *v.* Gibson, 40 Mich. 173; 1843, Jewell's Lessee *v.* Jewell, 1 How. 231. Nor need the knowledge, such as it is, be exact in its details; for example, the declaration, in affirming relationship, *need not particularize* as to the degree, where that is not material in the case: 1806, Vowles *v.* Young, 13 Ves. 147, L. C. Erskine; 1828, Doe *v.* Randall, 2 Moo. & R. 25, Burrough, J.

The following rulings therefore seem sound: 1899, Rothwell *v.* Jamison, 147 Mo. 601, 49 S. W. 503 (a person testifying on the stand to family history must have personal knowledge, unless he professes merely to give family repute upon the subject); 1906, Scott *v.* Herrell, 27 D. C. App. 395, 400 (attorney's testimony excluded; following Blackburn *v.* Crawfords, U. S. *post*, § 1491); 1903, Grand Lodge *v.* Bartes, 69 Nebr. 631, 96 N. W. 186 (wife's statement of her deceased husband's age, based solely on the statement of the priest at the time of marriage, excluded); 1904, Grand Lodge *v.* Bartes, 69 Nebr. 631, 98 N. W. 715 (same case as in 96 N. W., *supra*: the witness appearing, on the whole of the record, to have lived 20 years with her husband, during which period his parents lived in the family, and thus to have become "acquainted with family history, and tradition" independently of the priest's statement, her testimony was held admissible; "the date of a person's birth may be testified to by members of his family, although he may know of the fact only by hearsay founded on family tradition").

1807, L. C. ELDON, in *Whitelocke* v. *Baker*, 13 Ves. 514: "It was not the opinion of Lord Mansfield, or of any judge, that tradition, generally, is evidence even of pedigree; the tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken."

1811, MANSFIELD, C. J., in *Berkeley Peerage Case*, 4 Camp. 416: "General rights are naturally talked of in the neighborhood, and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."

The difficulties, then, that arise are concerned with drawing the line between declarants that may fairly be supposed to be thus qualified and those that may not. The questions here are of two general sorts: *First*, Shall a line be drawn between those who are relatives, *i.e.* strictly members of the family circle, and those who are not, *i.e.* servants, friends, neighbors, and the like? *Secondly*, Shall any line be drawn between different kinds of relatives, for example, according as they are near or distant, or as they are related by consanguinity or by affinity?

Before considering these two great classes of questions, it is desirable to examine the language of the Courts and observe what general notions, if any, are expressed, as to the scope of this knowledge-qualification:

1790, L. C. J. KENYON, in *R.* v. *Eriswell*, 3 T. R. 707: "I admit, declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in those cases."

1806, L. C. ERSKINE, in *Vowles* v *Young*, 13 Ves. 140: "[A pedigree declaration] is evidence from the interest of that person in knowing the connections of the family. Therefore the opinion of the neighborhood or what passed among acquaintance will not do."

1817, SWIFT, C. J., in *Chapman* v. *Chapman*, 2 Conn. 349: "The declaration must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connexions, they are speaking the truth and cannot be mistaken. . . . The opinion of deceased neighbors or acquaintances of the family are not evidence in a question of pedigree; for they cannot be supposed to have that certain knowledge which can be relied on. . . . From this it appears that the deceased relative whose declarations are given in evidence is to be considered as standing on the foot of a witness, and the hearsay declarations admitted in lieu of his testimony. It is therefore essential that the relative whose declarations are given in evidence should be named, so that the Court may be enabled to know whether his relationship or connexion with the family whose pedigree is in question was such that he may be supposed to know the truth of the declarations."

1883, DICKEY, J., in *Harland* v. *Eastman*, 107 Ill. 538: "What has been said by deceased

The following ruling seems unsound: 1873, Deedes *v.* Giles, 17 Sol. J. 420, 7 Alb. L. J. 269 (statements by a deceased grandfather about his own grandfather, who died before his birth, excluded, because it did not appear that the former's information was obtained from members of the family).

The following case is hardly a ruling of exclusion: 1841, R. *v.* Lydeard, St. Lawrence, 11 A. & E. 616 (pauper settlement; a witness' statement, "I was born in the parish of L. St. L., as I have heard and believe", held not to be of itself sufficient to prove the place of his birth; Patteson, J.: "It does not appear when or where the son was born, except by his own evidence; he could not know these facts; and they do not ask his father, who probably knew and was examined"; that the testimony was regarded as absolutely inadmissible does not clearly appear).

members of the family is admissible upon the presumption that they knew from the general repute in the family the facts of which they speak."

§ 1487. **Same: Declarations of Non-Relatives.** The required qualification, then, in general may be supposed to be present whenever (following the judicial phrases) there are found persons "likely to know the facts", "having an opportunity to know the facts", or "holding a relation rendering it very probable that he would learn them truly." If this is so, the line need not be drawn strictly at relatives. But the language of Lord Erskine (quoted above), "the interest of the person in knowing the connections of the family" does require the line to be drawn there, excluding *non-relatives*.[1]

§ 1487. [1] Accordingly, this uncertainty of phrasing has led to conflicting rulings; note, however, that several of the rulings excluding the statements of non-relatives do so on the ground that the declarant was not shown deceased (*ante*, § 1481) or that the particular declarant was not qualified on the facts of the case:

ENGLAND: 1743, Craig dem. Annesley *v.* Earl of Anglesea, 17 How. St. Tr. 1160 (the godmother of an alleged child, intimate friend of the mother; her hearsay to the child's existence and legitimacy, not allowed); 1754, Robins *v.* Wolseley, 2 Lee Eccl. 135, 421, 442 (deceased vicar's affidavit of the time of a marriage by him, admitted; whether by common law or canon law does not appear; compare § 1476, *ante*); 1776, Duchess of Kinston's Trial, 20 How. St. Tr. 355, 592 (bigamy; the widow of parson Annis testified to knowing the defendant; Q. "Were you privy to her marriage in your husband's lifetime?" A. "I was not at the wedding; but I have heard my husband say he married them"; a Lord: "That is not evidence"; no ruling was made or asked for); 1811, Berkeley Peerage Case, Min. Ev. 655, quoted in Hubback, Succession, 246 (declaration of a deceased clergyman, chaplain to the Earl, that the Earl and Countess were married by him, and that a certain person was their legitimate son, excluded, by all the judges); 1812, Walker *v.* Wingfield, 18 Ves. 443, 446 (Eldon, L. C.: "The question whether a physician or a servant who has attended the family can be admitted as one of the family has not, I conceive, been decided"); 1824, Johnson *v.* Lawson, 2 Bing. 86 (quoted *post*); 1843, Casey *v.* O'Shaughnessy, 7 Jur. 1140 (Roman Catholic priest, excluded); 1879, Polini *v.* Gray, L. R. 12 Ch. D. 426, per James, L. J. (intimate friends, excluded).

In the British Indian Code, drawn by Sir James Stephen, declarations by persons having "special means of knowledge" are made admissible: Whitley-Stokes' ed. II, 875, § 32.

CANADA: 1848, Doe *v.* Auldjo, 5 U. C. Q. B. 175 (declarations of an old body-servant, excluded, by two judges to one).

UNITED STATES: *Federal:* 1839, Stein *v.* Bowman, 13 Pet. 209, 220 (statements of "many old persons" in Germany, as to the plaintiff being brother to G. S., deceased, excluded, partly because the declarants were living, partly because the statements "do not appear to have been made by members of the family or by persons who had such connexions with the deceased as to have a personal knowledge of the facts stated"); 1876, Connecticut Mut. Life Ins. Co. *v.* Schwenck, 94 U. S. 598 (an entry of age in the minute-book of a lodge of Odd Fellows, of which the deceased was a member, was rejected, as being the statement of a "stranger"); 1896, Flora *v.* Anderson, 75 Fed. 217, 222 (declaration of one who was a servant in the household for an unspecified time, as to the birth of an illegitimate child to a daughter in the house; *semble*, excluded); 1911, Osborne *v.* Ramsay, C. C. A., 191 Fed. 114 (repute or statements from persons not family members nor related; not decided); *Arkansas:* 1867, Wilson *v.* Brownlee, 24 Ark. 589 (it was conceded that declarations by others than members of the family were admissible; but declarations by persons as to whose knowledge nothing whatever was shown were rejected); *Connecticut:* 1817, Chapman *v.* Chapman, 2 Conn. 347 ("declarations of the deceased members of a family, *or* those who have lived in the family and may from their connexion with it be supposed to know the state of it", are admissible; but not "of deceased neighbours or acquaintances of the family", "for they cannot be supposed to have that certain knowledge which can be relied on"); *Iowa:* 1901, Alston *v.* Alston, 114 Ia. 29, 86 N. W. 55 (declarations of F. and his wife, friends in whose family the plaintiff, the illegitimate child of a mother D., was brought up from a time shortly after birth, were admitted to show plaintiff's paternity); *New York:* 1811, Jackson *v.* Cooley, 8 Johns. 130 (Thompson, J.: the declarations of "persons who from their situation were likely to know are competent evidence"; and a reputation among acquaintances of the family was admitted; Spencer, J., dissented, but apparently on the chief ground that the acquaintances were not shown to be deceased); 1820, Jackson *v.* Browner, 18 Johns. 39 (Spencer, C. J.; rejected declarations

Yet, after all, such a narrow test seems too narrow, at least for this country. Even in England, where so much of personal advancement and material prosperity for the individual depended upon his family rank and his rights of inheritance, it seems too much to say that only those who have this immediate property-interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may, in cases, be equally and sufficiently informed. In this country at least, the conditions are such, for the mass of the population, that the interest in family rank and inheritance cannot require such a narrowing of the test.

It is not necessary to maintain that the statements of *any friend* are always admissible; but it is desirable to disavow any limitation which would exclude the statements of one whose intimacy with the family could leave no doubt as to his sufficient acquaintance, equally with the family members, or the facts of the family history:

1848, Robinson, C. J., in *Doe* v. *Auldjo*, 5 U. C. Q. B. 175 (holding admissible testimony from a member of the family that an old body-servant, now deceased, had returned from Africa and told them of the death there of his master, an explorer, the ancestor in question): "There is therefore no improbability in the servant's relation, which seems to have been credited at the time and ever since . . . and after fifty years parties are relieved from the necessity of attempting to account for him. . . . No better evidence would be required than the account brought back by his faithful servant to his family, and accredited by them and by the government which employed him."

The only reasoned defence of the narrower rule is found in the following opinion:

1824, Johnson v. Lawson, 2 Bing. 86; declarations of one who had been a housekeeper in the family for 24 years were rejected. Best, C. J.: "Evidence of that kind must be subject to limitation, otherwise it would be a source of great uncertainty; and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations

from acquaintances of a particular ancestor in Ireland, because the witnesses "have not derived their information from such persons as had any connection or particular acquaintance with the family from which John M'Neil sprang"); *Oklahoma:* 1921, O'Neill *v.* Lauderdale, 80 Okl. 170, 195 Pac. 121 (identity of parentage; testimony of G., grandson of "the G's who had reared E. L.", that he had heard his grandmother and uncle say that E. L.'s "mother was dead, and that she was an orphan", held not qualified); *Oregon:* 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 (neighbor speaking only from repute; excluded); *Pennsylvania:* Dinan *v.* Supreme Council, 201 Pa. 363, 50 Atl. 999 (health board's certificate, undertaker's coffin-plate, and newspaper obituary notice, stating the deceased's age, and founded on conflicting statements of various members of the family, excluded); *Texas:* 1889, Howard *v.* Russell, 75 Tex. 171, 176, 12 S. W. 525 (recitals in an ancient masonic lodge-record, as to the domicile of a visitor, received, as involving a question of pedigree); 1899, Turner *v.* Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358 (declarations as to H.'s death, by persons who were with him, admitted); 1899, Lewis *v.* Bergess, 22 Tex. Civ. App. 54 S. W. 609 (declarations of a friend who went with H. to the Mexican war, that he served in the army and died there unmarried, admitted); *West Virginia:* 1884, Peterson *v.* Ankro, 25 W. Va. 56, 61, 63 (affidavit of an intimate friend; undecided).

Distinguish the following, which seems to involve the principle of § 1788, *post:* 1897, Posey *v.* Hanson, 10 D. C. App. 497, 507 (in rebutting the presumption of death, the fact of the person being "heard from" may include the hearsay of persons not members of the family).

of the family, affords a rule at once certain and intelligible. If the admissibility of such evidence were not so restrained, we should on every occasion, before the testimony could be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant."

It may be noted, as to this reasoning, first, that its result is inconsistent with the general language used in earlier judicial opinions (*ante*, § 1486), and is supportable only on the narrow test of Lord Erskine before mentioned; secondly, that the special reason given, namely, the inconvenience of an investigation into sources of knowledge, is anomalous in the law of Evidence; for no Court is allowed to decline to investigate the sources of a witness' qualifications so far as may be necessary, while in each case the investigation need be no more tedious than the judge's discretion permits; and, finally, that the proof of intimacy in the household would surely be no more tedious than proof of family membership is often found to be.

§ 1488. **Same: Reputation in the Neighborhood or Community.** The use of declarations of individual friends and intimates is to be distinguished from the use of reputation in the neighborhood or community. The elements of trustworthiness that are found in a community-reputation, and are recognized as sufficient to render it evidential in certain classes of cases are examined under the Reputation-Exception to the Hearsay rule, and the application of that principle to facts of family history (such as race-ancestry, marriage, birth, and death), can there best be dealt with (*post*, § 1605). In the Courts recognizing the use of neighborhood-reputation for the present class of facts, the recognition has historically been reached often as a direct extension of the principle of family-reputation.

§ 1489. **Same: Declarations of Relatives; Distinctions between Different Kinds of Relatives.** Is there any reason for excluding any class of relatives as not having probable adequate information?

1. First, there has been no attempt to rule out specific consanguines because of the *remoteness of relationship*. This might, perhaps, well be done in a given case; but the rule has apparently crystallized with this arbitrary limit.

2. Next, should any distinction be made between a *relation by blood* and a *relation by marriage*, to the disadvantage of the latter? All that can be said for such a distinction is that relations by marriage are likely to be less intimate in the family circle and to have little or no interest depending upon a chance of inheritance. But the general likelihood of their being correctly informed is perhaps quite as great as for distant consanguineous relations, and is sufficient in the ordinary instances. As a matter of precedent, the statements of one who is a *party to a marriage* are regarded as acceptable (*i.e.* statements regarding the other marital party's family history). Historically, this was first settled for the case of a declarant *husband:*[1]

§ 1489. [1] *Accord:* 1825, Doe *v.* Harvey, 1 Ry. & Mod. 297; 1843, Jewell's Lessee *v.* Jewell, 1 How. U. S. 231.

1806, L. C. ERSKINE, in *Vowles* v. *Young*, 13 Ves. 140: "The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out. . . . As far as hearsay is evidence of anything within the knowledge of a man, no man can be supposed ignorant of the reputation of the descent of his wife. . . . But it must be considered whether that can extend to mere collateral declarations of this kind [a wife's illegitimacy], where there is no interest in the husband. . . . Consider, then, whether the knowledge of the husband as to the legitimacy of his wife is not likely to be more intimate, and his interest stronger, than that of any relation however near in blood. First, if she has an estate tail, he is tenant by the curtesy. Has he not an interest in knowing her legitimacy, his expectation depending upon it? So as to her personal estate, he is entitled to all that comes to her. Is not that a strong interest?"

Then, tardily, it was settled for the case of a declarant *wife*.[2] Furthermore, in general, the declaration of any person connected on one side of a marriage concerning relationship in the family on the other side would probably be received, unless the actual absence of adequate information should be made to appear in a given instance:[3]

1828, BEST, C. J., in *Doe* v. *Randall*, 2 Moo. & P. 25: "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is become a member than a relation who is only distantly connected by blood, as by frequent conversation the former may hear the particulars and characters of branches of the family long since dead."

§ 1490. **Same: Declarant's Qualifications must be shown.** Upon the general principle for testimonial knowledge (*ante*, § 654), the qualifications of the deceased declarant — his *relationship*, or whatever is relied upon as equipping him with information — *must be shown* in advance.[1] In other words,

[2] 1857, Shrewsbury Peerage Case, 7 H. L. C. 22, 26; presumably superseding Davies *v.* Lowndes, 1843, 7 Scott N. R. 188, and confirming Doe *v.* Randall, 1828, 2 Moo. & P. 25.

[3] *Accord:* Codes cited *ante*, § 1480; 1840, People *v.* Fire Ins. Co., 2 Wend. N. Y. 209 (admitting declarations by deceased members of the family of a grandson of a maternal uncle of W., the propositus, as to the non-existence of collateral relatives of W. on the paternal side); 1905, State *v.* Hazlett, 14 N. D. 490, 105 N. W. 617 (mother's father's family Bible admitted); 1894, Pickens' Estate, 163 Pa. 14, 28 Atl. 875.

Contra: 1895, Turner *v.* King, 98 Ky. 253, 32 S. W. 941 (a family Bible of the testator's mother's father, to show the testator's age, excluded as not being the reputation of the testator's family; this is unsound; is not a grandchild a member of the grandfather's blood-family?).

§ 1490. [1] *Eng.* 1810, Banbury Peerage Case, 2 Selw. N. P. 764, and in App. to LeMarchant's Gardner Peerage Case, 410, 412; *Can.* 1848, Doe *v.* Servos, 5 U. C. Q. B. 284, 289; *U. S.* 1886, Fulkerson *v.* Holmes, 117 U. S. 389, 6 Sup. 780; 1921, Ross' Estate, 187 Cal. 454, 202 Pac. 641; 1905, Lanier *v.* Hebard, 123 Ga. 626, 51 S. E. 632; 1919, Liliuokalani's Estate, 25 Haw. 127; 1906, Hoyt *v.* Lightbody, 98 Minn. 189, 108 N. W. 818, 843; 1882, Wise *v.* Wynn, 59 Miss. 592; 1904, Grand Lodge *v.* Bartes, 69 Nebr. 631, 98 N. W. 715; 1906, Bernards Tp. *v.* Bedminster Tp., 74 N. J. L. 92, 64 Atl. 960; 1901, Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135; 1880, Thompson *v.* Woolf, 8 Or. 463; 1884, Sitler *v.* Gehr, 105 Pa. 592; 1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174.

Of course, also, it must be shown that the *witness on the stand*, reporting the family reputation, has sufficient *acquaintance with the family* to know what that reputation is; this, again, is an ordinary question of the testimonial qualifications, *i.e.* of the witness on the stand, and is not peculiar to the Hearsay exception: 1883, Harland *v.* Eastman, 107 Ill. 539; 1854, Emerson *v.* White, 29 N. H. 491; 1820 Jackson *v.* Browner, 18 Johns. N. Y. 29; 1814, Barnet's Lessee *v.* Day, 3 Wash. C. C. 243; 1869, Eaton *v.* Tallmadge, 24 Wis. 222.

But the witness on the stand need not be *related* to the family of the declarant: 1900, Elder *v.* State, 124 Ala. 69, 27 So. 305; 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967; 1913, McLain *v.* Woodside, 95 S. C. 152, 79 S. E. 1. *Contra:* 1915, Mobley *v.* Baxter &

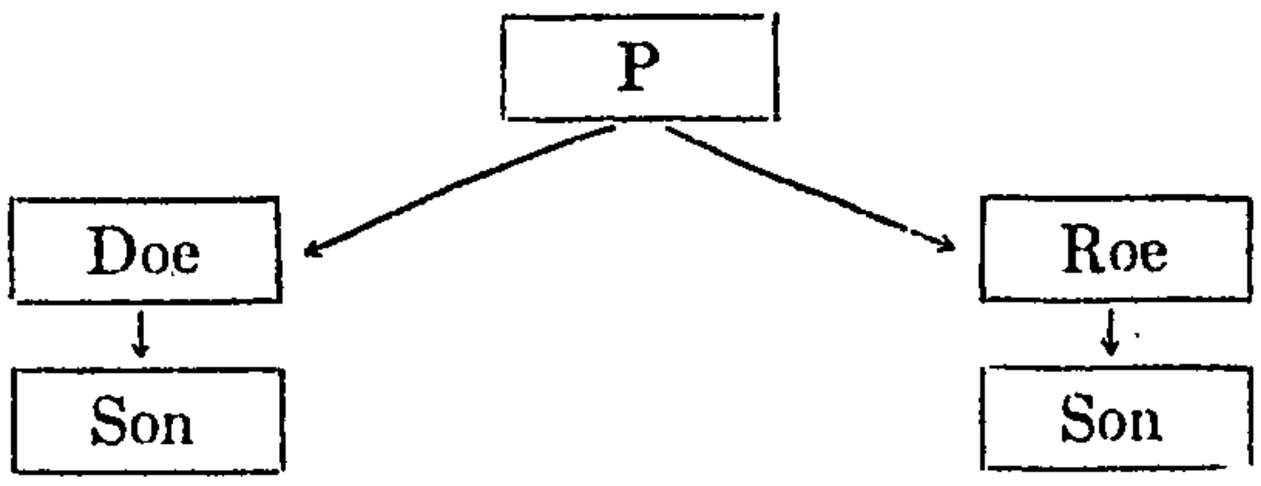
the relationship of the declarant to the family whose history he refers to must be shown by evidence independent of his mere declaration; otherwise, there would be a begging of the question.

The only apparent exception is found in the case of a declarant speaking of his own personal history, — for example, of his marriage.[2] But obviously a person is qualified to speak of himself; it is only where a relationship with others is involved that the fact must be made to appear independently.

§ 1491. **Same: Relationship always Mutual; Connecting the Declarant with Both Families.** It follows, in applying the foregoing principle, that where an alleged relationship between Doe and Roe is to be testified to, a relation of Doe may speak to it, because it concerns the relationships of Doe's family, while a relation of Roe may equally speak to it, because it concerns the relationships of Roe's family; hence, all that is required of the declarant is a *connection with either one or the other*, but *not with both*.

This truth, however, has been obscured by what must be regarded as erroneous rulings. The question being whether Doe is related to Roe (for example, so as to share in Roe's inheritance), the argument has been that it would be idle to require merely that the declarant should be shown to be related to Doe alone, because then any family could connect itself with any other by its members' mere assertion of the relationship. But the proper way to approach the question seems to be a different one, and is as follows:

Suppose that Roe's inheritance from P is in issue, and a declaration of Doe's deceased son is offered that Roe was the brother of Doe, the declarant's father; thus:



Any member of Doe's line may declare as to the relationships (*i.e.* memberships) of that family, and any member of Roe's line may declare as to the relationships (*i.e.* memberships) of that family; and the qualifications of

Co., 143 Ga. 565, 85 S. E. 859 (opinion obscure); 1915, Mobley *v.* Pierce, 144 Ga. 327, 87 S. E. 24 (same evidence, and same ruling).

Nor need the *witness on the stand*, of course, have *personal knowledge* of the fact, provided he knows the family repute: Cases cited *supra*.

[2] 1915, Colbert's Estate, 51 Mont. 455, 153 Pac. 1022 (certain declarants held sufficiently qualified; citing the above text with approval); 1819, Allen *v.* Hall, 2 Nott & McC. S. C. 114 (partition; defendants claiming against a grantee from their ancestor's alleged wife were allowed to show their ancestor's declarations that he was not married).

Of course a deceased declarant's statements about *his own* age, birth, etc., are admissible under the present rule: 1905, Travelers' Ins. Co. *v.* Henderson C. Mills, 120 Ky. 218, 85 S. W. 1090; 1907, Taylor *v.* Grand Lodge, 101 Minn. 72, 111 N. W. 919; this is assumed in the English cases settling the rule.

Compare § 268, *ante* (conduct as evidence of marriage), and § 2063, *post* (testimony to illegitimacy of offspring during marriage).

the declarant, as such member, must of course be shown beforehand, like the qualifications of any witness (*ante*, § 1486). Thus, before declarations of a supposed member of Doe's family can be admitted, the declarant's membership in Doe's family — for example, that he is Doe's son — must be shown. But that is the whole effect of this requirement. The further question, if any, is, whether a declaration of Doe's son that Doe is related to Roe (for example, is Roe's brother) *is a declaration as to Doe's family at all*, — *i.e.* whether it is, for the case in hand, solely a declaration about Roe's family-relationships, as to which Doe's son is by hypothesis not yet shown to be a qualified declarant. Now the state or condition of relationship must always in effect, though not in form, be double or mutual;[1] *i.e.* the fact that Doe is brother to Roe is also the fact that Roe is related as brother to Doe. Hence, a statement of Doe's son that Doe is brother to Roe, though in one form an assertion of Roe's relationships, is also and equally a declaration that one of the relations of Doe (*i.e.* one of the members of Doe's family) is Roe, — for example, that one of the sons of Doe's father is Roe. It is therefore a declaration upon which Doe's son is qualified to speak. The doubt, then, can only be as to whether it should make any difference that in the case in hand it is Roe's descendants who are seeking Doe's estate or Doe's who are seeking Roe's estate. This surely cannot affect the evidential value of the declarations; for that must depend on the circumstances at the time of making, and no one has ever contended that, apart from the 'lis mota' and kindred limitations (*ante*, §§ 1483, 1484), it makes any difference whether the declarant belongs to a poor or obscure branch of the family or to a rich and notorious one. Moreover, it is usually at a later date only that it has become apparent which branch would have a pecuniary interest in connecting itself with the other. The difference, then, is a matter of the form of statement only, and such assertions as the above must be treated as in substance declarations as to Doe's family-relationships; whether it is one or the other family that *now happens to be seeking the inheritance is immaterial*.[2]

§ 1491. [1] L. C. Brougham, in Monkton *v.* Attorney-General, cited *infra:* "It is not more true that things which are equal to the same thing are equal to one another than that persons related by blood to the same individual are more or less related to each other."

[2] *Accord: England:* 1831, Monkton *v.* Attorney-General, 2 Russ. & M. 147 (declarations of J. T. as to the relationship of S. T. and G. T. were admitted, J. T.'s kinship with G. T., but not with S. T., being first shown; Lord Brougham, L. C.: "I cannot go to the length of holding that you must prove him to be connected with both the branches of the family touching which his declaration is rendered"); *United States:* 1906, Scheidegger *v.* Terrell, 149 Ala. 338, 43 So. 26, *semble*, 1901, Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854 (recitals of grantors' heirship of J. C. in an ancient deed by J. J. C. and others, held sufficient to prove J. C. the ancestor of J. J. C.); 1884, Sitler *v.* Gehr. 105 Pa. 577, 592 ("The declarants were A. M. G. and John G.; the plaintiff's ancestor was Joseph G.; the deceased ancestor was Balser G., of Berks County. It was not denied that the declarants were of the family of Joseph G., and it was attempted to show by their declarations that the above-named Joseph G. and Balser G. were related to each [other]. . . . The plaintiffs in error contend, not only that the declarants must be shown by evidence 'aliunde' to be related to the family as to which declarations were made, but also that they must be thus shown to be related to the person who died seised. . . . Although there is some conflict in the cases, the weight of authority seems to be that while a declarant must be shown by evidence 'aliunde' to belong to the family, it does not appear to be necessary to

Any other rule would produce this singular inconsistency, that if in 1863, Doe and Roe being both poor, Doe's son James mentions Roe in a letter as his father's brother, and then dies in 1864, and if in 1884 litigation arises and James is proved to be the son of Doe, his letter would be received if Doe had become the wealthy one and Roe's relatives were claiming a share, but would be rejected (without other proof) if Roe had happened in the meantime to become the wealthy one and Doe's relatives were seeking a share. Yet this seems to be the practical consequence of the doctrine laid down by the Federal Supreme Court.[3]

show that he belongs to the same branch of it"; Monkton *v.* Attorney-General followed); 1891, Robb's Estate, 37 S. C. 19, 22, 33, 36, 16 S. E. 241 (declarations of G., son of M. M., whose sister was J. M., that R. was the son of R. and J. M., admitted; the family to which it was necessary to connect the declarant being that of M., not R.).

Compare the cases cited *post*, § 1573 (recitals of heirship in *ancient deeds*), which often give the same result.

Where the declarant is the *intestate himself*, his declarations may be received as admissions of a predecessor in title (*ante*, § 1082), and the present question need not arise; *e.g.*: 1918, Friedman's Estate, 178 Cal. 27, 172 Pac. 140 (persons claiming that declarant is a member of their family, held not entitled to require that his relationship be shown by the opponent when offering declarations; James' Estate, *post*, § 1495, doubted); 1901, Malone *v.* Adams, 113 Ga. 791, 39 S. E. 507 (one claiming as niece and heir, allowed to prove her relationship to the decedent by the decedent's declarations; distinguishing Greene *v.* Almand, 111 Ga. 735, 36 S. E. 957, which, however, seems *contra*).

[3] The following cases take the stricter view: CANADA: 1849, Dunlop *v.* Servos, 5 U. C. Q. B. 288 (here the plaintiff claimed as heir of J. D., and declarations of A. D., the plaintiff's father, that the plaintiff was the heir, were offered; it was held that A. D.'s relationship to J. D. must first be shown); UNITED STATES: *Federal:* 1865, Blackburn *v.* Crawfords, 3 Wall. 187 (declarations by A, sister of B, that B was married to X, the brother of Y, whose property-succession was in issue, were rejected, because the declarant did not belong to the family whose pedigree was in issue); *Columbia (Dist.)*: 1896, Jennings *v.* Webb, 8 D. C. App. 43, 56 (Blackburn *v.* Crawfords, U. S., followed); *California:* 1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support plaintiff; the testator's declarations that he was only the guardian of the plaintiff, excluded on the present principle; of course this is erroneous; it is a pity that the negative form of such statements seems to puzzle and mislead the minds of so many judges; if we have regard to the general principles of the Exception, and imagine a man having a boy in his family and about to speak of his relationship with the boy, it is obvious that his utterances will be neither more nor less credible whether on speaking he happens to say "He *is*" or "He is *not* my son"; *i.e.*, it is the *subject* of sonship that makes it a pedigree utterance, not the negative or affirmative tenor of the assertion); *Georgia:* 1914, Terry *v.* Brown, 142 Ga. 224, 82 S. E. 566 (whether William H. was the only son of Wilson H.; declarations to that effect by William H. and by his mother as wife of Wilson H., all being deceased, were excluded; following Greene *v.* Almand, cited *supra*, n. 2; but, per Lumpkin, J., "that decision fell into error, and is contrary both to sound reason and to the great weight of authority; disapproving Blackburn *v.* Crawfords, U. S., and approving the text above); *Illinois:* 1912, Jarchow *v.* Grosse, 257 Ill. 36, 100 N. E. 290 ("where the claimant is seeking to reach the estate of the declarant himself, . . . such declarations are admissible"; thus accepting the unsound distinction); 1920, Nolan *v.* Barnes, 294 Ill. 25, 128 N. E. 293 (action by heirs to set aside a deed of Annie N., deceased; N.'s declarations as to who were her relatives, admitted, without other evidence of her relationship to them, the declarant's estate being the subject in controversy); *Mississippi:* 1882, Wise *v.* Wynn, 59 Miss. 588, 592 (C. W.'s estate being claimed by children of an alleged brother T. W., C. W.'s declarations that he had a brother T. W., admitted; but they would have been excluded if the claim here had been by C. W.'s children to T. W.'s estate); *Missouri:* 1912, Vantine *v.* Butler, 240 Mo. 521, 144 S. W. 807 (John B. and Jane B. had three children, and then John separated from his wife pregnant with a fourth, born thereafter; afterwards he married again; the plaintiff, Lizzie V., was the adopted child of W., and married V.; she claimed to be the last child of John B.; the declarations of the plaintiff's mother, calling herself Jane Butler, and stating that John Butler was her husband, admitted; the opinion does not note the point, but nevertheless admits the evidence, on the ground that the relationship of Jane to John was otherwise

§ 1492. **Same: Relationship of Illegitimate Child.** It has been ruled in England that where the relationship claimed and to be testified to is that of an *illegitimate* child, the father's relations are not qualified declarants, because (apparently) the claimant is legally not of the declarant's family.[1] But this seems a mere juggling with legal rules. The question is, Was the declarant in such a position as to be likely to know something of this alleged fact of family history? Whether the illegitimate child is or is not a lawful heir according to the rules of the substantive law about succession, is quite beside the point in determining the evidential question of the declarant's probable information. The principle of the ruling has been disapproved in England,[2] and ought not to be followed in this country.[3]

It seems never to have been doubted that the declarations of the *parents themselves*, or the repute in the household where the child lived, as to a child's legitimacy or illegitimacy, are receivable;[4] although it is obvious that upon

sufficiently evidenced); *New Jersey:* 1911, Hubatka *v.* Maierhoffer, 81 N. J. L. 410, 79 Atl. 346 (action by a daughter to obtain title to land of her mother; a deed conveyed to Josephine M. and the defendant M.; the issue was whether Josephine was the wife of M.; Josephine's declarations that she was not were held inadmissible; same fallacy; the declarations of J. ought to be interpreted as declarations about *her* relationships as including M., hence she is qualified; it is strange how difficult this simple idea seems to many learned judges); *New York:* 1914, Aalholm *v.* People, In re Kenneally, 211 N. Y. 406, 105 N. E. 647 (rule of Blackburn *v.* Crawfords followed, and Monkton *v.* Att'y-Gen'l distinguished; Werner, J., in a careful but unconvincing opinion, discusses the principle).

In Plant *v.* Taylor, 1861, 7 H. & N. 226, 237, the reasoning is hopelessly confused.

§ 1492. [1] 1863, Crispin *v.* Doglioni, 3 Sw. & Tr. 44 (declarations of J. as to the relationship of illegitimate son which the plaintiff claimed with J.'s brother were excluded, by Sir C. Cresswell, because "the plaintiff according to his own account is 'filius nullius' by our law"). *Accord:* 1837, Doe *v.* Barton, 2 Moo. & Rob. 28 (declarations of B., an illegitimate son, as to the death of an illegitimate brother, excluded).

[2] 1879, Murray *v.* Milner, L. R. 12 Ch. D. 849 (admitting declarations in a will as to the naturalness of a child, *semble*). The following ruling seems to require too much: 1871, Hitchins *v.* Eardley, L. R. 2 P. & D. 248 (whether M. was the legitimate child of J. and L.; M.'s declarations admitted, after a 'prima facie' case of legitimacy was otherwise made out).

[3] It has however been at least twice approved: 1896, Flora *v.* Anderson, 75 Fed. 217, 234 (following Crispin *v.* Doglioni); 1844, Northrop *v.* Hale, 76 Me. 312 (approving Crispin *v.* Doglioni, but here admitting declarations of the mother's sister, because a bastard is legally of his mother's family).

Contra, admitting the statements: 1907, Champion *v.* McCarthy, 227 Ill. 87, 81 N. E. 808 (whether plaintiff H. was the illegitimate son of S. the mother of J., who was also an illegitimate, and the intestate; S. was married to C. and had also legitimate children; declarations of J., S., and deceased members of the C. family, as to H. being a relative, held admissible; rule of Crispin *v.* Doglioni repudiated); 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 (declarations of the illegitimate child's father's sister, in whose home the illegitimate intestate was brought up; also of a half-brother of the illegitimate intestate by a subsequent lawful marriage).

Compare Barnum *v.* Barnum, in the next note.

[4] *Eng.* 1777, Goodright *v.* Moss, Cowp. 594 (quoted *post*, § 1497); 1791, Goodright *v.* Saul, 4 T. R. 356 ("the reputation in the family of the son's being a bastard", received without question); *U. S. Cal.* 1901, Heaton's Estate, 135 Cal. 385, 67 Pac. 321 (claim of inheritance as illegitimate child of H.; declarations of H., in whose family the claimant lived, held admissible); 1903, Heaton's Estate, 139 Cal. 237, 73 Pac. 186 (preceding ruling affirmed); *Colo.* 1874, Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 453, 460; *Ia.* 1862, Niles *v.* Sprague, 13 Ia. 198, 207; 1899, Watson *v.* Richardson, 117 Ia. 673, 80 N. W. 407; 1901, Alston *v.* Alston, 114 Ia. 29, 86 N. W. 55 (declarations as to paternity of a conceded illegitimate child, admitted); 1914, Robertson *v.* Campbell, 168 Ia. 47, 147 N. W. 301 (illegitimate child's claim to inheritance; the deceased father's recognition being in issue under Code § 3385, his declarations of paternity were admitted); *La.* Rev. Civ. C. 1920, §§ 193, 194 (quoted *post*, § 1606); *Md.* 1848, Copes *v.* Pearce, 7 Gill 247, 264; 1875, Barnum *v.* Barnum, 42 Md. 251, 304 (declara-

the false theory of Crispin *v.* Doglioni, the father's declarations of illegitimacy would be inadmissible. There is a danger of being too nice in the logical application of the substantive law of relationship to the present testimonial rule, which rests rather upon the moral probabilities of trustworthiness in the declarant.

Apart from the evidential question of using the parents' declarations is the question of substantive law, whether the parents have *acknowledged an illegitimate child* so as to fix his status by an act equivalent to adoption. This question can hardly arise for a legitimate child; for the birth during marriage constitutes legitimacy. But in the Continental system of law a status of quasi-legitimacy — that of the "natural" child — may be bestowed by acts of acknowledgment as defined by law; and in several American States a partial and unsystematic legislative measure has introduced a similar principle. This aspect is considered *post*, § 1606.

§ 1493. **Same: Testimony to one's Own age.** Testimony to one's own age may be treated in one of two ways. (1) The objection may be made that the statement on the stand (for example, "I am twenty years of age", or, "I was born January 1, 1860") is not founded on adequate knowledge. Whether it is so, although not based on personal observation and direct memory, but on hearsay sources, is a question of Testimonial Qualifications. From this point of view, it should nevertheless be regarded as admissible; and is therefore accepted by most Courts (*ante*, § 667). (2) But if it is not, it may still be admissible, under the present Exception, as in effect an assertion of the family reputation. Some Courts so treat it, and therefore admit it.[1] The only question can then be whether it is necessary to show that all the members of the family are unavailable (*ante*, § 1481).

tions of the mother of R. as to the non-marriage of R. and C., and the illegitimacy of their child J., admitted); 1894, Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752 ("declarations of deceased parents are admitted as evidence to prove the legitimacy of their children"); *Mass.* 1862, Haddock *v.* R. Co., 3 All. 298 (deceased mother's statement that her daughter was illegitimate, admitted); *Mich.* 1919, Kotzke *v.* Kotzke's Estate, 205 Mich. 184, 171 N. W. 442 (mother's statements of paternity of illegitimate child, admitted; also the family repute); *N. Car.* 1890, Woodward *v.* Blue, 107 N. C. 407, 410, 12 S. E. 453 ("Was not the violent grief of David, the king, upon the death of the child, some corroboration that he, and not Uriah, was its father?"); *Okl.* 1915, Johnson *v.* Perry, 54 Okl. 23, 153 Pac. 289 (inheritance; deceased mother's affidavit, in an application for Indian enrollment, of illegitimacy of a child, admitted).

If the declarant is available, such statements are of course inadmissible: 1825, Stegall *v.* Stegall's Adm'r, 2 Brockenb. 256, 262.

Compare the cases cited *ante*, § 269 (*parents' conduct* as evidence of legitimacy).

Distinguish the question whether a parent may testify to facts of *non-access* as evidencing the illegitimacy of a child born *after marriage*, *post*, § 2063.

For *community-reputation* of illegitimacy, see *post*, § 1605.

§ 1493. [1] 1880, Cherry *v.* State, 68 Ala. 30; 1888, Kreitz *v.* Behrensmeyer, 125 Ill. 141, 185, 17 N. E. 232 ("What was your reputed birthday in the family?", allowed, the father being out of the jurisdiction); 1892, Houlton *v.* Manteuffel, 51 Minn. 185, 187, 53 N. W. 541; 1894, State *v.* Cougot, 121 Mo. 463, 26 S. W. 566 ("that a witness may be permitted to state his or her own age, subject to cross-examination as to the sources of his or her information, is the settled practice"; but here excluded because it appeared to rest solely on perusal of a church record); 1897, State *v.* Marshall, 137 Mo. 463, 39 S. W. 63, *semble;* 1891, State *v.* Best, 108 N. C. 749, 12 S. E. 907; 1845, Watson *v.* Brewster, 1 Pa. St. 383; 1884, Sitler *v.* Gehr, 105 Pa. 592; 1877, Hart *v.* Stickney, 41 Wis. 630, 638 ("It was a matter of repute in the family when the defendant was born, and though he could not

§ 1494. **Same: Statements of Family History, to Identify a Person.** Where a mere question of identity of person is involved, *i.e.* whether J. S., formerly of Millville, is the same person as J. S. deceased in San Antonio, all the personal marks of the two become relevant (*ante*, § 411). From this point of view the person's history, and in particular his beliefs and utterances, may have a bearing, and therefore his claims of relationship may be receivable. They are not offered testimonially, and therefore are not obnoxious to the Hearsay rule (*post*, § 1791). It is true that their testimonial use will tend to be employed by indirection, especially if in the case there is also an issue as to relationship. Yet, even when offered testimonially, it would seem that they are receivable without connecting the declarant to a particular family by other evidence, if they concern merely the declarant's personal doings (*ante*, § 1489). In any event, they are independently receivable so far as they serve legitimately the purpose of identifying one person with another.[1]

§ 1495. (*b*) **Form of the Assertion (Family Bibles or Trees; Tombstones, Wills, etc.).** According to the general testimonial principle (*ante*, §§ 789, 799), the testimonial statement may be in any form. It may be oral or written; it may consist in words or in conduct;[1] it may be made by the declarant's own writing, or by assenting to or adopting the writing of another. This is equally true, whether the statement offered be an individual's assertion or the family repute:

1777, Lord MANSFIELD, C. J., in *Goodright* v. *Moss*, Cowper 594: "Suppose from the hour of one child's birth to the death of its parent it had always been treated as illegitimate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in a family mansion (as the Duke of Buckingham's was), are all good evidence."

1806, ERSKINE, L. C., in *Vowles* v. *Young*, 13 Ves. 140: "Inscriptions upon tombstones are admitted, as it must be supposed the relations of the family would not permit an inscription without foundation to remain. So engravings upon rings are admitted upon the presumption that a person would not wear a ring with an error upon it."

1811, MANSFIELD, C. J., in *Berkeley Peerage Case*, 4 Camp. 416: "If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate."

have any personal knowledge of [the date of] his birth, yet he might testify as to his age as he had learned it from his parents and relatives"; yet the point was not "absolutely decided").

Contra: 1847, Doe *v.* Ford, 3 U. C. Q. B. 352 (deceased person's statement as to his own age, excluded, as not based on "personal knowledge"; here his testamentary capacity was involved).

Compare the cases cited *ante*, § 1486.

Of course, a *deceased* declarant's statement as to his *own age* is admissible; cases cited *ante*, § 1490, n. 2; and doubtless in many of the earlier precedents this is assumed.

§ 1494. [1] 1915, Colbert's Estate, 51 Mont. 455, 153 Pac. 1022 (heirship; deceased relatives' statements that C. spoke German, etc., admitted; citing the above text with approval); 1900, Young *v.* State, 36 Or. 417, 59 Pac. 812, 60 Pac. 711 (John F.'s property was escheated; plaintiff claimed it as heir of Jonas F., identical with John F.; declarations of John F. as to his family relationships with persons of plaintiff's family, admitted, as identifying circumstances); and cases cited *ante*, §§ 270, 413, *post*, § 1791.

Compare also some of the cases cited *post*, § 1502.

The practical difference between the present rule and that of the principles above cited would be that the death of the declarant must here be shown.

§ 1495. [1] For *conduct*, as evidence of marriage and legitimacy, see also *ante*, §§ 268, 269, *post*, § 1606.

1880, Lord BLACKBURN, in *Sturla* v. *Freccia*, L. R. 5 App. Cas. 641: "Such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them or assented to them, or did anything that amounted to showing that they recognized them."

That the document containing the assertion is a formal one — as, a deed or will — does not make the assertion inadmissible.[2] That the assertion is made in the course of a deposition or trial-testimony is immaterial, so long as the litigation does not involve a controversy rendering the statement biassed and untrustworthy.[3]

An assertion may have necessary implications which should be given full effect by natural interpretation; for example, an assertion by a woman that she is a widow implies clearly enough that her husband is deceased.[4] Even the failure to make an express assertion, where it would naturally have been made if the fact existed, may (on the same principle as in § 1071, *ante*) be construed as an assertion that the fact does not exist.[5]

§ 1496. (2) **Authentication; Proving Individual Authorship; Family Bible.** The principles of Authentication (*post*, § 2129), as applicable to proof of the execution or genuineness of a writing, are in general applicable to a writing offered under the present exception. No special considerations here need attention, except as regards the necessity of proving the handwriting of entries in family Bibles or the like. The fundamental idea of Authentication is to connect the writing with the person alleged to be its author. Now under the present exception the testimonial statement may be the assertion either of an individual member or of the family. Hence, it is not necessary, where a family Bible or family tree is offered as embodying the *family repute*

[1] 1867, Smith *v.* Tebbitt, L. R. 1 P. & D. 354 (deed); 1879, Murray *v.* Milner, L. R. 12 Ch. D. 349 (will); 1901, Heaton's Estate, 135 Cal. 385, 67 Pac. 331 (will); 1900, Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942 (will).

For recitals of pedigree in *ancient deeds*, see *post*, § 1573. For the use of a *family Bible*, see cases cited *ante*, §§ 1481, 1484, and *post*, § 1496.

[2] Cases cited *ante*, §§ 1483, 1484. The opinion of the judges in the Banbury Peerage Case, 1809 (extracted in 2 Selwyn's Nisi Prius, c. 18, 11th Eng. ed., p. 765), excluding a certain bill in chancery, as a "declaration respecting pedigree", is supportable on the ground that the fact of legitimacy, asserted in the bill, was apparently already in controversy, for the bill was filed to perpetuate testimony of that fact. For the use of depositions, bills, and answers, as *parties' admissions*, see *ante*, §§ 1065, 1075.

For *certificates* and *registers* of marriage, birth, or death, see *post*, § 1642.

[3] 1897, Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601 (recital in a deed by a woman that she was a widow, admitted to show the fact of her husband's death); 1899, James' Estate, 124 Cal. 653, 57 Pac 579 (declarations of intestate, that he was unmarried, not admissible for heirs denying the alleged wife's claim; unsound, because the intestate virtually declared that there was in his family no person who was his wife); 1918, Friedman's Estate, 178 Cal. 27, 172 Pac. 140 (declarations that he had "no one left", etc., admitted; James' Estate doubted).

A statement that a person is the declarant's "sister" or the like is to be construed as asserting legitimate relationship: 1867, Smith *v.* Tebbitt, L. R. 1 P. & D. 354.

[4] 1812, Doe *v.* Griffin, 15 East 293 (that an absent family-member had never been heard of in the family as married, admitted); 1852, Crouch *v.* Hooper, 16 Beav. 182, 186 (omission of entry in baptismal register, though other children were entered, admitted); 1913, Uuku *v.* Kaio, 21 Haw. 710, 719 (that the witnesses "never heard from I. and K. that P. was I.'s half-brother", admitted); 1848, Copes *v.* Pearce, 7 Gill Md. 247, 265 (lack of entry of alleged illegitimate child's name in family Bible; not given weight on the facts).

to prove the entry to be that of an individual member, for its adoption by the family makes it a family assertion:[1]

1860, BIGELOW, C. J., in *North Brookfield* v. *Warren*, 16 Gray 174 (speaking of a pedigree-chart): "They are in their nature public, openly exhibited, and well-known to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record."

1876, ALVEY, J., in *Jones* v. *Jones*, 45 Md. 160: "Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament, for then the entries, as evidence, derive their weight not more from the fact that they were made by any particular person than that, being in that place as a family registry, they are to be taken as assented to by those in whose custody the book has been kept."

On the other hand, if the signature of a *specific member* of the family can be authenticated, proof of this general family-recognition, by a public exposure of the writing, is not needed:

1831, L. C. BROUGHAM, in *Monkton* v. *Attorney-General*, 2 Russ. & M. 163 (admitting a signed chart): "It is urged . . . that the principle of all those cases would exclude such a pedigree as this, which was not hung up or in any way made public. . . . But why is it that the publicity is relied upon in those cases? Why is it that the family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because in all those cases the publicity supplies a defect, there existing but not here existing, — the want of connection between the pedigree, the tombstone, the ring, or the Bible with particular individuals, members of the family. . . . The presumption is, it would not be suffered to remain if the whole of the family did not more or less adopt it and thereby give it authenticity."

Moreover, even where it is offered as an individual's assertion, the individual's personal execution of the writing is not always essential; for he may

§ 1496. [1] *Eng.* 1846, Perth Peerage Case, 2 H. L. C. 876 (held sufficient, where the documents had been hung up on the wall of a room of a family relative, the room being a general reception-room to which all visitors had access); 1866, Hubbard *v.* Lees, L. R. 1 Exch. 258 (family Bible); *U. S.* 1896, People *v.* Ratz, 115 Cal. 132, 46 Pac. 915 (a family Bible with entries in English; the fact that the mother, who authenticated it, could not read or write English, held immaterial); 1898, People *v.* Slater, 119 Cal. 620, 51 Pac. 957 (family Bible received to show the date of a child's birth); Ky. St. 1916, Mar. 18, p. 162 (age for school-attendance; family Bible admissible; quoted *post*, § 1644); 1879, Weaver *v.* Leiman, 52 Md. 719; 1915, Colbert's Estate, 51 Mont. 455, 153 Pac. 1022 (family Bible admitted; "the admissibility of a family Bible . . . does not depend upon authorship or authenticity of the entries"); 1848, Eastman *v.* Martin, 19 N. H. 157; N. Y. Cons. L. 1909, Penal § 817 (age of child; entry in a family Bible, admissible); 1905, State *v.* Hazlett, 14 N. D. 490, 105 N. W. 617 (grandfather's family Bible admitted); 1912, Peterson's Estate, 22 N. D. 480, 134 N. W. 751 (family Bible entries, received); 1896, Union Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421 (family Bible admissible, no matter who made the entry).

Contra: 1906, Bryant *v.* McKinney, 29 Ky. L. 951, 96 S. W. 809 (entry on a fly-leaf of a Bible, copied from another Bible, excluded; not authority cited for this point; the ruling is entirely unsound); 1897, Supreme Council *v.* Conklin, 60 N. J. L. 565, 38 Atl. 659 (family Bible, used in the family, with entries in different handwriting and in different inks; "there is no evidence showing when the dates were placed in the book or by whose authority"; not received to show the deceased father's age; no precedents cited); 1897, State *v.* Hairston, 121 N. C. 579, 28 S. E. 492 (handwriting of the mother in a Bible, spoken of as material).

In State *v.* Neasby, 188 Mo. 467, 87 S. W. 468 (1905), was admitted a paper containing pencil entries made at the time of each child's birth by neighbors at the father's request, who testified; this was really on the principle of § 748, *ante*, though treated by the Court under the present principle.

have adopted something written by another, — as, by wearing a ring engraved with a marriage-date, or by ordering a tombstone to be carved, or by carrying about a certificate of marriage.[2]

§ 1497. (3) **Production of Original Document; Preferred Writings.** If the statement offered is in the form of a writing, the general rule requiring the production of the writing itself (*ante*, § 1179), is of course applicable.[1] But if the object of the offer is an oral declaration of an individual, or the general unwritten family repute, the terms of no writing are in question, and the rule of production is not applicable. Furthermore, it has been already seen (*ante*, § 1335) that there is no general principle preferring written statements above oral statements; hence, the mere existence of a written statement, in the form of a Bible-entry or the like, does not render it necessary to use that writing in preference to independent oral statements otherwise admissible.[2]

2 and 3. Kind of Fact that may be the Subject of the Statement

§ 1500. **General Principle.** In considering what sort of facts it is that may be the subject of the declarations, it is seen that the limitations must rest partly on the principles of both the second and the third groups just considered; that is, (2) the circumstantial guarantee that ordinary family conversation will be indifferent and sincere is true of certain topics only, namely, the ordinary incidents of family life; while (3) the probability that the various members of the family will have fair information (*i.e.* will be testimonially qualified) is also true for certain topics only, namely, the topics that are most likely to be the subject of repeated conversation and of fairly definite knowledge.[1]

The combined effect of these two principles, therefore, is to limit the topics with which the declarations may be concerned to the *events regarded commonly as of importance in the family life.* This certainly includes the fact and date of birth, marriage, and death, and the fact and degree of relationship, — as has always been conceded. But there has been more or less fluctuation and uncertainty about the exact limits to be applied, and upon certain classes of facts some doubt still unnecessarily exists.

[2] 1874, Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 453, 461 (extracts from parish register, passport, etc., found among deceased's effects, and reciting his marriage and the birth and names of his children, admitted as statements of the deceased); 1900, Hall *v.* Cardell, 111 Ia. 206, 82 N. W. 503 (leaves of a family Bible, with entries said to be copied from another Bible, admitted).

§ 1497. [1] 1873, McDeed *v.* McDeed, 67 Ill. 545, 559 (leaf of Bible "blotched" but legible; production required); 1888, Kreitz *v.* Behrensmeyer, 125 Ill. 141, 185, 17 N. E. 232 (production of family-record required); 1913, Ewell *v.* Ewell, 163 N. C. 233, 79 S. E. 509 (copy of an entry in a family Bible).

[2] 1915, Carter *v.* State, 68 Fla. 143, 148, 66 So. 1000 (mother testifying to her child's age; her entry of the birth-date in the family Bible, not preferred); and cases cited *ante*, § 1336 and § 1339.

§ 1500. [1] "Family transactions," says Mansfield, C. J., in the Berkeley Peerage Case, 4 Camp. 416, "are naturally talked of among the relations of the parties. Therefore what is thus dropped in conversation *upon such subjects* may be presumed to be true."

§ 1501. **Declarations as to Place of Birth, Death, etc.** The *place* of birth or death — something more than the fact of birth or death — has by some Courts been thought to be an inadmissible subject. But there is no apparent reason to conclude that a statement on this topic is, from either of the above points of view, less trustworthy:

1847, KNIGHT-BRUCE, V. C., in *Shields* v. *Boucher*, 1 DeG. & Sm. 53 (declaring in favor of statements concerning the place of birth, place of residence, and the like, so far as material in a pedigree case): "I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories . . . like the present. . . . Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? . . . Nor are there, perhaps, any recollections or traditions of the old more readily communicated or more acceptable to an auditory of descendants than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy . . . and in the most striking manner with the reason [of the rule]."

Such is the conclusion to-day generally and properly accepted.[1]

The truth seems to be that the doubt as to receiving declarations of place was originally due solely to a misunderstanding of the obscure language of the ruling in R. *v.* Erith (*post*, § 1503); in that case the ruling actually proceeded on the nature of the issue involved (*post*, § 1503) — a pauper's settlement — and not on the kind of fact stated. In England this misunderstanding has now been recognized;[2] but in the United States it has had considerable influence, and a few Courts have excluded declarations as to place.[3]

§ 1502. **Sundry Kinds of Facts.** There is no definite or formal limitation as to the kind of fact that may be the subject of the statement.[1] The general

§ 1501. [1] *Eng.* 1812, Doe *v.* Griffin, 15 East 293 (ejectment; family repute that a member had died in the West Indies, admitted); 1844, Rishton *v.* Nesbitt, 2 Moo. & Rob. 554; 1861, Attorney-General *v.* Köhler, 9 H. L. C. 686; *U. S.* 1919, Paulsen's Estate, 179 Cal. 528, 178 Pac. 143 (death in Denmark); 1882, Wise *v.* Wynn, 59 Miss. 588, 591; 1818, Jackson *v.* Boneham, 15 Johns. N. Y. 227; 1884, Hammond *v.* Noble, 57 Vt. 193, 203, *semble*.

[2] 1847, Knight-Bruce, V. C., in Shields *v.* Boucher, 1 De G. & Sm. 40 ("If the place of birth in Rex *v.* Erith had been a genealogical fact, as it was not, — had been material, namely, for any genealogical purpose, which it was not, Lord Ellenborough and the Court of King's Bench might possibly have dealt with the evidence differently"). See also Lord Brougham, L. C., in Monkton *v.* Attorney-General, 2 Russ. & M. 156. *Contra* in Canada: 1885, Currie *v.* Stairs, 25 N. Br. 4, 10 (entries in a family Bible, not admitted to prove the place of birth).

[3] 1821, Brooks *v.* Clay, 3 A. K. Marsh, Ky. 550; 1826, Wilmington *v.* Burlington, 4 Pick. Mass. 175; 1876, Tyler *v.* Flanders, 57 N. H. 618, 624; 1827, Independence *v.* Pompton, 4 Halst. N. J. 212; 1875, Carter *v.* Montgomery, 2 Tenn. Ch. 229.

§ 1502. [1] *Admitted:* ENGLAND: 1844, Rishton *v.* Nesbitt, 2 Moo. & Rob. 554 (the existence of relatives in a certain town); 1861, Attorney-General *v.* Köhler, 9 H. L. C. 686 ("events in the early life of J. G. which identify him with G. K."; such as his trade, enlistment in the army, running away from home, sending home money, etc.); UNITED STATES: *Federal:* 1908, Cox *v.* Brice, 5th C. C. A., 159 Fed. 378 (that a person went to Texas, and was killed there while with Fannin's command, allowed; approving Byers

inquiry, as already indicated (*ante*, § 1500), should be: Were the circumstances named in the statement such a marked item in the ordinary family history and so interesting to the family in common that statements about them in the family would be likely to be based on fairly accurate knowledge and to be sincerely uttered? There is ample authority for a broad application of this principle, although the rulings are by no means in harmony.

4. Arbitrary Limitations

§ 1503. **Kind of Issue or Litigation involved.** On principle, the kind of issue involved in the litigation ought to have no bearing on the admission of the present class of declarations. A deceased father's entry in a family Bible is equally trustworthy or untrustworthy whether the issue subsequently arising happens to be framed upon a claim to an inheritance, a plea of infancy to a promissory note, or an application to appoint a guardian. But historically these declarations were first customarily (though not exclusively) used in England in inheritance cases, where the pedigree or genealogy of a claimant was directly a part of the issue; and this traditional use served to give the impression to many Courts that the rule had crystallized into an arbitrary shape. This rule, thus interpreted, says that declarations, otherwise satisfactory, can nevertheless be used in those cases only where the issue involves as material a question of pedigree, *i.e.* genealogy, — chiefly, therefore, in inheritance cases:

1807, Lord ELLENBOROUGH, C. J., in *R.* v. *Erith*, 8 East 539 (settlement of a pauper; the father's declarations as to his bastard birth and the place of birth were rejected): "The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree. The controversy was not, as in a case of pedigree, from what

v. Wallace, Tex., *infra*); *Ala.* 1904, Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008 (the declarant's negro race); *Cal.* 1900, Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670 (enlisting in the Federal army in the civil war, and being there killed); *Md.* 1820, Walkup *v.* Pratt, 5 Harr. & J. 56 (the purchase and sale of a slave; here, in order to identify the alleged ancestor and trace descent); 1920, Hendrickson *v.* Attick, 136 Md. 1, 109 Atl. 468 (place of residence of relatives); *Mich.* 1879, Fraser *v.* Jennison, 42 Mich. 206, 214, 235, 3 N. W. 882 (that two brothers came from Michigan together, and were the only two brothers of the family that came); *N. Y.* 1818, Jackson *v.* Boneham, 15 Johns. 227 (the death in war and the place of death of an ancestor); *Or.* 1900, Young *v.* State, 36 Or. 417, 59 Pac. 812, 60 Pac. 711 (that the declarant had enlisted, gone to Washington, deserted, etc.; here, on the theory of identifying circumstances); *Tenn.* 1848, Story *v.* Saunders, 8 Humph. 667, *semble* (that S. had died in the revolutionary army); *Tex.* 1894, Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1059 (that a person went to Texas, and enlisted in the army, and was killed at the Fannin massacre; overruling Smith *v.* Shinn, *infra*); *Vt.* 1869, Webb *v.* Richardson, 42 Vt. 465, 471 (time of death); *Wis.* 1872, Du Pont *v.* Davis, 30 Wis. 178 (that A. was killed by the explosion of a powder-mill in 1855 or 1856).

Excluded: 1905, Lutterell *v.* Whitehead, 121 Ga. 699, 49 S. E. 691 (family repute as to possession of land by an ancestor); 1903, Wright *v.* Com., — Ky. —, 72 S. W. 340 (family tradition, to show ancestral and collateral insanity); 1870, Crane *v.* Reeder, 21 Mich. 83 (the existence of heirs; failure of heirs being in issue); 1826, Jackson *v.* Etz, 5 Cow. N. Y. 319 (the circumstances of the finding and burial of a body); 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730 (family reputation as to insanity); 1882, Smith *v.* Shinn, 58 Tex. 1 (service in war).

Compare the Codes quoted *ante*, § 1480, and the cases cited *post*, § 1503.

For *neighborhood-repute* to this class of facts, see *post*, §§ 1605, 1623–1626.

parents the child has derived its birth; but in what place an undisputed birth, derived from known and acknowledged persons, has happened. The point thus stated turns on a single fact, involving no question but of locality, and therefore not falling within the principles of or governed by the rules applicable to cases of pedigree."

1891, EARL, J., in *Eisenlord* v. *Clum*, 126 N. Y. 552, 27 N. E. 1024: "A case is not necessarily one of that kind [pedigree], because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree."

This strict limitation was probably a novelty of Lord Ellenborough's;[1] though it came to prevail in England and in some courts of the United States.[2]

But in the majority of American jurisdictions this limitation is ignored; the declarations are now admitted whatever the general nature of the issue, and whether or not the issue is one of genealogy, pedigree, or descent.[3]

§ 1503. [1] 1664, Herbert *v.* Tuckal, T. Raym. 84 (devisor's capacity to make a will; father's entry of age in almanac, admitted). In settlement cases (which were notoriously esoteric in their practice) Lord Ellenborough appears to have gone directly against the previous practice: 1744, R. *v.* Greenwich, Burr. Settl. Cas. I, 343; 1772, R. *v.* Nutley, Burr. Settl. Cas. II, 701; 1782, R. *v.* Holy Trinity, Cald. Just. Peace (Settl. Cas.), 141.

[2] ENGLAND: 1841, Figg *v.* Wedderburne, 11 L. J. Q. B. 46, *semble* (contract; plea of infancy); 1884, Haines *v.* Guthrie, L. R. 13 Q. B. D. 818 (contract; plea of infancy). But otherwise under some Colonial statutes: 1916, Mahomed Syedol Ariffin *v.* Yeoh Ooi Gark, 2 A. C. 575 (plea of infancy to a mortgage; entry of date of defendant's birth made by his deceased father in a book containing family records of births, deaths, and marriages, held admissible, under Straits Settlements Evidence Ordinance 1893, § 32, similar to Indian Evidence Act; the limitation of Haines *v.* Guthrie *supra*, to cases of pedigree not being recognized in that statute).

UNITED STATES: *Fed.* 1876, Connecticut Mut. L. Ins. Co. *v.* Schwenck, 94 U. S. 598 ("The present case [an action on a life-insurance policy] involves no question of pedigree; the proof of age was not offered for the purpose of proving parentage or descent, both of which were impertinent to the issue between the parties"); 1902, Fidelity Mutual L. Ass'n *v.* Mettler, 185 U. S. 308, 22 Sup. 662 (insurance policy; death of the insured); *Cal.* 1897, People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, *semble* (rape on a child under 14); *Conn.* 1873, Union *v.* Plainfield, 39 Conn. 564 (pauper settlement); *Mass.* 1882, Com. *v.* Felch, 132 Mass. 22 (criminal charge of abortion); *Mo.* 1896, State *v.* Marshall, 137 Mo. 463, 36 S. W. 619 (criminal action for seduction where the offence could by statute be committed only upon a person under 18 years of age); *N. J.* 1826, Westfield *v.* Warren, 8 N. J. L. 251 (pauper settlement); *N. Y.* 1891, Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024 (quoted *supra*); 1902, Washington *v.* Bank, 171 N. Y. 166, 63 N. E. 831 (action for money in the defendant savings bank, deposited by the plaintiff's intestate in the name of certain alleged sons, the plaintiff claiming that the beneficiaries were fictitious, and the defendant denying this; held, that the issue was as to "the right of succession to the personal property of a deceased person" and therefore one of pedigree); *Okl.* 1914, Freeman *v.* First National Bank, 44 Okl. 146, 143 Pac. 1165 (cancellation of a minor's deeds; a brother's testimony to the alleged minor's age, as reputed in the family, excluded; citing Eisenlord *v.* Clum, *supra*, but not showing knowledge of the real angles of the exception); *Tex.* 1903, Donley *v.* State, 44 Tex. Cr. 428, 71 S. W. 958, *semble* (the statement of a brother, not shown to be deceased, as to the age of a prosecutrix in rape, excluded); *Vt.* 1856, Londonderry *v.* Andover, 28 Vt. 428 (pauper settlement).

[3] *Ala.* 1880, Cherry *v.* State, 68 Ala. 30, *semble* (selling liquor to a minor); *Ark.* 1867, Wilson *v.* Brownlee, 24 Ark. 589 (action on a promissory note; plea in abatement that one of the joint payees was dead); *Cal.* 1919, Paulsen's Estate, 179 Cal. 528, 178 Pac. 143 (appointment of administratrix); *Colo.* 1874, Kansas Pac. R. Co. *v.* Watson, 2 Colo. 442, 453, 461 (action by administrator for damages for death); *Ga.* 1874, Southern Life Ins. Co. *v.* Wilkinson, 53 Ga. 547 (entries in a family Bible; the issue being as to the age of the insured in an action on an insurance policy; § 3772 of the Code was perhaps slightly involved); *Ind.* 1859, Collins *v.* Grantham, 12 Ind. 444 (plea of infancy to a note); *Ia.* 1860, Carnes *v.* Crandall, 10 Ia. 379 ('scire facias' to revive a judgment; hearsay as to the fact of the defendant's death was rejected on grounds not affecting the nature of the issue); 1870, Greenleaf *v.* R. Co., 30 Ia. 302 (declarations of a father as to the son's age, in an action for death by a brakeman's carelessness, were

This is a just result. Any such arbitrary and unreasoning limitation places the rules of Evidence on a par with the rule of chess that a king may move one square only, or the rule of whist that the card played must follow the suit led, — rules, that is, which justify their existence because they add complexity, and therefore interest, to the game. If a trial upon evidence is a game, such limitations have a place in the law of Evidence; if it is the employment of rational and practical methods in the discovery of truth, such limitations should be discarded without scruple:

1860, BIGELOW, C. J., in *North Brookfield* v. *Warren*, 16 Gray 175 (admitting evidential declarations where the main issue was as to a pauper's settlement): "Upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation."

held admissible, though ruled out for other reasons); *Ky.* 1905, Travelers' Ins. Co. *v.* Henderson C. Mills, 120 Ky. 218, 85 S. W. 1090 (action to indemnify for a sum paid for the death of a minor); *Mich.* 1879, Fraser *v.* Jennison, 42 Mich. 206, 235, 3 N. W. 882 (will-contest); 1891, Lamoreaux *v.* Attorney-General, 89 Mich. 146, 50 N. W. 812 (mandamus to institute 'quo warranto' proceedings as to the right to exercise a sheriff's office); *Minn.* 1892, Houlton *v.* Manteuffel, 51 Minn. 185, 187, 53 N. W. 541 (plea of infancy to action on note; point not raised); *Pa.* 1840, Carskadden *v.* Poorman, 10 Watts 84 (action against a magistrate to recover a penalty for marrying a minor); 1845, Watson *v.* Brewster, 1 Pa. St. 383 (action on a note, with a plea of infancy); *S. D.* 1916, Svendsen's Estate, 37 S. D. 353, 158 N. W. 410 (wife's application for appointment as administratrix; issue as to validity of marriage; deceased's statements both asserting and denying marriage, received; *Tenn.* 1846, Ford *v.* Ford, 7 Humph. 98 (a testator devised to negroes, and his sanity was impeached; hearsay was accepted to show that they were his illegitimate children, and thus to sustain his capacity); 1883, Swink *v.* French, 11 Lea 79 (in an action on a note, a contract to extend the time was alleged, and infancy was alleged in reply; hearsay of the date of birth was admitted); *Tex.* 1851, Primm *v.* Stewart, 7 Tex. 178, 182 (whether W. was dead when a power of attorney from him was executed; rule held not confined "to cases where the question is one of pedigree); 1900, Summerhill *v.* Darrow, 94 Tex. 71, 57 S. W. 942 (vendor's lien; whether the statute of limitations was suspended by coverture; her mother's will-recitals admitted); *Vt.* 1872, Masons *v.* Fuller, 45 Vt. 30 (bastardy complaint); 1884, Hammond *v.* Noble, 57 Vt. 193, 203, *semble* (petition for new trial, because of a juror's alienage; family declarations admitted); *Wis.* 1872, Du Pont *v.* Davis, 30 Wis. 178 (the death of A. was shown, as indicating the non-necessity of joining him as a party plaintiff in a suit relating to land of which he was assumed to be joint-tenant); 1877, Hart *v.* Stickney, 41 Wis. 630, 638 (plea of infancy to a promissory note; defendant's testimony to the family repute of his age, admitted; yet the point was not "absolutely decided").

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC IV: ATTESTATION OF A SUBSCRIBING WITNESS

CHAPTER L.

§ 1505. **Theory of the Exception.** It has long been unquestioned that the attestation of an attesting or subscribing witness to a document may be used, when the attester is unavailable in person, as evidence of the document's execution; and according to the orthodox form of the Preferred Witness rule (*ante*, § 1320), the attestation must even be used in preference to other testimony. There was a time, apparently, when the testimony of the attester in person was so rigorously required that even his death could not excuse his absence (*ante*, §§ 1287, 1311), and in that period it cannot be said that the present exception to the Hearsay rule (if indeed there existed then any Hearsay rule) was recognized. But the recognition unquestionably came by the second half of the 1700s, and this use of an attestation has since then been unquestioned.

What has not been always clearly understood is that such a use of an attestation is in truth an exception to the Hearsay rule, *i.e.* is the testimonial use of an extrajudicial assertion as evidence of the truth of the fact asserted (*ante*, § 1362). In practice, the dramatic feature of the evidence has tended to obscure the legal principle; that is to say, the mode of using it consists merely in proving the genuineness of the attester's signature to the document. But this is after all nothing less than offering the attester's written statement, expressly or impliedly made at the time of execution, that the document was seen by him to be executed as it purports to be. And this was always assumed in judicial opinion, until the following perverse utterance from an eminent judge shook the faith of the profession:

1836, *Stobart* v. *Dryden*, 1 M. & W. 615; declarations of a deceased attesting witness M., whose handwriting had been proved, were offered as amounting to an acknowledgment of forgery, but were rejected. *Counsel:* "Proving the *signature* of the deceased witness is no more than [proving] a *declaration* on his part that he saw the party execute the deed. . . . If the plaintiff is permitted to prove declarations of M. to sustain the deed, the defendant may use them also to impugn it. If the signature does not amount to a declaration that the witness saw the party sign, it amounts to nothing." Lord ABINGER, C. B.: "Is it not an assumption of yours that the signature is a *declaration?* It is a *fact.*" . . . PARKE, B. (for the Court): "One of the grounds [of argument] was that as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer to this argument is that evidence of the handwriting in the attestation is not used as a declaration by the witness, but to show the fact that he put his name in that place and manner in which in the ordinary course of business he would have done if he had actually seen the deed executed. A statement of the attesting witness by parol, or written on any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is therefore not the proof of a declaration, but of a fact."

As to this, it may be said (1) that all evidential data whatever are merely "facts"; the testimonial utterance of a witness in the stand is merely a "fact", *i.e.* we are asked to believe that A struck B because of the evidential "fact" that M, a competent observer, is willing to assert under oath on the stand that A struck B (*ante*, § 475). (2) If, however, by "fact" the learned judge be supposed to have meant an extrajudicial utterance, and to have looked upon all such statements as circumstantial evidence in distinction from testimonial evidence, then it must be answered that the distinction between testimonial and circumstantial evidence admits of no such significance (*ante*, §§ 25, 479). The Hearsay rule, to be sure, draws a distinction between testimonial utterances made upon the stand and made off the stand (*ante*, § 1362); but a human assertion offered as evidence of the truth of the assertion is testimonial evidence, no matter where it is uttered. (3) If, finally, by "fact" the learned judge meant that the act of subscribing in attestation, when proved in Court for the purpose of establishing the maker's execution, is a mere circumstance of conduct and not an implied assertion of the fact of execution, his notion is clearly not correct. It might as well be argued that, because a deponent merely signs his name to a deposition, his act is mere circumstantial evidence and not testimony.

That this singular aberration of Stobart *v.* Dryden is unfounded, appears in the constant judicial treatment of the whole subject, as indicated in the following sections (particularly in §§ 1511–1513); but the error is especially repudiated in the following passages:[1]

1824 Per CURIAM, in *Clark* v. *Boyd*, 2 Oh. 280 (57): "The proof of the handwriting of the witness is 'quasi' bringing him into Court. . . . It proves as much as the subscribing witness can prove himself in many cases."

§ 1505. [1] *Accord:* 1903, Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756 (good opinion by Holloway, J.); 1860, Boylan *v.* Meeker, 28 N. J. L. 274, 294; 1832, Daniel, J., in Crowell *v.* Kirk, 3 Dev. 356; 1847, Gibson, C. J., in Hays *v.* Harden, 6 Pa. St. 412 ("the equivalent of the witnesses' oath"); 1848, Rogers, J., in Harden *v.* Hays, 9 Pa. St. 156.

1842, NELSON, C. J., in *Losee* v. *Losee*, 2 Hill 609: "Proof of the signature of a deceased subscribing witness is presumptive evidence of everything appearing upon the face of the instrument relative to its execution; as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. . . . The attestation, comes in by way of substitute for his oath." Note by Mr. Nicholas *Hill* (afterwards judge): "The act of attesting an instrument is regarded as a written declaration of the subscribing witness, to which the law, in the event of his death or absence, yields a reluctant credit by way of necessary substitute for his oath."

1867, THOMPSON, J., in *Kirk* v. *Carr*, 54 Pa. 285, 290: "Memory can no more be kept alive than the body, and hence the law allows the attesting signature to speak when the tongue may be silent."

1867, WRIGHT, J., in *Boyens' Will*, 23 Ia. 354, 357: "The witnesses to a will become such from the moment they sign it. They testify from that moment, and hence, though they should die before the testator or before the probate of the will, it is still good."

The attestation, then (when proved to have been made), by establishing the genuineness of the signature, comes in as an *extrajudicial* or hearsay *assertion of the attester*.[2] What are the limitations to its use, upon the general principles of the Hearsay exceptions as already expounded?

1. The Necessity Principle

§ 1506. **Attester must be Deceased, Absent from Jurisdiction, etc.** Upon the general principle already noted for the preceding Exceptions (*ante*, § 1421), the attester's hearsay statement cannot be used unless the attester is unavailable for the purpose of giving testimony in person. The various situations which fulfil this condition — *death*, *absence from the jurisdiction*, *insanity*, *illness*, etc. — have already been fully examined in connection with the rule of Preferred Witnesses (*ante*, §§ 1309–1319), and therefore need not be again considered here. The case of *failure of memory* of an attester, called to the stand, is later examined (*post*, § 1511).

2. The Circumstantial Guarantee of Trustworthiness

§ 1508. **General Principle.** Unquestioned as the reception of this hearsay statement has been, no judicial attempt seems to have been made to define the reasons for the trustworthiness thus accorded, by exception, to this class of hearsay statements.[1] The question is virtually this (*ante*, § 1422): What guarantee is there that the attester did not sign his name as attester to a document which he did *not* see executed by the purporting maker?

[2] Of course, it *may* be proved without any attempt to use it testimonially, as where the law requires an attestation as an element in the validity of the document and the party desires merely to show that the elements of validity exist; 1860, Boylan *v.* Meeker, 28 N. J. L. 274, 295 (where the signature was proved merely to show the statutory requirement fulfilled, and the will's execution was otherwise proved).

§ 1508. [1] The following suggestions are found: 1819, Kirkpatrick, C. J., in Newbold *v.* Lamb, 2 South. N. J. 449, 451 ("The only reason why the proof of the handwriting of the subscribing witness is taken as sufficient proof of the execution of a deed is founded upon the presumption that what an honest man hath attested under his hand is true"); 1823, Gibson, J., in Crouse *v.* Miller, 10 S. & R. Pa. 158 ("The handwriting of a witness. . . . standing in the place of the oath, derives its claim to respect from the consideration that the law presumes every man honest till the contrary appears").

The circumstances tending to trustworthiness seem to be four: (1) The occasion is a formal one, and the statement requires a writing; and there is commonly a radical disinclination to take part in a false transaction of such a sort. (2) The concoction of a false document will either fix an innocent party with a false obligation or will divest legitimate heirs of their rights, and there is a natural repugnance to giving assistance in such a wrong. (3) The making of a false attestation, whether or not it is in criminal law a forgery or a perjury, is popularly supposed to be such, and the attester would probably be at least an accomplice in a forgery; so that the subjective sanction deterring from a crime would probably operate to prevent a false attestation. (4) The attester knows that he is liable at any time to be called upon in Court to substantiate his attestation; and not only is his falsity likely there to be exposed by the opponent's witnesses, but he will there be obliged either to commit perjury by swearing to the fact of execution or to undergo the disagreeable ordeal of recanting and confessing his falseness. — There is thus a combination of circumstances which easily account for the establishment of this Exception to the Hearsay rule.

§ 1509. **Who is an Attester; Definition of Attestation.** An attesting or subscribing witness, then, is a person who, at the request or with the consent of the maker, places his name on a document with the intent of making thereby an express or implied statement that the document was then known by him to have been executed by the purporting maker. Only such a signature can be used as a hearsay statement. Thus, it cannot be used if the person did not write it himself, or not at the time, or if he did not sign as an attester but for some other purpose. These and related questions have been already treated in examining the notion of an attesting witness under the rule of Preferred Witnesses (*ante*, § 1292), and their solution would probably be the same for the present subject.

The *kind of issue* in which the attestation is offered is immaterial, so long as it is offered to prove the execution of a document.[1] But the only statement admissible as made under circumstances of trustworthiness is the *written statement in the document*, either expressed or implied by the signature; so that any oral statement otherwise made is not receivable;[2] except when offered as a self-contradiction to impeach the written statement (*post*, § 1514). The statement need not be *expressly written in full;* the placing of the signature implies an assertion of execution (*post*, § 1511).

§ 1509. [1] *Contra:* 1895, Walker *v.* State, 107 Ala. 5, 18 So. 393 (perjury for falsely swearing that he had not signed a conveyance; evidence of the handwriting of a deceased attesting witness was not admitted to show that the defendant had signed it; "upon this question he was entitled to be confronted by the witnesses against him, and not be prejudiced by evidence that the paper bore the names, as attesting witnesses, of persons who are not examined on the trial"; this is unsound; on such a doctrine no exceptions to the Hearsay rule could ever exist; see *ante*, §§ 1397, 1398).

[2] 1866, Boardman *v.* Woodman, 47 N. H. 120, 135 (excluding statements by the deceased witness as to the sanity of the testator; such statements are not an implied part of the attestation).

3. Testimonial Principles

§ 1510. **Attester must be Competent at time of Attestation.** The attestation is offered as the statement of the attester made at the time of attestation. Hence:

(1) If he was *at that time* not qualified as a witness,[1] his statement in the attestation is not admissible. The usual instance of this has been the case of a disqualification by interest.[2] But this result involved often the frustration of genuine testamentary dispositions and did an injustice to honest legatees. Modern statutes have devised a remedy, viz. the nullification of the interest, by *declaring void any devise or bequest* made in the will to an attesting witness; thus rendering the attester competent. The statutes vary, however, in the details by which this expedient is given effect.[3]

(2) If the attester was then qualified, but has *since* become disqualified to take the stand, his attestation is receivable, because it speaks as from a time when he was qualified.[4] Whether in this case the attestation is valid as an *element of execution*, under statutes requiring the attester to be a *credible witness*, is a matter of substantive law not here involved;[5] the doubt

§ 1510. [1] Whether in such a case, under the Preferred Witness rule, he may be disregarded as not an attester, and need not be called or accounted for, is a different question, treated *ante*, § 1292.

[2] 1793, Swire *v.* Bell, 5 T. R. 371 (interest existing at the time of attestation and since; handwriting not allowed, the case of a subsequent incompetency being distinguished); 1841, Amherst Bank *v.* Root, 2 Metc. Mass. 522, 532; 1813, Hamilton *v.* Marsden, 6 Binn. Pa. 45, 50, per Yeates, J.; 1820, Miller *v.* Carothers, 6 S. & R. Pa. 215, 222 (will); 1852, Harding *v.* Harding, 18 Pa. St. 340, 342; 1859, Jones *v.* Jones, 12 Rich. S. C. 116, 120.

[3] CANADA: *Newf.* Consol. St. 1916, c. 118, §§ 6, 7; *Ont.* R. S. 1914, c. 120, §§ 17–19; *Sask.* R. S. 1920, c. 74, §§ 11–14; UNITED STATES: *Alaska:* Comp. L. 1913, §§ 579–584; *Ark.* Dig. 1919, §§ 10529–10535; *Cal.* Civ. C. 1872, §§ 1282, 1283; *Colo.* Comp. L. 1921, § 5190, 5191; *Conn.* Gen. St. 1918, § 4943; *Ga.* Rev. C. 1910, § 3849; *Haw.* Rev. L. 1915, §§ 3262, 3263; *Ill.* 1915, Scott *v.* O'Connor-Couch, 271 Ill. 395, 111 N. E. 272 (applying the rule of Rev. St. 1874, c. 148, § 8, and St. 1911, p. 538, that a person disqualified by a beneficial interest under the will may become competent and compellable by the annulment of the interest; here applied to a stockholder attesting a will which made his banking corporation executor); *Ind.* Burns' Ann. St. 1914, § 3144; *Ia.* Code 1919, § 7796; *Kan.* Gen. St. 1915, § 11763; *Ky.* 1917, Caddell's Heirs *v.* Caddell's Ex'x, 175 Ky. 505, 194 S. W. 541; *Me.* 1915, Clark's Appeal, 114 Me. 105, 95 Atl. 517 (history of statutes examined); *Mass.* Gen. L. 1920, c. 191, § 2; *Mich.* Comp. L. 1915, §§ 11823, 11824; *Minn.* Gen. St. 1913, § 7254; *Miss.* Code 1906, §§ 2001, 2002, Hem. §§ 1666, 1667; *Mo.* Rev. St. 1919, §§ 542–547; *Mont.* Rev. C. 1921, § 6987; *Nebr.* Rev. St. 1922, §§ 1248, 1249; *N. J.* Comp. St. 1910, Wills, §§ 4–8; *N. Y.* S. C. A. 1920, § 75, Cons. L. 1909, Decedent Est. § 27; *N. C.* Con. St. 1919, §§ 4137, 4138; § 370 (proof of contents of destroyed will; any devisee or legatee is competent to prove contents, "except such as may concern his own interest in the same"); *N. D.* Comp. L. 1913, §§ 5630, 5631; *Or.* Laws 1920, §§ 10111–10118; *P. I.* C. C. P. 1901, § 622, Civ. C. § 683; *S. C.* Civ. C. 1922, §§ 5557, 5558; *Tex.* Rev. Civ. St. 1911, §§ 7870, 7871; *Utah:* Comp. L. 1917, § 6322; *Vt.* Gen. L. 1917, § 3211; *Va.* Code 1919, §§ 5244, 5245; *Wash.* R. & B. Code 1909, § 1332; *W. Va.* Code 1914, c. 77, §§ 18–20; *Wis.* 1921, Re Johnson's Will, — Wis. —, 183 N. W. 888 (under St. 1905, c. 128, making void a gift to a subscribing witness "unless there be two other competent witnesses to the same", the proviso means "subscribing witnesses"; so that the gift is void even though other bystander-witnesses, not subscribing, testified to the will's execution; two judges diss.); *Wyo.* Comp. St. 1920, § 6670.

[4] The cases are collected *ante*, § 1316, in dealing with the excuses for not calling the attesting witness.

That his *good character* need not first be shown in any case is clear: 1850, Chaffe *v.* Cupp, 5 La. An. 684 (Slidell, J., diss., being apparently the only person who ever doubted). Compare § 1104, *ante*.

[5] 1904, Boyd *v.* McConnell, 209 Ill. 396, 70 N. E. 649; 1904, O'Brien *v.* Bonfield, 213 Ill. 428, 72 N. E. 1090; 1865, Sparhawk *v.* Sparhawk, 10 All. Mass. 155 (Bigelow, C. J.:

has usually been solved by statutes expressly authorizing probate in spite of subsequent testimonial incompetency.[6]

§ 1511. **Implied Purport of Attestation; (1) All Elements of Due Execution implied.** When the attester's signature is identified as genuine, what does the attester thereby purport to testify to?

Assuming that the signature is appended to a *clause of attestation* expressly stating the facts of execution, it is clear that the signed attestation is a *testimonial assertion of all the facts thus required to be stated*. This has never been doubted for the case of an attester deceased or otherwise unavailable in person.

But it has not been always so easy to appreciate in the case of an attesting witness who on being called to the stand is found to have forgotten all the circumstances. In such a case, it is not doubted that the proponent may, if he can, *prove the facts of execution by other witnesses* (*ante*, § 1302). But, apart from that, does not the signed attestation *itself serve as some evidence* of the facts, the attester's failure of memory having practically made his present testimony unavailable? On this point there can be no doubt:

1839, TUCKER, P., in *Clarke* v. *Dunnavant*, 10 Leigh 13, 30, 35: "[If the witness is dead, or the like,] his attestation is a sufficient ground for presuming that the instrument has been executed with all the solemnities and ceremonies required by the law. . . . It is then a question for the jury whether under the circumstances of the case it is probable that all the formalities of the statute were regularly observed. . . . The question still recurs whether, as the witnesses have been actually examined and have failed to prove a compliance with all the requisitions of the statute, that compliance can be inferred from their attestation. . . . [This is answered in the affirmative, by the precedents,] nor do I apprehend any evil from this decision. It may perhaps sometimes lead to the establishment of wills not duly executed, as doubtless may be the case also where the witnesses are all dead or absent, and everything is presumed from their attestation. But far greater mischiefs would arise from a contrary decision, which should make the rights of every devisee and legatee depend not only upon the honesty but also upon the slippery memory of witnesses. Under such a decision, no man could be sure of dying testate, since the forgetfulness of a witness would frustrate all his precaution; and a question of title by will, which in the spirit of the statute of frauds, the Legislature designed to rest upon written evidence alone, would after all depend upon the integrity and the memory of those who were called on to attest the instrument. . . . It would tend, I have no doubt, to multiply the attempts, already too common, to set aside wills; since the chances of success must be very much increased if the frailty of human memory is to be called in to the aid of the discontented heir."

"It is to be borne in mind that the question to be determined in this case is, not whether the witness objected to at the trial was competent to give evidence in the case, but whether he was competent according to the rules of the common law to act as a subscribing witness. If he was, then the will was duly attested; but if he was not, then the will cannot be admitted to probate, because it was not subscribed in the presence of the testator by three competent witnesses"); and compare the cases cited *ante*, § 582.

[6] CANADA: *Newf.* Consol. St. 1916, c. 118, § 5; *Ont.* R. S. 1914, c. 120, § 16; *Sask.* R. S. 1920, c. 74, § 11; UNITED STATES: *Ala.* Code 1907, § 6173; *Cal.* Civ. C. 1872, § 1280; *Ga.* Rev. C. 1910, § 3848; *Haw.* Rev. L. 1915, § 3261; *Ida.* Comp. St. 1919, § 7813; *Ind.* Burns' Ann. St. 1914, § 3132; *Ky.* Stats. 1915, § 4836; *Kan.* Gen. St. 1915, § 11767; *Me.* Rev. St. 1916, c. 79, § 2; *Mass.* Gen. L. 1920, c. 191, § 3; *Mich.* Comp. L. 1915, § 11821; *Minn.* Gen. St. 1913, § 7251; *Mont.* Rev. C. 1921, § 6984; *Nebr.* Rev. St. 1922, § 1245; *N. D.* Comp. L. 1913, § 5682; *P. I.* C. C. P. 1901, § 621; *P. R.* Rev. St. & C. 1911, § 3769; *S. D.* Rev. C. 1919, § 640; *Utah:* Comp. L. 1917, § 6319; *Vt.* Gen. L. 1917, § 3210; *Wyo.* Comp. St. 1920, § 6670.

1849, GIBSON, C. J., in *Greenough* v. *Greenough*, 11 Pa. St. 489, 498: "What avails it that the man is living, if his memory is dead? If it were blotted out by paralysis, or worn out by decay, his attestation would stand for proof by a witness; but it must be immaterial how or by what means it lost its tenacity."

That the attestation may thus, in all cases where the witness is unable to testify in person, be taken as evidence of the fact of execution is not doubted.[1] The matter of controversy has usually been merely the effect of such evidence, *i.e.* whether it should be given the force of a presumption or merely suffices as evidence to go to the jury (*post*, §§ 2490, 2520), — a matter not here involved.[2] As to the specific facts to be taken as a part of the assertion, — delivery, presence, request, publication, and the like —, there is perhaps some room for doubt.

Assuming that there is on the document an *attestation-clause of* some sort, it is generally said that the attestation is evidence of *all the facts essential to a due execution* of the document under the substantive law applicable to that kind of document.[3] A few Courts have here and there hesitated in regard

§ 1511. [1] *Accord:* 1846, Hitch *v.* Wells, 10 Beav. 84, 89 (in this case "where one witness is dead, [and] another is not to be believed [in denying attestation], and the third is an ignorant man whose recollection fails him, you must supply it [publication] by presumption"); 1895, Gillis *v.* Gillis, 96 Ga. 1, 23 S. E. 107; 1898, Thompson *v.* Owen, 174 Ill. 229, 233, 51 N. E. 1046; 1873, Kellum's Will, 52 N. Y. 517, 519 ("a mere failure of memory on the part of the witnesses shall not defeat a will, if the attestation clause and other circumstances are satisfactory to prove its execution").

So, too, from another point of view, the failure of memory of an attester called to the stand *excuses the party* under the Preferred Witness rule, as if through death or the like his attendance could not be had (*ante*, § 1315).

[2] Whether the attestation suffices under the Quantity rule, requiring *two witnesses not necessarily attesters*, is considered *post*, § 2048.

As to the sufficiency of the attestation, when the witness *on the stand fails to remember* and merely verifies by asserting that he would not have attested without knowing the facts, see the cases cited *ante*, § 1315, and also compare §§ 747, 98.

[3] ENGLAND: 1739, Croft *v.* Pawlet, 2 Stra. 1109 (the attestation clause to a will said nothing about the witnesses' signing in the testator's presence; and it was objected that "the hands of the witnesses could only stand as to the facts they had subscribed to"; but the Court left it to the jury to say whether there was "a compliance with all circumstances [required]"); 1808, Milward *v.* Temple, 1 Camp. 375 (debt on bond; the plaintiff put in a paper, signed by the defendant's attorney, whereby the signatures of the defendant and the attesting witness to the bond were admitted; L. C. J. Ellenborough at first doubted whether the delivery of the bond by the defendant as his deed ought not also to have been admitted, or must not still be proved to entitle the plaintiff to a verdict; but upon consideration, "his lordship said, as the attesting witness' handwriting was admitted, this might be taken as a presumptive admission of all he professed to attest and would have been called to prove"); 1834, Tindal, C. J., in Wright *v.* Tatham, 1 A. & E. 3, 22 ("the presumption [is] that he witnessed all that the law requires for the due execution of a will").

CANADA: 1843, Hamilton *v.* Love, 2 Kerr 243, 250 (on the facts); 1874, Hanlon's Will, 15 N. Br. 136, 140.

UNITED STATES: *Georgia:* 1900, Underwood *v.* Thurman, 111 Ga. 325, 36 S. E. 788 (the clause "raises a presumption that such paper was executed with all the requisite legal formalities"); *Illinois:* 1895, Hobart *v.* Hobart, 154 Ill. 610, 614, 619, 39 N. E. 581 (proof of handwriting presumes due attestation); 1898, Thompson *v.* Owen, 174 Ill. 229, 233, 51 N. E. 1046; 1889, Canatsey *v.* Canatsey, 130 Ill. 397 (the testimony of one of the witnesses, who identified his signature but recollected nothing of the circumstances, held sufficient; Wilkin, J., diss.); 1909, Elston *v.* Montgomery, 242 Ill. 348, 90 N. E. 3 (see the citation *post*, § 1513, n. 3); 1917, Hutchison *v.* Kelly, 276 Ill. 438, 114 N. E. 1012; 1919, Hart *v.* Hart, 290 Ill. 476, 125 N. E. 366; 1918, Flynn *v.* Flynn, 283 Ill. 206, 119 N. E. 304 (principle applied to signature by mark); 1919, Rupp *v.* Jones, 289 Ill. 596, 124 N. E. 560; 1921, Jenkins *v.* White, 298 Ill. 502, 131 N. E. 634 (even where one of the witnesses testifies to non-performance of some requirement); *Iowa:* 1898, Scott *v.* Hawk, 107 Ia. 723, 77 N. W. 467 (proof of handwriting is

to its application to individual kinds of facts; but the principle as above stated is the orthodox one and is in general acceptance. It has commonly

proof of due execution, even where the testator signs by mark); 1902, Hull's Will, 117 Ia. 738, 89 N. W. 979; *Kentucky:* 1829, Pate *v.* Joe, 3 J. J. Marsh. 113, 116; 1847, Chisholm *v.* Ben, 7 B. Monr. 408, 410, *semble; Maine:* 1920, Re Goodridge, 119 Me. 371, 111 Atl. 425 (attestation clause held sufficient, even though other evidence showed that it was incorrect as to certain non-essential facts of execution); *Maryland:* 1913, Conrades *v.* Heller, 119 Md. 448, 87 Atl. 28; 1917, Woodstock College *v.* Hankey, 129 Md. 675, 99 Atl. 962; *Massachusetts:* 1853, Nickerson *v.* Buck, 12 Cush. 332, 342 (the signature is to be taken as "put there for the purpose stated in connection with the signature"); *Michigan:* 1860, Lawyer *v.* Smith, 8 Mich. 411, 414, 423 (identification of his signature by the witness, sufficient to go to the jury); *Mississippi:* 1857, Fatheree *v.* Lawrence, 33 Miss. 585, 618; 1858, Nixon *v.* Porter, 34 Miss. 697, 706; *Nebraska:* 1906, Robertson's Estate, — Nebr. —, 109 N. W. 506 (witnesses' failure of memory); *New Jersey:* 1819, Newbold *v.* Lamb, 2 South. 449, 451 (an attestation-clause not specifying sealing and delivery, held not sufficient to show that a scroll-seal was made before attestation; Southard, J., diss.); 1858, Mundy *v.* Mundy, 15 N. J. Eq. 290, 293 ("the attestation-clause . . . is 'prima facie' evidence of the facts stated in it"); 1872, Alpaugh's Will, 23 N. J. Eq. 507 (death or non-recollection; "the attestation-clause must be taken as true"); 1875, Allaire *v.* Allaire, 37 N. J. L. 312, 325 ("proof of their signature will be evidence that what they attested in fact did take place"); 1876, Tappen *v.* Davidson, 27 N. J. Eq. 459 (similar); 1882, Turnure *v.* Turnure, 35 N. J. Eq. 437, 440 (publication also, if recited, is presumed); 1886, McCurdy *v.* Neall, 42 N. J. Eq. 333, 7 Atl. 1566; 1887, Ayres *v.* Ayres, 43 N. J. Eq. 565, 569, 12 Atl. 621; 1888, Elkinton *v.* Brick, 44 N. J. Eq. 154, 167, 15 Atl. 391; 1892, Farley *v.* Farley, 50 N. J. Eq. 435, 439, 26 Atl. 178; 1905, Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874; 1906, Bogert *v.* Bateman, — N. J. Eq. —, 65 Atl. 238; 1910, Bioren *v.* Nesler, 77 N. J. Eq. 560, 78 Atl. 201; *New York:* 1841, Remsen *v.* Brinckerhoff, 26 Wend. 325, 338 (attestation-clause is "good presumptive evidence . . . and sufficient to prove the will, if not refuted"; but see ib. p. 332); *North Carolina:* 1832, Crowell *v.* Kirk, 3 Dev. 356, *semble; Oklahoma:* 1916, Ballard's Estate, 56 Okl. 149, 155 Pac. 894; *Oregon:* 1902, Skinner *v.* Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Pennsylvania:* 1847, Hays *v.* Harden, 6 Pa. St. 409, 412 (attestation is "'prima facie' evidence of execution"; here, of the testator's signing); 1849, Greenough *v.* Greenough, 11 Pa. 489, 498 (attestation presumes "compliance with the requisitions of the statute"; here, that the testator's name was written by his express direction); 1847, Barr *v.* Graybill, 13 Pa. 396, 399 ("his memory, in respect of it, was extinct, and he himself legally dead; . . . his attestation would have stood for proof by a witness"; but in this case there was not such a failure of memory); 1856, Barker *v.* McFerran, 26 Pa. 211, 214 (attestation presumes "everything else necessary to establish the will"; here, that the testator's name was written by his express direction); 1858, Vernon *v.* Kirk, 30 Pa. 218, 224 (like Greenough *v.* Greenough; attestation implies "that everything else necessary to give the instrument validity existed"; the Court may treat this as a presumption to control the jury); 1865, McKee *v.* White, 50 Pa. 354, 360 (like Greenough *v.* Greenough); 1867, Kirk *v.* Carr, 54 Pa. 285, 290 (same); 1867, Leckey *v.* Cunningham, 56 Pa. 370, 373 ("proof of attestation proves the will"; here, held to imply a signing in the witness' presence); 1868, Hamsher *v.* Kline, 57 Pa. 397, 402, *semble; South Carolina:* 1817, Pearson *v.* Wightman, 1 Mill Const. 336, 341 (publication may be presumed); 1831, M'Elwee *v.* Sutton, 2 Bail. 128, 129 (attestation imports "the testimony which the law presumes him to give"; "the proof of his handwriting after his death established the deed as a true and genuine paper, on presumptions, 1st, that if it had not been so, he would not have witnessed it, and 2d, that if he had been alive, he would have given all the evidence necessary to support it"); 1839, Dawson *v.* Dawson, Rice Eq. 243, 254 ("Attestation is evidence of what it professedly declares"; here an attestation of signing and sealing was held not to imply delivery); 1840, Ednionston *v.* Hughes, Cheves 81, 83 (the grantor's "signature, seal, and delivery are proved when the handwriting of the witnesses is proved"); 1892, Re Brock, 37 S. C. 348, 353 (attestation presumes all essential facts); St. 1839, Civ. C. 1922, § 5570 (attestation and testator's signature are 'prima facie' evidence "that the testator did execute the will in question in the presence of the witnesses thereto"); *South Dakota:* 1922, Hauer *v.* Hauer, — S. D. —, 186 N. W. 566; *Tennessee:* 1877, Beadles *v.* Alexander, 9 Baxt. 604, 609 (attestation raises a presumption of the presence of testator); 1830, Crane *v.* Morris, 6 Pet. 598, 616 (Story, J.: "[There arises] only a presumption of the due execution of the deed from the mere fact that the signature of the witness is to the attestation clause"); *Utah:* 1912, Butcher *v.* Butcher, — Utah —, 122 Pac. 397; *Vermont:* Gen. St. 1917, § 3221 (the handwriting of the witnesses is usable "where the names of the witnesses are subscribed to a certificate stating

been extended to imply an assertion of the maker's *sanity*.[4] But it could not cover facts not ordinarily known to the attester at the time of execution.[5]

§ 1512. **Same: Lack of Attestation-Clause is Immaterial.** It cannot be material, for this purpose, that the signature is *not accompanied by an attestation-clause* expressly stating all the facts; for, in the first place, the sole object of the signature is to attest the facts of execution; secondly, the maker and the witness may not know these facts to be essential or may not suppose it necessary to state them in writing, although the facts have occurred; and, thirdly, experience teaches that, if heed were given to the contrary possibility, more genuine and properly-executed documents would fail of proof than forged or improperly executed documents would be established by proof of the mere signature:

1777, Lord MANSFIELD, C. J., in *Graft* v. *Lord Bertie*, Peake, Evidence, 72: "Dadley's [the deceased attesting-witness] hand is proved as evidence of all he would have said if living."

1872, MCCAY, J., in *Deupree* v. *Deupree*, 45 Ga. 415, 443: "As a matter of course, the presumption is stronger or weaker according to any material facts connected with the case; and if it was recited, this would strengthen it. But it is a wise rule of law that such a presumption should exist. How many wills do not come up for probate until many years after the execution of them! Sometimes the witnesses can only recognize their own handwriting; sometimes they can only remember the fact that the testator signed, and perhaps only that they signed. Who was present, and all the other details, have passed from memory. To say that under such circumstances the will is not to be probated would be a death-blow to wills. . . . I only say that if the jury had been told there was a presumption of the presence of the testator . . . , it is possible they might have come to a different conclusion [than they did here in finding against the will]."

Such seems always to have been the rule in England;[1] and it obtains, with

that the will was executed as required in this chapter"); 1901, Claflin's Will, 73 Vt. 129, 50 Atl. 815 (the attestation clause is evidence of due execution); *Virginia:* 1799, Bogle v. Sullivant, 1 Call 561, *semble;* 1846, Pollock v. Glassell, 2 Gratt. 439, 464, *semble* (attestation is evidence of a "compliance with all the circumstances"); *West Virginia:* 1881, Webb v. Dye, 18 W. Va. 376, 388 (attestation suffices to show all the requirements of execution); 1898, Thompson v. Halstead, 44 W. Va. 390, 29 S. E. 991; *Wisconsin:* 1903, Gillmor's Will, 117 Wis. 302, 94 N. W. 32; 1910, Hawkinson v. Otway, 143 Wis. 136, 126 N. W. 683 (careful opinion, by Dodge, J.: applied to a signature by mark); 1912, Grant's Will, 149 Wis. 330, 135 N. W. 833; 1922, Maresh's Will, — Wis. —, 187 N. W. 1010.

[4] 1904, More v. More, Ill., cited *post*, § 1512, n. 2; 1900, Stevens v. Leonard, 154 Ind. 67, 56 N. E. 27 ("The witness must be understood to attest, not merely the act of signing, but also the mental capacity of the testator to sign"); 1830, Scribner v. Crane, 2 Paige 147, 149 (attestation implies sanity); 1871, Sellars v. Sellars, 2 Heisk. 430 (same). *Contra:* 1856, Baxter v. Abbott, 7 Gray 71, 82: 1848, Flanders v. Davis, 19 N. H. 139, 148 (attestation does not imply testimony to a grantor's sanity). Compare the cases cited *ante*, § 689 (attesting witness qualified to speak to sanity).

[5] 1838, People v. McHenry, 19 Wend. 482, 484 (where it appeared that the signature of the debtor was not in his handwriting, the proof of the subscribing witness' signature was held not to imply that the person signing for the debtor had a power of attorney).

§ 1512. [1] 1694, Dayrell v. Glascock, Skinner 413 (that a will-witness will not swear to execution, held, not fatal: "if proved to be his hand, and that he set it as a witness to the will, it is sufficient to satisfy the statute"); 1736, Hands v. James, 2 Comyns 531 (the clause did not recite the witnesses' signing in testator's presence; per *Curiam:* "In case the witnesses be dead, . . . the proof must be circumstantial, and here are circumstances: 1. Three witnesses have set their names, and it must be intended that they did it regularly; 2. One witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary. . . . It being a matter of fact, was proper to be left

scarcely an exception, in all the American jurisdictions in which the question has arisen.[2]

§ 1513. **Same: (2) Must the Maker's Signature or Identity also be otherwise proved?** It has often been contended that the signature of the maker also, as well as that of the attester, must be proved. This contention means in effect that another witness to the maker's signature must be called; for (as has just been noted) the attestation is the attester's testimony to the fact of execution, *i.e.* the placing of the signature by the purporting maker. If, then, it is necessary to call a second witness to the maker's signature, this must be on the supposition that the testimony of the attestation, taken alone, does not go far enough in its implied or expressed statements. This is indeed the ground upon which in part the above contention has been rested. It argues, first, that the attestation, while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in

to them [the jury]"); 1737, Brice *v.* Smith, Skinner 539, Willes 1 (apparently, similar); 1844, Burgoyne *v.* Showler, 1 Rob. Eccl. 5; 1859, Thomas' Goods, 1 Sw. & Tr. 255; 1860, Trott *v.* Skidmore, 2 Sw. & Tr. 12; 1890, Harris *v.* Knight, L. R. 15 P. D. 170 (by two judges to one; a profitable case for study; Lopes, L. J.: "The inference to be drawn in cases of this kind depends upon a number of circumstances peculiar to the cases in which they arise").

The following is apparently the only contrary expression: 1855, Roberts *v.* Phillips, 4 E. & B. 450, 457 (Lord Campbell, C. J.: "What effect then arises from the entire absence of a 'testimonium' clause? A 'testimonium' clause not being indispensable, we conceive that the absence of it would only make a difference in the extrinsic evidence which would be required to prove that the witnesses had seen the testator execute the will and that they signed it with the intention of attesting it at his request and in his presence").

[2] To the following cases, add a few of those noted in the preceding section, where the doctrine is apparently adopted to the present extent: *Ala.* 1900, Woodruff *v.* Hundley, 127 Ala. 640, 29 So. 98; *Cal.* 1898, Tyler's Estate, 121 Cal. 405, 53 Pac. 928 (all the statutory requisites presumed); *Del.* 1838, Pennel *v.* Weyant, 2 Harringt. 501, 506 (attestation implies all necessary formalities; but not ordinarily for a foreign will, where the requirements of execution may differ from those of the forum); 1847, McDermott *v.* McCormick, 4 id. 543 (signature as witness does not imply all the requisites for a will, but does for other documents); *Ga.* 1872, Deupree *v.* Deupree, 45 Ga. 415, 441 (see quotation *supra*); *D. C.* 1903, Kelly *v.* Moore, 22 D. C. App. 9, 25 (imperfect clause); *Ill.* 1904, More *v.* More, 211 Ill. 268, 71 N. E. 988 ("an inference arises, from the mere fact of attestation, that the witnesses believed that the testator possessed testamentary capacity", and that the execution and attestation were duly performed; here one of the attesters was a lawyer); 1907, Mead *v.* Presbyterian Church, 229 Ill. 526, 82 N. E. 371 (More *v.* More followed); *Mass.* 1860, Ela *v.* Edwards, 16 Gray 91, 97 (mere signature may suffice, if the tribunal is "reasonably satisfied of the fact of a proper attestation from other sources and the circumstances of the case"); 1865, Eliot *v.* Eliot, 10 All. 357 (preceding case approved); *N. Y.* 1843, Chaffee *v.* Baptist M. C., 10 Paige 85, 90, 91 ("the fact of such compliance may be . . . inferred from circumstances"); *Or.* 1903, Mendenhall's Will, 43 Or. 542, 72 P. 318, 73 Pac. 1033; *Pa.* 1865, McKee *v.* White, 50 Pa. 354, 359 ("The name of the deceased witness stands for his solemn declaration that it was executed as it appears; . . . in all such cases, the proof of the signature by the witness proves the instrument"; here held to imply the testator's signature, request, etc.); *R. I.* 1852, Fry's Will, 2 R. I. 88 (no attestation clause; all elements of execution implied); 1909, Newell *v.* White, 29 R. I. 343, 73 Atl. 798 (imperfect attestation clause; Blodgett, J., diss.); *Va.* 1839, Clarke *v.* Dunnavant, 10 Leigh 13, 22, 30 ("all the necessary requisites [may be implied] . . . although the memorandum of attestation is silent as to material ones"; Brooke, J., diss., except where the witnesses are unavailable; see the quotation in the preceding section); *Vt.* 1855, Dean *v.* Dean, 27 Vt. 746, 750 (the signature, with no attestation-clause, is evidence "of all those facts which he was required to attest"; but see the statute quoted in the preceding section); *Wis.* 1888, O'Hagan's Will, 73 Wis. 78, 82, 40 N. W. 649 (the signature only is sufficient to show due execution).

But whether a genuine *presumption* is raised by the signature alone might be differently decided (*post*, § 2520).

the case. It argues, furthermore, from the point of view of policy, that a person might be bribed to make a false attestation to a forged maker's signature, and then to abscond, leaving it feasible to prove the document against a deceased person by establishing the attester's genuine signature. These arguments are presented in the following passages:

1833, BAYLEY, B., in *Whitelocke* v. *Musgrove*, 1 Cr. & M. 520: "I have always felt this difficulty, that that proof alone [of the subscribing witness' handwriting] does not connect the defendant with the note. . . . What is the effect which, with the greatest degree of latitude can be given to the attestation of the subscribing witness? It is that the facts which he has attested are true. Suppose an attestation of an instrument which describes the person executing it as A. B. of C. in the county of York. Then the utmost effect you can give to the attestation is to consider it as establishing that A. B. of C. in the county of York executed the instrument. But you must go a step further and show that the defendant *is* A. B. of C. in the county of York, or in some manner establish that he is the person by whom the note appears to be executed. Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of Francis Musgrove. There may be many persons of that name, and if you do not show that the defendant is the Francis Musgrove who executed the instrument, you fail in making out an essential part of what you are bound to prove. It is not sufficient for the subscribing witness merely to prove that he saw the instrument executed. . . . Why? Because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore, on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument."

1828, PORTER, J., in *Dismukes* v. *Musgrove*, 7 Mart. N. S. 58, 63: "The only case that can be readily imagined where this rule would produce hardships is that of a stranger, whose handwriting was little known, coming into the country and exacting obligations before witnesses who after his departure died. No general rule can be laid down that will not do injury in some particular cases. But that just spoken of, in our judgment, is nothing in comparison with the danger that might result from sanctioning the other doctrine. The facility of proving any instrument under it is obvious. Whether forged or not, nothing more is necessary than to procure a non-resident of the State to put his name to it as a witness; and thus, a paper false in itself might be established by proving nothing but the truth in a court of justice." [1]

These arguments may be answered as follows. As to the first, it is at least an objection which may equally be made when the attester is called to the stand; for he may have known A. B. to execute the document, but he may not know him to be identical with A. B., a deceased party to the cause. Furthermore, sameness of name is always some evidence, and perhaps even raises a presumption, of identity of person;[2] so that his attestation-statement that A. B. executed the document is at least sufficient evidence of the identity of that and this A. B. As to the second argument, it is also equally, though not so strongly, available against an attesting witness on the stand; for it is equally possible, though perhaps more difficult, to bribe an attester to give false testimony on the stand to a forged maker's signature. Furthermore, the

§ 1513. [1] Further expositions of the same notion will also be found here and there in the quotations in § 1320, *ante;* a good opinion is that of Gantt, J., in Plunket v. Bowman, 2 McCord 139, 140 (1822).

[2] *Post*, § 2529.

supposed requirement merely asks that another witness be brought to testify to the maker's signature; yet a proponent who has bribed an attesting-witness and forged a maker's signature will presumably not lack the scruple and the means to supply a false witness to meet this additional requirement. Finally, to fail to impose this requirement, merely relieves the proponent of an extra burden; it does not sanction his supposed forgery, and does not prevent the opponent, any more than before, from exposing the forgery, if it is one.

These answers to the above arguments on behalf of such a requirement are in part represented in the following passages:

1808, MARSHALL, C. J., in *Murdock* v. *Hunter*, 1 Brockenb. 135, 140: "If the plaintiff, by proving the death and handwriting of the subscribing witness, was only let in to prove the execution of the bond by other testimony, it would seem to be sufficient to prove the death of the subscribing witness and to identify his person by any other proof than that of his handwriting, — as, for instance, that he was the only person of that name in a situation to render it probable that he could have attested the bond. [But] since it is not only necessary to prove the death, but to prove the handwriting of the subscribing witness, it would seem that something further than the mere permission to establish the execution of the bond by other testimony was gained by this proof. This can only be the inference, which is drawn by the law, that if the person who attested the bond was present he could and would prove its execution. . . . It would seem, then, . . . that a naked case, standing singly on this proof, would be in favor of the plaintiff. But this evidence, which is merely circumstantial, may be met by other circumstantial evidence. Whatever deducts from it may and ought to be weighed against it. It is therefore always advisable to support it by other testimony, if such testimony be in the power of the plaintiff. . . . The Court is inclined to the opinion that, in a case unsupported and unopposed by any other circumstance whatever, this proof would be deemed sufficient to establish the execution of the bond."

1838, NELSON, C. J., in *Kimball* v. *Davis*, 19 Wend. 442: "It seems to me, if proof of the signature of the witness amounts to anything, it must be carried in the first instance as far as an acknowledgment goes; otherwise it affords no evidence of the execution at all, because so much is essential to make out what the face of the deed purports, or any proof of the execution by the grantor."

These arguments, it would seem, should conclude us against imposing such a requirement as a general rule. The preferable rule is to allow the attester's signature to suffice, in the absence of special circumstances which might justify the trial Court, in its discretion, in exacting something more. At the same time, where the alleged maker is deceased (as in the case of wills), and therefore the counter-proof may likely be less available, it would be proper enough to insist on the present requirement.

So far as concerns the state of the law in the various jurisdictions, the requirement has been by some Courts repudiated, by others sustained; and the jurisdictions are fairly divided on the question; except that statutes almost always sanction the requirement for *wills*.[3] Of those jurisdictions

[3] The *rulings* in the various jurisdictions are as follows; but the *statutes*, which in the case of wills often expressly prescribe a rule, have been collected in one place, to avoid repetition, *ante*, § 1320 (where they are involved in the rule of Preferred Attesting Witnesses);

sustaining the contention, some require, having respect to the first argument above noted, that other evidence of the maker's identity be offered; some

the cases on the *Presumption from Identity* of Name (*post*, § 2529) may also be profitably consulted:

ENGLAND: *ante* 1767, Buller, Nisi Prius 171 ("Proof that one who called himself B. executed is not sufficient if the witness did not know it to be the defendant"; said of a witness on the stand); 1779, Coghlan *v.* Williamson, 1 Dougl. 93 (Mansfield, L. C. J., allowed proof of both signatures, but it does not appear that he required it); 1798, Buller, J., in Adam *v.* Kerr, 1 B. & P. 360 ("The handwriting of the obligor need not be proved; that of the attesting witness, when proved, is evidence of everything on the face of the paper; which imports to be sealed by the party"); 1790, Wallis *v.* Delancey, 7 T. R. 266, note (bond executed abroad; Lord Kenyon, C. J., ruled that the handwriting of the obligor as well as of one witness must be proved); 1817, Parkins *v.* Hawkshaw, 2 Stark. 239, Holroyd, J. (an attesting witness saw execution by a person introduced as H.; held, further evidence necessary); 1817, Bayley, J., in Nelson *v.* Whittall, 1 B. & Ald. 19, 21 ("If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it"; and he required the same when the attester's signature was used); 1827, Page *v.* Mann, Moo. & M. 79 (the attesting witness' signature having been proved, evidence that the defendants were the parties whose signature he had attested was held unnecessary; Tenterden, L. C. J., would not follow Bayley, J., in Nelson *v.* Whittall: "The practice has been otherwise; . . . if I am wrong, I may be corrected"); 1828, Kay *v.* Brookman, 3 C. & P. 555, 556 (a power of attorney; Best, C. J.: "It has been the uniform practice only to prove the handwriting of the attesting witness, and I am of opinion that it is the most convenient course"); 1833, Whitelocke *v.* Musgrove, 1 Cr. & M. 520 (Exchequer; see quotation *supra;* other evidence of maker's identity required; Bolland, B.: "It is a question as to which eminent judges have certainly entertained different opinions. It seems clear from the case of Wallis *v.* Delancey that Lord Kenyon was of opinion that such evidence was necessary; and it is clear that Lord Ellenborough had not made up his mind upon the subject, because in Nelson *v.* Whittall he did not take upon himself to say what would be the case if no evidence of identity had been given. The opinion of Lord Tenterden was certainly invariably the other way, and Lord Chief Justice Best acted on the same view of the subject as Lord Tenterden"); 1841, Jones *v.* Jones, 9 M. & W. 75 (King's Bench; the attesting witness testified to the maker's signature "Hugh Jones", but could not identify him with defendant, and it appeared that the name was there a common one; further evidence of identity held as necessary; Parke, B.: "This point must be considered as settled by the case of Whitelocke *v.* Musgrove"); 1841, Greenshields *v.* Crawford, M. & W. 314 (bill drawn on "Charles Banner Crawford" and accepted "C. B. Crawford"; held sufficient; Alderson, B.: "It is quite a different question whether . . . [proof of an attesting witness' signature suffices]; I agree that in such a case there should be some additional evidence").

UNITED STATES: *Federal:* 1808, Murdock *v.* Hunter, 1 Brockenb. 135, 139 (signature of the witness, usually enough; see quotation *supra*); 1823, Spring *v.* Ins. Co., 8 Wheat. 268, 283 (where both are dead, other evidence of the signature of the party is required); 1830, Walton *v.* Coulson, 1 McLean 120, 124 (not required, "in ordinary cases"); 1882, Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. 313 (on objection that "as the testimony to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor", the identity was then proved by other evidence); *Alabama:* 1887, Snider *v.* Burks, 84 Ala. 53, 56, 4 So. 225 (other evidence of testator's signature, not required for wills); 1897, Smith *v.* Keyser, 115 Ala. 455, 22 So. 149 (witness' signature sufficient; here, a deed); *Delaware:* 1837, Layton *v.* Hastings, 2 Harringt. 147 (witness ignorant of the maker's identity, but proving his own signature; proof also of the maker's handwriting, sufficient); *Georgia:* 1849, Watt *v.* Kilburn, 7 Ga. 356, 358 (witness' signature suffices); 1850, Settle *v.* Allison, 8 Ga. 201, 206 (same); 1861, Howard *v.* Snelling, 32 Ga. 195, 202 (other evidence of maker's signature, not required; but here the maker signed by mark); 1895, McVicker *v.* Conkle, 96 Ga. 584, 586, 24 S. E. 23 (proof of the maker's signature not necessary; but the policy of this doubted by Atkinson, J.; the maker's signature held necessary where it was to be used merely as a standard for comparison of hands); 1914, Strickland *v.* Babcock Lumber Co., 142 Ga. 120, 82 S. E. 531 (under Code 1895, § 5245, Code 1910, § 5834, quoted *ante*, § 1320, n. 2, testimony to the signing or the handwriting of the maker is indispensable, unless it be shown to be unattainable; here, on evidence only of the signature of one witness, a verdict was directed against the document); *Illinois:* 1851, Newsom *v.* Luster, 13 Ill. 175 ("evidence of the handwriting of both party and witness would be requisite" for documents required by law to be attested); 1895, Hobart *v.* Hobart, 154 Ill. 610, 615, 39 N. E. 581 (whether the testator's signature also must always be proved, undecided);

require, having in view the second argument, that other evidence of the maker's signature be offered; some, again, require that evidence be offered of

1909, Elston *v.* Montgomery, 242 Ill. 348, 90 N. E. 3 (attesting witnesses deceased, but signatures genuine, conflicting evidence as to the testatrix' handwriting, an attestation clause reciting due execution; the judge's direction of a verdict for the proponent was held proper, on the ground that the testatrix' oral acknowledgment of a will in the witnesses' presence is legally sufficient, that therefore proof of her signature's genuineness is not essential, and that the absence of evidence negativing the acknowledgment required a directed verdict; the ruling on the last point is novel, but seems sound); 1915, O'Brien *v.* Rhembe's Estate, 269 Ill. 592, 109 N. E. 1044; 1919, Rupp *v.* Jones, 289 Ill. 596, 124 N. E. 560 (affirming O'Brien *v.* Rhembe's Estate); *Indiana:* 1828, Ungles *v.* Graves, 2 Blackf. 191 (not decided); *Iowa:* 1898, Scott *v.* Hawk, 105 Ia. 467, 75 N. W. 368 (not decided; will); *Louisiana:* 1828, Dismukes *v.* Musgrove, 7 Mart. N. S. 58, 60 (other evidence of maker's signature required); 1836, Tagiasco *v.* Molinari, 9 La. 512, 521 (same; except where the maker signs by mark); 1837, Madison *v.* Zabriskie, 11 La. 247, 251 (same); 1847, Harris *v.* Patten, 2 La. An. 217 (approving the preceding cases); 1849, Rachal *v.* Rachal, 4 La. An. 500 (not required; preceding cases not noticed); 1850, Chaffe *v.* Cupp, 5 La. An. 684 (required; earlier cases followed with hesitation; rule not applied where the obligor signs by mark); 1851, Smith *v.* Gibbon, 6 La. An. 684 (not clear); 1854, Wattles *v.* Conner, 9 La. An. 227 (required; earlier cases followed); 1857, McGowan *v.* McLaughlin, 12 La. An. 242 (same); *Maryland:* 1800, Collins *v.* Elliott, 1 H. & J. 1 (signatures "of the testator and of all the witnesses", required for a will); 1864, Keefer *v.* Zimmerman, 22 Md. 274 (St. 1825, c. 20, making it lawful not to call the attesting witness, does not make proof of the grantor's signature preferable, and allows proof of the witness' signature as before); *Missouri:* 1874, Gallagher *v.* Delargy, 57 Mo. 29, 36 (witness' handwriting, no dispute as to identity, and direct testimony of execution; sufficient); *New Hampshire:* 1848, Cram *v.* Ingalls, 18 N. H. 613, 616 (for a mortgage, where witnesses are required by law, the grantor's and both witnesses' signatures must be proved); *New Jersey:* 1832, Kingwood *v.* Bethlehem, 13 N. J. L. 221, 226 (indenture of apprenticeship; other evidence of the maker's signature required); 1909, Worman *v.* Seybert, 78 N. J. L. 176, 73 Atl. 529 (bill of sale; attesting witnesses' signatures alone suffice; Kingwood *v.* Bethlehem not noticed; useful opinion); *New York:* 1800, Mott *v.* Doughty, 1 John. Cas. 230 (bond; the obligor's handwriting need not be proved; here the witness was dead); 1809, Sluby *v.* Champlin, 4 Johns. 461, 467 (same; here the witness was in foreign parts); 1822, Jackson *v.* Legrange, 19 Johns. 386, 389 (will; other evidence of testator's signature required); 1825, Jackson *v.* Luquere, 5 Cow. 221, 225 (same); 1828, Jackson *v.* Vickory, 1 Wend. 406, 412 (same); 1833, M'Pherson *v.* Rathbone, 11 Wend. 96, 99 (requirement repudiated for a deed); 1834, Jackson *v.* Waldron, 13 Wend. 178, 197, per Tracy, Sen. (preceding case approved); 1838, Kimball *v.* Davis, 19 Wend. 437, 442 (deed; requirement as to maker's identity repudiated; see quotation *supra*); 1840, s. c. appealed, s. v. Brown *v.* Kimball, 25 Wend. 259, 270 273 (Verplanck, Sen., in cases where there was "anything to raise a counter-presumption of fraud or even of doubt", required additional evidence of either the signature or of the identity of the grantor; but whether he meant by "identity", the bearing of the signed name by the grantor, or the grantor's identity with another person, was not stated; Walworth, C., and Edwards, Sen., thought proof of the witness' signature was sufficient; by 11 to 9 the former opinion prevailed); 1844, Northrop *v.* Wright, 7 Hill 476, 493 (preceding case questioned); *North Carolina:* 1792, Nelius *v.* Brickell, 1 Hayw. 19 (bond; other evidence of the maker's signature required); 1793, Jones *v.* Brinkley, 1 Hayw. 20, *semble* (bond; *contra*); 1798, Irving *v.* Irving, 2 Hayw. 27 (bond; like the first case); 1818, Stump *v.* Hughes, 5 Hayw. 93, *semble* (witness' handwriting, and either grantor's handwriting or an admission of signature, or the handwriting of both witnesses, required); *North Dakota:* St. 1907, c. 139, p. 198 ("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", but proof must be made as if there were no subscribing witnesses; what this legislator doubtless meant — and, by the way, what queer whim induced him to meddle in this particular triviality of the law of Evidence? — would be expressed by inserting "alone" at the end of the quoted clause); *Ohio:* 1824, Clark *v.* Boyd, 2 Oh. 280 (57) ("under proper circumstances . . . either may be sufficient"); 1858, Richards *v.* Skiff, 8 Oh. St. 586 (other evidence not required); *Pennsylvania:* 1810, Clark *v.* Sanderson, 3 Binn. 192, 196 (bill; other evidence of the maker's signature, suggested as desirable but not as settled law); 1813, Hamilton *v.* Marsden, 6 Binn. 45, 47, 50 (requirement repudiated; here for a lease); 1815, Powers *v.* M'Ferran, 1 S. & R. 44, 46 (requirement repudiated; here for a deed); 1847, Hays *v.* Harden, 6 Pa. St. 409, 412 ("[The witness' signature], when it is all that can be had, is an equivalent of the witness' oath; and, being 'prima facie' evidence of execution, it is not

either the one or the other; and there are more sub-varieties of rule. In England, there was for a long time a varying practice, until finally a requirement apparently became fixed that other evidence of the maker's identity should be offered. In this country, the requirement, when any has been made, has usually been of other evidence of the maker's signature; though a few Courts have properly left the matter to depend on the circumstances of each case.

Whether the *attester's* signature *must* be proved, or the *maker's alone* suffices, is a different question, involving the rule of Preference for Attesting Witnesses, and has been examined under that head (*ante*, § 1320).

§ 1514. **Attester may be Impeached or Supported like other Witnesses.** Since the attestation is offered as testimonial evidence of the attester speaking at the time of attestation (*ante*, § 1505), his statement, though he himself is not on the stand, may be impeached or supported as any witness' statements may be:

1860, WHELPLEY, J., in *Boylan* v. *Meeker*, 28 N. J. L. 274, 294: "Whenever the attestation is offered in evidence as proof of the execution of the instrument, any evidence which would have been competent against the witness, had he been sworn, will be competent to overthrow the force of his declaration offered in evidence instead of his testimony."

(1) Thus his *moral character* as a witness may be impeached in the way (*ante*, §§ 920, 977) appropriate for an ordinary witness.[1] He may also be

indispensable that it be followed by evidence of the handwriting of the grantor, obligor, or drawer of a bill or note"; here applied to a will); 1857, Transue *v.* Brown, 31 Pa. St. 92, *semble* same; 1868, Hamsher *v.* Kline, 57 Pa. St. 397, 402 (signature of the witness, with evidence of identity of the maker's name, sufficient); *South Carolina:* 1798, Hopkins *v.* DeGraffenreid, 2 Bay 187, 192 (for a "bond or deed", and here for a will, other evidence of maker's signature required); 1803, Turner *v.* Moore, 1 Brev. 236 (release; witnesses absent; proof of their handwriting held sufficient, without proof of the obligor's); 1810, Shiver *v.* Johnson, 2 Brev. 397 (witness' hand alone, sufficient, even where the maker signs by mark); 1820, Bussey *v.* Whitaker, 2 N. & McC. 374 (note signed by mark; subscribing witness' signature, sufficient); 1822, Plunket *v.* Bowman, 2 McC. 139 (bond; signature of both witness and maker required for all documents); 1827, Sims *v.* DeGraffenreid, 4 McC. 253 (deed; both required); 1840, Edmonston *v.* Hughes, Cheves 81, 83 (other evidence of the grantor's signature not necessary; "but it is usual to prove his handwriting, and where it can be done, it is safest and best to prove it"); 1841, Trammell *v.* Roberts, 1 McM. 305, 307 (both required at common law; here for a note); 1858, Russell *v.* Tunno, 11 Rich. 303, 318 (other evidence of the maker's handwriting or "something else to connect him with the instrument", necessary in addition to the witness' signature; here applied to an assignment; Plunket *v.* Bowman followed); 1859, Jones *v.* Jones, 12 Rich. 116, 120 (preceding case approved); 1878, Lyons *v.* Holmes, 11 S. C. 429, 432 (handwriting of the two witnesses to a maker signing by mark, held sufficient, without other evidence of the mark, there being corroborating evidence besides; Russell *v.* Tunno not overruled, but regarded as not to be extended; here there was such additional evidence as Russell *v.* Tunno required); 1892, Martin *v.* Bowie, 37 S. C. 102, 115, 15 S. E. 736 (deed; witness' proof of his own and the maker's signature, not enough; a singular novelty); *Tennessee:* 1850, Jones *v.* Arterburn, 11 Humph. 97, 103 ("the signature of the testator, though not absolutely essential, ought to be superadded"); 1855, Harrel *v.* Ward, 2 Sneed 610, 612, *semble* (other evidence of the maker's signature not necessary, unless required to prove identity); *Texas:* 1878, Gainer *v.* Cotton, 49 Tex. 101, 118 (not clear).

§ 1514. [1] 1836, Doe *v.* Harris, 7 C. & P. 330, Coleridge, J. (here for "the attorney who prepared the will"; but the notion in the Court's mind is evidently the general one); 1868, Chamberlain *v.* Torrance, 14 Grant Ch. U. C. 181, 184 (deed attempted to be proved by thirty years' age); Me. Rev. St. 1916, c. 87, § 135 (former testimony of deceased subscribing witness, admissible in certain suits, may be impeached like that of a living witness); 1843, Lawless *v.* Guelbreth, 8 Mo. 139,

impeached by evidence of *bias or interest*,[2] or of *self-contradictions* or inconsistencies,[3] or by other appropriate evidence.

(2) The party offering his attestation may in turn endeavor to rehabilitate him, by evidence of his *good character*,[4] or otherwise, according to the principles applicable to the corroboration and rehabilitation of witnesses (*ante*, §§ 1100–1144).

142; 1903, Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756 ("the petitioner may not have the benefit of the testimony of the two witnesses . . . without having such witnesses subject to be discredited"; here, by bad reputation for honesty and integrity); 1842, Losee *v.* Losee, 2 Hill N. Y. 609, 611; 1854, State *v.* Thomason, 1 Jones L. N. C. 274, *semble;* 1848, Harden *v.* Hays, 9 Pa. St. 158; 1820, Gardenhire *v.* Parks, 2 Yerg. Tenn. 23.

This is of course allowable where the witness is *on the stand:* 1832, Vandyke *v.* Thompson, 1 Harringt. 109 (a subscribing witness who merely testifies to execution may be impeached).

Compare the cases cited *ante*, § 68 (character of a third person alleged to have forged a will).

[2] 1868, Chamberlain *v.* Torrance, 14 Grant Ch. U. C. 181, 184 (bias).

[3] The authorities will be found *ante*, § 1033, because the question is complicated by the supposed necessity of inquiring of the witness before proving the inconsistent statement.

[4] 1831, Doe *v.* Walker, 4 Esp. 50, Kenyon, L. C. J. (deceased witnesses to a will; by the testimony of the survivor of three, the conduct of all appeared fraudulent; the good character of the deceased two was admitted); 1829, Provis *v.* Reed, 5 Bing. 435, 438 (deceased attorney who had prepared the will and was attesting witness; good character received in support, after imputations cast upon it; Best, C. J.: "The two decisions which have been cited, one of them from no less an authority than Lord Kenyon, are clearly in point; I have repeatedly tendered such evidence myself in similar cases when at the bar; I have had it tendered on the other side and have never objected; and the common practice of Westminster Hall has always been to receive it"; Park, J., reaffirmed this, and Burrough, J., referred to Doe *v.* Wood, unreported); 1784, Com. *v.* Fairfield, Mass., Dane's Abr. c. 84, art. 2, § 3, *semble;* 1838, People *v.* Rector, 19 Wend. N. Y. 569, 580 (good character received, after imputations of fraud); 1823, Crouse *v.* Miller, 10 S. & R. Pa. 158 (same); 1839, Braddee *v.* Brownfield, 9 Watts Pa. 124 (admissible; but whether merely because he is deceased, or not until his character is impeached, or in what way it must be impeached, does not appear).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC V: REGULAR ENTRIES

CHAPTER LI.

§ 1517. **In general.** To this Exception there are two branches. Historically, they are separate, yet traceable to a common origin. Theoretically, they are by no means identical, yet closely related in principle.

The main branch has a legitimate and living place among the Hearsay Exceptions. The other branch (for parties' account-books) has no longer on the whole any justification for a separate existence, and remains only as a fixed tradition, surviving in a form more or less modified by statute, after the reasons for its establishment have passed away. The former involves a general exception in favor of regular entries made in the course of business (but in England only in the course of a specific duty), the entrant being no longer available as a witness on the stand. The latter sanctions the admission of a narrower class of regular entries, *i.e.* made by a party to the suit, whether available as a witness or not.

The history of the two branches of the Exception must be considered before examining the tenor and limitations of each.

§ 1518. **History of the Two Branches of the Exception.**[1] (1) In *England*, (*a*) first, for *parties' books*, there appears at least as early as the 1600s, a custom to receive the shop-books of "divers men of trades and handicraftsmen" in evidence of "the particulars and certainty of the wares delivered"; and this whether the books were kept by the party himself or by a clerk, and whether the entrant were living or dead. But there was more or less abuse of this evidence, in "leaving the same books uncrossed and any way discharged" and still suing for the claim. Moreover, the whole proceeding was also discredited as involving the making of evidence for one's self, for "the rule is that a man cannot make evidence for himself." In 1609, then, a statute,[2] after reciting these considerations, forbade this use of parties' shop-books "in any action for any money due for wares hereafter to be delivered or for work hereafter to be done", except within one year after the delivery of the wares or the doing of the work, or where a bill of debt existed, or "between merchant and merchant, merchant and tradesman, or between tradesman and tradesman", for matters within the trade.[3] The higher Courts,

§ 1518. [1] The history of the exception was first traced and expounded by Professor Thayer in his Cases on Evidence, 1st. ed., 471, 506, 516.

[2] 1609, St. 7 Jac. I, c. 12, continued by St. 3 Car. I, c. 4, § 22; St. 16 Car. I, c. 4; Rev. St. I, 691.

It would seem, however, that this English statute was merely falling in with a movement which had for a generation been proceeding, all along the line, in other headquarters of the mercantile world. The precise features of the statute, namely, exclusion of mercantile books from evidence above a certain sum and beyond a certain time, are found in numerous Italian and French ordinances of the same epoch, several of which dated between 1575 and 1609 (Pertile, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 1, pp. 421, 423; Bonnier, Traité des preuves, ed. Larnaude, 5th ed., 1888, § 779; Lessona, Le Prove, 1892-1905, Book IV, Sect. I, part I, Ch. I, § I, Ch. II, § I, part II, Ch. I, § I, A); *e.g.* in 1575, "ad fraudem occasiones tollendas, aromatariorum libris ultra tres annos fides in judiciis ne habeatur", etc.; in 1582, "s'abbi da dare intera fede in giudizio insino alla somma di 10 scudi."

[3] That this statute was regarded as limiting a usage before unlimited, may be inferred from the following passage: Isaac Disraeli, Curiosities of Literature, vol. III, p. 362, Boston ed. of 1858 (in "The Philosophy of Proverbs"):

"A member of the House of Commons, in the reign of Elizabeth, made a speech entirely composed of the most homely proverbs. The subject was a bill against double-payments of book-debts. Knavish tradesmen were then in the habit of swelling out their book-debts with those who took credit, particularly to their

applying the principle that a man cannot make evidence for himself, ultimately made this exclusion complete, by refusing to recognize these books at all, after the expiration of the year.[4] In the lower courts, it is true (the Small Causes Court of London and provincial Courts of Request, succeeded by the County Courts), where the jurisdiction was limited to small claims, the use of these books continued to be a common practice, in many if not in all,[5] — where indeed the general rules of Evidence were perhaps, in the absence of counsel, more or less relaxed. But, apart from this local usage, the books of a party ceased after the 1600s to form the subject of a hearsay exception at common law in England. They came in again only under statutory rules of the late 1800s.[6]

(*b*) Next, however, for *third persons' books*, it appears that before the end of the same century of the above statute (1600) the entries of a deceased clerk (even a clerk of a party) began to be admitted, on a principle distinctly that of the preceding Hearsay exceptions (*ante*, §§ 1421, 1422), — necessity and trustworthiness. At that time there was hardly a conscious and definite recognition of the scope of the Hearsay rule (*ante*, § 1364), but the idea was the fundamental idea of its exceptions. The admission of these books was treated as anomalous, and it was directly understood that their use, though affording some concession to parties, was an essentially different thing from the use of books kept by a living party himself. The cases begin with the 1700s;[7] Price *v.* Lord Torrington is the one most frequently taken as the landmark of the rule. The attitude of the Courts at this time may be gathered from the following language of Lord Chancellor Hardwicke, in 1750, in Lefebure *v.* Worden:

"It must be admitted that by the rules of evidence no entry in a man's own books by himself can be evidence for himself to prove his demand. So far [nevertheless] the Courts of justice have gone (and that was a good way, and perhaps broke in upon the original strict rules of evidence), that where there was such evidence by a servant known in transacting the business, as in a goldsmith's shop by a cashier or bookkeeper, such entry, supported on the oath of that servant that he used to make entries from time to time and that

younger customers. One of the members who began to speak 'for very fear shook', and stood silent. The nervous orator was followed by a blunt and true representative of the framed governor of Barataria, delivering himself thus — 'It is now my chance to speak something, and that without humming or hawing. I think this law is a good law. Even reckoning makes long friends. As far goes the penny as the penny's master. "Vigilantibus non dormientibus jura subveniunt." Pay the reckoning over-night, and you shall not be troubled in the morning. If ready money be "mensura publica", let every one cut his coat according to his cloth. When his old suit is in the wane, let him stay till that his money bring a new suit in the increase.' (Townshend's 'Historical Collections', p. 283.)"

The practice of receiving the books appears considerably earlier in England, in the ecclesiastical Courts at least: 1552, Reformatio Legum Ecclesiasticarum, tit. 'De fide', c. 5.

[4] Crouch *v.* Drury, 1 Keble 27 (1661); Smart *v.* Williams, Comb. 247 (1694); Glynn *v.* Bank of England, 2 Ves. 38 (1750); Lefebure *v.* Worden, 2 Ves. 54 (1750); Digby *v.* Stedman, 1 Esp. 328 (1795); Sikes *v.* Marshall, 2 Esp. 705 (1798).

[5] Thayer, *ubi supra*, 'ex relatione' an English judge (Thomas Hughes).

[6] See the quotations in the next section. Meantime, it is true, there was some recognition in chancery practice: 1828, L. C. Hart, in Kilbee *v.* Sneyd, 2 Moll. Ire. 186, 196 (used by the Chancellor "to inform his mind, although perhaps not absolutely to govern his decision").

[7] Pitman *v.* Maddox, 1 Ld. Raym. 722 (1698–99); Price *v.* Lord Torrington, 2 Ld. Raym. 873 (1703); Sir Biby Lake's Case, Theory of Evidence, 93 (1761); Glynn *v.* Bank of England, *supra;* Lefebure *v.* Worden, *supra.*

he made them truly, has been read. Further, where that servant, agent, or bookkeeper has been dead, if there is proof that he was the servant or agent usually employed in such business, was intrusted to make such entries by his master, [and] that it was the course of trade, — on proof that he was dead and that it was his handwriting, such entry has been read (which was Sir Bibly Lake's Case). And that was going a great way; for there it might be objected that such entry was the same as if made by the master himself; yet by reason of the difficulty of making proof in cases of this kind, the Court has gone so far."

The admission thus far made covered only the books of the clerk of a party. But already there were instances foreshadowing a wider principle. In several rulings, books regularly kept by third persons then deceased had been admitted, his death and the regularity of the book being more or less explicitly recognized as the grounds of admission.[8] Finally, in 1832, in Doe *v.* Turford,[9] following one or two minor cases, the doctrine was placed on a firm footing, and the general scope of the exception was recognized. It was understood to cover all entries made "by a person, since deceased, in the ordinary course of his business", whether a person wholly unconnected with the parties, or the clerk of a party, or the party himself; and it is this general exception that to-day is universally recognized.

(2) The history of the doctrine was widely different in the *United States*.

(*a*) For *parties' books*, the English statute of 1609, or a similar one, for parties' shop-books, was in force, to a considerable extent, in the Colonies. In the Plymouth Laws, as well as in the later laws of Massachusetts, Connecticut, and other New England States, the use of parties' account-books was limited, but still authorized by statutes; a special action of "book-debt" was in some places authorized.[10] In New York and New Jersey the use seems clearly traceable to Dutch practice,[11] which however did not vary in essentials from the English. In most of the jurisdictions (though not in all) the party was allowed and required to verify the accounts by a "suppletory" oath; but in all jurisdictions, though there were practically no limitations of time (as there were in England) to the use of the books, there were many restrictions as to the kind of business, the kind of transaction, and the like, which rested on the same distrust of a party's own evidence and seriously limited the use of the books. But a cardinal feature of the attitude of the Courts, peculiar to the United States, was that the evidence was treated on the same grounds already set forth (*ante*, §§ 1421, 1422) as underlying the Hearsay

[8] Smart *v.* Williams, Comb. 247 (1694); Woodnoth *v.* Lord Cobham, Bunbury 180 (1724); Sutton *v.* Gregory, Peake's Add. Cas. 150 (1797).

[9] 3 B. & Ad. 890.

[10] These statutes for the New England Colonies, will be found quoted or cited in Thayer, *ubi supra*, 506, 515. To those citations add, for North Carolina, St. 1756, and for South Carolina, St. 1721 (*post*, § 1519). These early statutes are not here set out, because nothing turns upon their wording; for either (as in New England) the statutes have fallen into desuetude and the rulings of the Courts since the Revolution have become the source of the law, or (as in North Carolina) a modern statute has superseded the early one.

[11] This is pointed out by Mr. Justice Charles P. Daly, the learned historian of New York, in his History of the Court of Common Pleas, in 1 E. D. Smith xxx; also in 4 id. 397. Possibly (on the lines suggested by Mr. Douglas Campbell, in his Puritan in England, Holland, and America) the English usage of Elizabeth's time was itself learned from the Dutch merchants.

exceptions generally, — the principles of necessity and of a circumstantial guarantee of trustworthiness. The necessity was the fact that so many small traders, in the then condition of the country, keeping no clerk, and being as parties incompetent to take the stand, were totally bereft of any means of proof except their own extrajudicial statements in these books (*post*, § 1537). The guarantee of trustworthiness was that which we now recognize in the regularity of the entries (*post*, § 1522).

What is to be noticed, then, is that the books were received practically on the footing of a special Hearsay exception. By keeping in mind that the party was unavailable as a witness for himself, and that there was thus a necessity for using his past, extrajudicial, *i.e.* hearsay statements, — that in short the judicial attitude was the same to this as to ordinary Hearsay exceptions, it is easy to follow out the rationalized form which this branch of the exception took, — a form usually, but incorrectly, regarded as merely arbitrary.

(*b*) For *third persons in general*, at that time (*i.e.* up to the earliest part of the 1800s) no other exception of the sort appears to have been recognized in the United States, — that is, there was no using of regular entries except this limited use of a party's shop-books.[12] But a knowledge of the doctrine of Price *v.* Lord Torrington (1703) seems to have been then brought about by the English decisions of Pritt *v.* Fairclough[13] and Hagedorn *v.* Reid,[14] rendered in 1812 and 1813; and shortly after this time two well-considered rulings, following these authorities, established on a firm footing the large and general principle of admitting regular entries by deceased persons, — the cases of Welsh *v.* Barrett,[15] in Massachusetts, in 1819, and Nicholls *v.* Webb,[16] in the Federal Supreme Court, in 1823. In these two decisions the Exception found a recognition entirely independent of the use of parties' books; and it was only in the course of time, especially through Professor Greenleaf's treatment in his work on Evidence, that the two branches of the exception became associated and their analogy recognized. When this relation came to be appreciated, certain difficulties had to be solved; for example, one of the questions presented to American Courts was whether the books of a deceased or an absent party should be treated according to the parties'-books doctrine or from the point of view of the broad and inclusive exception admitting regular entries of deceased persons generally. Another and analogous question was the place to be assigned to books kept by a deceased clerk of a party. These questions concerning the delimitation of the two divisions still trouble the waters of precedent.

[12] The following belongs under the older tradition: 1792, Lewis *v.* Norton, 1 Wash. Va. 76 (entries in the appellee's "store-books, which were proved to be in the handwriting of one of the appellee's bookkeepers, then dead", admitted).

[13] 3 Camp. 305.

[14] 3 Camp. 377.

[15] 15 Mass. 380.

[16] 8 Wheaton 326. There were one or two earlier cases, such as Clarke *v.* Magruder, 2 H. & J. 77 (Md., 1807), and Sterrett *v.* Bull, 1 Binn. 237 (Pa., 1808); but the former two were those chiefly esteemed by other Courts in establishing the doctrine.

By these stages the two parts of the Exception reached their present development in England and in the United States. In will be seen that in England there now exists (apart from statute) only the broad principle admitting regular entries of any sort by deceased persons generally; while in the United States there have grown up two branches, — one, the same general principle, the other, an analogous principle covering parties' account-books only.

§ 1519. **Statutory Regulation.** The main branch of the Exception — regular entries by persons deceased or the like — has seldom been intentionally dealt with in statutes. But the branch applicable to parties' books has been in many jurisdictions the subject of legislation.[1]

§ 1519. [1] The statutes for books of a *corporation* are noted *ante*, § 1074.

ENGLAND: 1883, Rules of Court, Ord. XXX, enacted 1894, Rule 7 ("On the hearing of the summons, the Court or judge may order that evidence of any particular fact, to be specified in the order, shall be given . . . by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct"); Ord. XXXIII, Rule 3 ("The Court or judge", in directing an account, "may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as 'prima facie' evidence of the truth of the matters therein contained"); 1879, St. 42 Vict. c. 11, Bankers' Books Evidence Act, § 3 (entries in a "banker's book" are to be 'prima facie' evidence of "the matters, transactions, and accounts therein recorded"); § 4 (provided the book "was at the time of making the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody of the bank").

CANADA: *Dom.* R. S. 1906, c. 146, Cr. C. § 984 (in proving the age of a young person, on certain charges, "any entry or record by an incorporated society or its officers having had the control or care" of the person about the time of his being brought to Canada, is admissible, if made before the offence committed); *Alberta:* Rules of Court 1914, No. 294 (directing an account; like Eng. Ord. 33, Rule 3); *British Columbia:* Rev. St. 1911, c. 53, § 89 (in actions in a county court for a demand not for tort and not exceeding $250, the judge "on being satisfied of their general correctness" may receive in evidence "the books of the plaintiff", or for a payment or set-off or counter-claim, those of the defendant); Rules of Court 1912, No. 382 (like Eng. Ord. 33, R. 3); *Manitoba:* Rev. St. 1913, c. 44, § 138 (in any action in county courts "for a debt or demand, not being for tort, the judge, on being satisfied of their general correctness, may receive in evidence the books of the plaintiff", or, for a set-off or counter-claim or payment, the books of the defendant); *New Brunswick:* Consol. St. 1903, c. 112, § 177 (on a reference, "the books or writings of either party, or of any person or party represented by him or under whom he claims, may also be used in evidence for or against the party producing them"); c. 127, § 38 (on an issue as to the estate of a deceased person, "entries in the books of accounts of such deceased persons shall on proof of their being in the handwriting of the deceased or of a clerk who is deceased" be admissible and be 'prima facie' proof, if the Court is satisfied "that they were made in the ordinary course of business"); 1906, Anderson *v.* Anderson, 37 N. Br. 432 (certain entries in the account-books of a deceased grantor, admitted, under St. 1895, c. 16, Consol. St. 1903, c. 127, § 38); *Newfoundland:* Consol. St. 1916, c. 83, Ord. 30, R. 3 (parties' books of account, admissible in certain cases); c. 92, §§ 2–6 (entries in bankers' books made admissible, on certain conditions); 1900, Mare *v.* Winter, 8 Newf. (Morris & Browning) 388 (action by a bank-trustee for balance due from a customer; the bank's books of 1882–1892, verified by the former bookkeeper, admitted); *Nova Scotia:* Rules of Court, 1900, Ord. 32, R. 3 (in directing an account, the judge may direct that "the books of account in which the accounts in question have been kept shall be taken as 'prima facie' evidence", with liberty to object); 1905, Carstens *v.* Muggah, 37 N. Sc. 361 (supplies of meat; plaintiff's books of account not admitted; no authority cited); *Ontario:* Rev. St. 1914, c. 63, § 119 (division courts: in money actions not exceeding $25: "the judge on being satisfied of their general correctness, may receive the plaintiff's, defendant's, or garnishee's books as evidence"); *Prince Edward Island:* St. 1889, § 52 ("Proof of the handwriting of any clerk, shopman, or servant, or other person, of any entry in any original book of entry, and made in the ordinary course of business, stating the delivery of goods, the payment of money, or the performance of labor", shall be evidence thereof, "in the absence from this Province of such clerk", etc., as if he were dead); *Yukon:* Consol. Ord.

In England this legislation has merely restored, in broad and indefinite language, something of the usage which for two centuries had ceased to be a part of the common law. In the New England States, the original colonial statutes fell into desuetude, and the practice was perpetuated by judicial rulings. But in some of the Southern States new statutes from time to time re-stated the terms of the rule; and in the legislation of

1914, c. 48, Rule 245 (like N. Sc. Ord. 32, R. 3).

United States: *Alabama:* Code 1907, § 3975 ("The original entries in the books of a physician are evidence for him in all actions brought for the recovery of his medical services, that the services were rendered, unless the defendant in open court deny on oath the truth of such entries, but the physician is required to prove the value of such services"; a denial by the opponent's representative may be on belief only); § 3976 ("Books of account kept by a deceased executor, administrator, guardian, or trustee, or entries or memoranda made by him in the course of business or duty, are admissible evidence; and if such book or memoranda be lost, a copy thereof, supported by the oath of the person making it, is admissible evidence"); § 4003 ("The books of account of any merchant, shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts upon the following conditions: (1) That he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying. (2) Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries. (3) Upon inspection by the court, to see if the books are free from any suspicion of fraud");
Arizona: Rev. St. 1913, Civ. C. §§ 1756–1758 (books of account; like Minn. Gen. St. 1913, §§ 8437–8439);
Arkansas: Dig. 1919, § 4134 ("The regular and fairly kept books of original entries of a deceased merchant or regular trader, or any person keeping running accounts for goods, wares, merchandise, or other property sold or labor done, accompanied by the affidavit of the executor or administrator of such deceased person, or some creditable person for him, setting forth that they are the books or accounts of his testator or intestate, shall be evidence to charge the defendant for the sum therein specified, subject to be repelled by other competent testimony"); § 4135 ("To entitle the party to introduce such evidence, he must first establish, to the satisfaction of the Court, that the testator or his intestate had the reputation of keeping correct books"); § 4136 (statute not to apply to "hawkers or peddlers");
California: C. C. P. 1872, § 1946 ("The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as 'prima facie' evidence of the facts stated therein, . . . 2, when it [the entry] was made in a professional capacity, and in the ordinary course of professional conduct; 3, when it was made in the performance of a duty specially enjoined by law"); § 1947 ("When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals");
Colorado: Comp. L. 1921, § 6557 (when in any civil action "the claim or defense is founded on a book account, any party or interested person, association or company may testify to his or their account-book and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself or his employe and are true and just, or that the same were made by a deceased person, or by a disinterested person, a non-resident of the State at the time of a trial, and were made by such employe, deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying");
Connecticut: Gen. St. 1902, § 981 ("In all actions for a book debt, the entries of the parties in their respective books shall be admissible in evidence"; and the defendant may have an order for oyer before pleading); 1904, Handy *v.* Smith, 77 Conn. 165, 58 Atl. 694 (statute applied, without noting the specific point involved); the statute concerning actions for book debt does not appear in Gen. St. 1918; St. 1911, c. 175, p. 1438, Aug. 9, § 1, Gen. St. 1918, § 5737 (in civil cases where a party has become unable to testify because of "incurable sickness, failing mind, old age, infirmity, or senility", or insanity, "the entries and memoranda of such party, made while sane, relevant to the matter in issue, may be received as evidence"; receivable also in favor of one claiming under such person insane, etc.; the trial Court to determine the applicability of this rule);
Delaware: Rev. St. 1915, § 4226 (a "book of original entries, regularly and fairly kept", offered with plaintiff's oath or affirmation, is admissible to charge the defendant "with the sums therein contained for goods sold and delivered, and other matters properly chargeable in an account", or is admissible, with defendant's oath or affirmation, to establish a set-off; "cash items are not properly so chargeable"; "provided that the party proving his book of original entries shall be subject to cross-

many Western States this part of the exception was also embodied in statutes.

examination touching the same and the entries therein and the transactions to which such entries relate");
Florida: Rev. G. S. 1919, § 2738 ("In all suits the shop-books and books of account of either party, in which the charges and entries shall have been originally made, shall be admissible in evidence in favor of such party", the jury to judge of credibility);
Georgia: Rev. Code 1910, § 5764 ("The books of account of any merchant, shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts, upon the following conditions: 1. That he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying; 2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries; 3. Upon proof (by his customers) that he usually kept correct books; 4. Upon inspection by the Court, to see if the books are free from any suspicion of fraud"); St. 1910, No. 309, p. 57, July 28 (amending Code 1895, § 5182, Rev. C. 1910, § 5764, by inserting, after "blacksmith" the words "farmer, dairyman, planter");
Idaho: Comp. St. 1919, § 7967 (like Cal. C. C. P. § 1946);
Illinois: Rev. St. 1874, c. 51, § 3 ("Where in any civil action, suit, or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account-book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the State at the time of the trial, and were made by such deceased or disinterested person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account-book and entries shall be admitted as evidence in the cause"); 1872, Presbyterian Church *v.* Emerson, 66 Ill. 269, 271 ("This section is a repeal of the common-law rule as to the admissibility of the account-book"); 1892, House *v.* Beak, 141 Ill. 290, 297, 30 N. E. 1065 ("Section 3, which was first passed in 1867 (Laws of 1867, § 3, p. 184), adds to and enlarges, but does not repeal the common law; a contrary statement made in Presbyterian Church *v.* Emerson, 66 Ill. 269, was mere 'dictum', and not necessary to the decision of the case");
Iowa: Code 1897, § 4622, Comp. Code § 7329 (like Cal. C. C. P. § 1946, with "or" instead of "and", in the second class of cases); § 4623, Comp. C. § 7330 ("Books of account, containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances. . . . First, the books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book or set of books; Second, it must be shown, by the party's oath or otherwise, that they are his books of original entries; Third, it must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof; Fourth, the charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made; Any loose leaf or card or other form of entry which may be in use in the ordinary course of business by the party seeking to prove an account against another, and shall have been properly identified as being the original entry of such account shall be admitted as competent evidence for the purpose of proving such account by deposition or in open court, and it shall be competent for any person whose duties in the ordinary course of such business require a personal knowledge of the records of such business, to verify such account or make deposition or testify in open court with regard to any matters pertaining to such records. In all cases where depositions are taken by either method provided by law, outside of the county in which the case is for trial when books of account are competent evidence in the case, the party desiring to offer the entries of said books as evidence may cause the same to be photographed by or under the direction of the officer taking the deposition and such photographic copy when certified by such officer with his seal attached shall be attached to the deposition"); a valuable critique of the judicial interpretation and the shortcomings of this statute, with suggestions for improvement, will be found in the article by Prof. Frederic M. Miller, "Regular Entries, Books of Account, and the Iowa Statutes" (1922, Iowa Law Bulletin, VII, 88);
Kansas: Gen. St. 1915, § 7288 ("Entries in books and other writings intended as records of sales, purchases, receipts, payments, deliveries, weights, measures, time, transactions of events, made in the regular course of business of any person, firm, corporation or public officer, as a record of the matters to which they relate, at or near the time of the transaction or occurrence, shall be admissible in evidence on proof that they were so made. Where such entries are in the possession of the adverse party, they shall be produced at the trial on reasonable notice, unless the court or judge excuse such production for good cause, and allow the substitution of a sworn copy thereof,

The history of this Western legislation is obscure; but it seems to have come about in general by way of imitation or adaptation of the Southern statutes

to be furnished by the party in possession thereof. Entries in possession of strangers to the suit, which are kept without the county in which the action is triable, may be proven copies");
Kentucky: C. C. P. 1895, § 606, par. 6 (quoted *ante*, § 488);
Louisiana: Rev. Civ. C. 1920, § 2248 ("The books of merchants cannot be given in evidence in their favor");
Massachusetts: St. 1913, c. 288, now Gen. L. 1920, c. 233, § 78 ("An entry in an account kept in a book or by a card system or by any other system of keeping accounts shall not be inadmissible in a civil proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, if the Court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid; the Court, in its discretion, before admitting such entry in evidence, may, to such extent as it deems practicable or desirable but to no greater extent than the law has heretofore required, require the party offering the same to produce and offer in evidence the original entry, writing, document or account, or any other [book] from which the entry offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the entry offered or the original or any other entry, writing, document or account from which the entry offered or the facts therein stated were transcribed or taken, or who has personal knowledge of the facts stated in the entry offered"); c. 233, § 79 (hospital records; quoted *post*, § 1639);
Michigan: Comp. L. 1915, § 12541 ("In all trials . . . books of account, containing charges or entries for money paid, laid out, or furnished, shall be received and admitted as evidence, and deemed to be evidence of such charges and entries, and that such moneys were so paid, laid out, furnished, or lent, as is in such books charged or entered, and of the liability of the person charged therefor, in the same manner and to the same extent as books of account containing charges for goods, wares, or merchandise sold and delivered, are received and admitted as evidence of sale and delivery of such goods and merchandise, and of the liability of the person charged therefor; provided, this section shall not apply to cases where persons acting or having acted as commission merchants or agents for the sale of produce, grain, or other property, unless accompanied by a voucher or receipt for the money so claimed to be laid out, lent, or furnished");
Minnesota: Gen. St. 1913, § 8437 ("Whenever a party in any cause or proceeding shall produce at the trial his account books, and prove that the same are his account books kept for that purpose, that they contain the original entries for moneys paid, goods or other articles delivered, services performed or material furnished; that such entries were made at the time of the transactions therein entered; that they are in his handwriting or that of a person authorized to make charges in said books, and are just and true to the best knowledge and belief of the person making the proof, such books, subject to all just exceptions as to their credibility, shall be received as 'prima facie' evidence of the charges therein contained. If any book has marks which show that the items have been transferred to a ledger, it shall not be received unless the ledger is produced. Provided, that the entry of charges or credits, involving money, goods, chattels or services furnished or received, when the furnishing or receipt thereof constitutes a part of the usual course of business of the person on whose behalf such entry is made, shall be received as evidence tending to prove the fact of the furnishing or receiving of such moneys, goods, chattels or services, whether the same be contained in an account book, or in a so-called loose-leaf, card or similar system of keeping accounts, and whether the same be made by handwriting, typewriting or other similar means, if it shall appear that such entry was made by a duly authorized person contemporaneously with the transaction therein referred to, as a part of the general system of accounts of the person on whose behalf the entry is made, and that the same is made in the usual and ordinary course of said business"); § 8438 ("Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence, in a case proper for the admission of such book as evidence, on proof that the same are in his handwriting, and in a book kept for such entries, without further verification"); § 8439 (where a deposition is used, production of such books to the officer suffices, and copies of entries may be attached);
Missouri: Rev. St. 1919, § 5410 (quoted *ante*, § 488); § 5411 (quoted *post*, § 1859);
Montana: Rev. C. 1921, §§ 10594, 10595 (like Cal. C. C. P. §§ 1946, 1947);
Nebraska: Rev. St. 1922, § 8855 (substantially like Cal. C. C. P. § 1946, substituting "or" for "and" in the second class, and "presumptive" for "prima facie"); § 8846 (like Ia. Code § 4623, with "or set of books" omitted at the end of the first proviso and ending with "not made" in the fourth proviso);
New Mexico: Annot. St. 1915, § 2187 (in civil causes, "the books of account of any merchant, shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted as proof of such accounts upon the following conditions:

familiar to many of the early immigrants. Much of it preceded the abolition of parties' disqualification (*ante*, § 577), and was intended to alleviate

First, that he kept no clerk, or else the clerk is dead or inaccessible; Second, upon proof, the party's oath being sufficient, that the book tendered is the book of original entries; Third, upon proof, by his customers, that he usually kept correct books; Fourth, upon inspection by the Court to see if the books are free from any suspicion of fraud"); 1898, Byerts *v.* Robinson, 9 N. M. 427, 54 Pac. 932 (the foregoing statute supersedes the common law);

New York: St. 1909, c. 517, p. 1309 (water-supply department of first-class cities; records of observations of water-supply, its effects, etc., to be admissible when verified by officer's affidavit, if he "cannot be found or is absent, incapacitated, or dead"; this statute is one of the strangest mongrels ever bred in the legislative kennels);

North Carolina: Con. St. 1919, § 1786 (in claims "for goods, wares, and merchandise by him sold and delivered or for work done and performed", on the claimant's oath that the matter is a book account and "that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book", and that "it doth contain a true account of all the dealings or the last settlement of accounts" and that "all the articles therein contained and by him so proved were 'bona fide' delivered, and that he hath given the opposing party all just credits", the book and oath are admissible for articles delivered within two years before action begun, but not "for any greater amount than sixty dollars"); § 1787 (similar provisions for an executor, etc., using deceased's book, on oath that "there are no witnesses to his knowledge capable of proving", etc.; the matters to be within three years before suit begun and two years before the death of the deceased); § 1788 (a copy of an account may be used instead of the original, unless the opponent has given ten days' notice to produce); § 1789 (in actions on an account for goods sold and delivered, "a verified itemized statement of such account" shall be 'prima facie' evidence);

North Dakota: Comp. L. 1913, § 7909 ("Any entries in a book or other permanent form, in the usual course of business, contemporaneous with the transactions to which they relate and as a part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the reach of a subpœna of the trial court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of business, also made in other books and papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpœna who were engaged in the making of such entries; but before such entries are admitted the court shall be satisfied that they are genuine and in other respects, within the provisions of this section");

Ohio: Gen. Code Ann. 1921, § 11495 (quoted *ante*, § 488);

Oklahoma: ("Entries in books of accounts may be admitted in evidence, when it is made to appear by the oath of the person who made the entries that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county");

Oregon: Laws 1920, § 790 (like Cal. C. C. P. § 1946, inserting, after "deceased", "or without the State", and after "writings", "of a like character"); § 791 (like Cal. C. C. P. § 1947);

Pennsylvania: St. 1883, June 22, § 1, Dig. 1920, § 10343, Evidence ("book entries of any bank or banker doing business at the time" of evidence required are provable by copy); St. 1883, June 22, § 2, Dig. § 10344 (in admitting this copy, "there must be an affidavit or the testimony of an officer of the bank stating that the book is one of the ordinary books of the bank used in the transaction of its business, that the entry is as was originally made at the time of its date, and in the usual course of its business, that there are no interlineations or erasures, and that the copy has been compared with the book, and is a correct copy of the same, and such book shall be open to the inspection of any interested party"); St. 1883, June 22, § 3, Dig. § 10345 (this statute shall not apply to "any suit to which the bank or bankers is a party"); St. 1897, May 25, § 1, Dig. 1920, § 18557 ("Hereafter in any suit or action brought in any Court within this commonwealth in which the accounts kept by any common carrier, railroad company, chartered storage or transportation company, or other public corporation doing business within this commonwealth are involved in an issue between other parties, and in the result of which such common carrier, railroad company, chartered storage or transportation company, or other public corporation, has no direct or pecuniary interest, a copy of the books of account of original entry of such common carrier, railroad company, chartered storage or transporation company, or other public corporation, under the oath or affirmation of an officer or employee in charge of the books of such common carrier, railroad com-

that rule. The Western legislation, however, was often broader in language than the Southern statutes, which usually did not do much more than per-

pany, chartered storage or transportation company, or other public corporation, filed within ten days of the date of the trial or hearing of the issue in said suit or action, shall be and become 'prima facie' evidence");
Philippine Islands: C. C. P. 1901, § 328 (like Cal. C. C. P. § 1946, adding to par. 3, "or in the course of the ordinary and regular duties of the person making the entry"); § 329 (like Cal. C. C. P. § 1947);
Porto Rico: Rev. St. & C. 1911, § 1461 (like Cal. C. C. P. § 1946, adding to par. 3 the words "contract or employment");
South Carolina: C. C. P. 1922, § 718 ("Books of original entry kept by farmers and planters relating to the transactions of their farms or plantations shall be receivable in evidence in all trials in which the business or transactions of their farms or plantations shall be called in question, as between the farmer or planter and his employees, in the same manner as books of merchants and shopkeepers are"); § 719 ("The books of accounts of tavernkeepers, shopkeepers, or retailers of spirituous liquors shall not be admitted, allowed, or received as evidence, in any court having a right to try the same, of any debt contracted, or moneys due, for spirituous liquors sold in less quantity than a quart");
Tennessee: Shannon's Code 1916, § 5562 (in actions for goods sold and delivered or for work and labor, the plaintiff's books of account are to be admissible to prove sale and delivery of "articles not exceeding seventy-five dollars in value, which were delivered within two years before the action brought, if the plaintiff make oath (1) that the matter in dispute is a book account, (2) that he has no means to prove the delivery of such articles as he shall then propose to prove by his own oath, but by his book, (3) that the book contains a true account of all the dealings or last settlement of account between them, (4) that all the articles therein contained and by him so proved were really delivered, and (5) that he has given the defendant all just credits"); § 5563 (a deceased creditor's representative may use the book on swearing (1) that he believes the account just, (2) that there are no witnesses who can prove it, (3) that he "found the book with the account so stated", and (4) that he "knows of no further or other credit to be given"); § 5564 (a copy may be used unless the defendant has given notice, at the time of issue joined, to produce the book); § 5565 (if both parties are deceased persons' representatives, the deceased opponent's book may be admitted to disprove charges);
Utah: Comp. L. 1917, § 7113 (like Cal. C. C. P. § 1946);
Vermont: Gen. L. 1917, §§ 1891, 1893 (quoted *ante*, § 488);
Wisconsin: Stats. 1919, § 4186 ("Whenever a party in any cause or proceeding shall produce at the trial his account-books and swear that the same are his account-books, kept for that purpose; that they contain the original entries of charges for goods or other articles delivered, or work or labor or other services performed or materials found, and that such entries are just, to the best of his knowledge and belief; that said entries are in his own handwriting, and that they were made at or about the time said goods or other articles were delivered, said work and labor or other services were performed, or said materials were found, the party offering such book or books as evidence, being subject to all the rules of cross-examination by the adverse party that would be applicable by the rules to any other witness giving testimony relating to said book or books, if it shall appear upon the examination of said party that all of the interrogatories in this section contained are satisfactorily established in the affirmative, then the said book or books shall be received"); § 4187 ("Whenever the original entries mentioned in the preceding section are in the handwriting of an agent, servant, or clerk of the party, the oath of such agent, servant, or clerk may in like manner be admitted to verify the same, and said books shall be testimony" as in § 4186; provided that under neither section shall a book "be admitted as testimony of any item of money delivered at one time exceeding five dollars, or of money paid to third persons, or of charges for rent"); § 4188 (a book with marks showing a posting in a ledger is inadmissible "unless the ledger be produced"); § 4189 ("Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence in a case proper for the admission of such books as evidence. Entries in a book or other permanent form, other than those mentioned in §§ 4186 and 4189*b*, in the usual course of business, contemporaneous with the transactions to which they relate and as part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the reach of a subpœna of the trial Court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of business, also made in other books or papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpœna who were engaged in the

petuate the original colonial practice with its narrow limitations. Moreover, at the time of the Western enactments, the main branch (or general exception for deceased persons' entries) was already fully recognized by the Courts; so that the language of these statutes often shows traces of this main exception, and in some respects serves to admit evidence which would ordinarily have been already available under the judicial exception. It is therefore sometimes difficult to know whether the statute is to be regarded as merely declaratory of the common law in those respects, or whether it must be taken as a substitute replacing and excluding the common-law principle. Having regard to the history of the parties'-books exception, it seems safer and more correct, as it certainly is more advantageous, to regard these statutes as intended to enlarge or to replace merely the parties'-books branch of the exception; so that whatever principle there was at common law for the main exception (for regular entries by deceased persons in general) remains unabolished by these statutes. Their clauses, therefore, which deal with such entries of persons deceased or absent, are merely declaratory and cumulative, and the remaining limitations or elements of the main exception at common law, unmentioned in the statute, remain in force as at common law. The result of these statutes, as affecting in general the existence of either of the branches of the Exception, is later dealt with (*post*, § 1561).

The statutes in their details may affect any of the topics of the ensuing sections, particularly in the branch dealing with the parties' books. Though they have been collected here at the outset, the common-law limitations examined in the following sections must be understood to be subject to the local control of these statutes.

A. REGULAR ENTRIES IN GENERAL

1. The Necessity Principle

§ 1521. **Death, Absence, etc., of the Entrant; Corporation Books; Carriers, Books; Bankers' Books; Hospital Books.** On the principle of Necessity (*ante*, § 1421), this Exception sanctions the use of statements by persons whose testimony, though not necessarily the sole evidence available on the subject, is yet the only testimony now available from that person. Hence the usual rule applies that the person *must be unavailable as a witness:*

making of such entries; but before such entries are admitted, the Court shall be satisfied that they are genuine" and fulfil the above rules); § 4189*b* ("Whenever any evidence shall be required . . . from the books of any bank or banker doing business at the time", copies of entries are admissible, with a bank officer's affidavit or testimony that the book is "one of the ordinary books of the bank used in the transaction of its business", that the entry "was originally made therein at the time of its date and in the usual course of the business of the bank, that there are no interlineations or erasures, that the book is in the custody or control of the bank"); § 3932 (after the decease of an executor or administrator, his books of account "as such executor or administrator, appearing to have been kept in his own handwriting", are admissible to prove receipts, disbursements, and services);

Wyoming: Comp. St. 1920, § 5806 (quoted *ante*, § 488).

1750, HARDWICKE, L. C., in *Lefebure* v. *Worden*, 2 Ves. Sr. 543: "On proof that the declarant was dead, such entry has been read; . . . by reason of the difficulty of making of proof in cases of this kind, the Court has gone so far."

1819, PARKER, C. J., in *Welsh* v. *Barrett*, 15 Mass. 380: "The question was thought to fall within the general rule which requires the best evidence the nature of the case admits of. . . . It is analogous to the exceptions to other general rules of evidence."

1823, STORY, J., in *Nicholls* v. *Webb*, 8 Wheat. 326: "It is the best evidence the nature of the case admits of. If a party is dead, we cannot have his personal examination upon oath, and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality."

As is frequent in these Hearsay exceptions, the principle of unavailability has not been fully and consistently carried out. Certain specific situations have from time to time been ruled upon as sufficient or insufficient.

(1) It is of course at least necessary that the witness should be somehow unavailable. Where the absence of the desired witness is not somehow accounted for (except when a party, under the other branch of the rule), the entries cannot be used.[1]

(2) Of the various facts sufficiently excusing from production, *death*, as in other Hearsay exceptions, is the common and universally conceded instance. *Insanity* should be equally sufficient.[3] *Illness* effectively preventing the attendance of the witness should suffice.[4] *Absence from the jurisdiction* should admit the statements, and this is generally conceded;[5] the offeror might

§ 1521. [1] To the following, add the cases *infra*, notes 2–6; 1899, Baird *v.* Reilly, 35 C. C. A. 78, 63 U. S. App. 157, 92 Fed. 884 (hospital record by person not called, excluded); 1891, Terry *v.* Birmingham N. Bank, 93 Ala. 608, 9 So. 299 (stock-exchange books excluded); 1896, Tennessee & C. R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502 (estimates of cost by a constructor not accounted for, excluded); 1874, Bartholomew *v.* Farwell, 41 Conn. 109 (requiring the entrant to be produced or shown to be unavailable; on this point overrules Butler *v.* Iron Co., 1853, 22 Conn. 360, an anomalous ruling); 1916, Stolz *v.* Scott, 28 Ida. 417, 154 Pac. 982 (journal kept by a bookkeeper not called, excluded); 1862, Barnes *v.* Simmons, 27 Ill. 512; 1901, State Bank of Pike *v.* Brown, 165 N. Y. 216, 59 N. E. 1 (bank-books excluded, the makers not being accounted for).

The following case should have been placed on this ground: 1884, Watrous *v.* Cunningham, 65 Cal. 410, 4 Pac. 408 (here the books of account of one L. S., called as a witness, were rejected, but on the absurd ground that "the entries in this book did not bind defendants"; no authority cited).

If the entrant is *present in court*, he should use the entries to assist his recollection (*post*, §§ 1530, 1560).

[2] *Eng.* In re Fountaine, In re Dowler, [1909] 2 Ch. 382, 390 (death of one member of a firm does not admit the books of the firm); *U. S. Ala.* 1895, Sands *v.* Hammel, 108 Ala. 624, 18 So. 489; *Conn.* 1842, Livingston *v.* Tyler, 14 Conn. 498; 1852, Stiles *v.* Homer, 21 Conn. 511; 1857, Ashmead *v.* Colby, 26 Conn. 310; 1874, Bartholomew *v.* Farwell, 41 Conn. 109; *Md.* 1807, Clarke *v.* Magruder, 2 H. & J. 77; *Mass.* 1838, Washington Bank *v.* Prescott, 20 Pick. 342; *N. M.* 1885, Price *v.* Garland, 3 N. M. 289, 6 Pac. 472; *N. Y.* 1843, Sheldon *v.* Benham, 4 Hill 131; 1865, Leland *v.* Cameron, 31 N. Y. 121; 1876, Fisher *v.* Mayor, 67 N. Y. 77; *Pa.* 1808, Sterrett *v.* Bull, 1 Binn. 237; 1821, Patton's Adm'rs *v.* Ash, 7 S. & R. 125.

[3] 1886, Bridgewater *v.* Roxbury, 54 Conn. 217, 6 Atl. 415 (books of a physician, who "had become mentally incompetent to testify", admitted; "it is the same as if he were dead"); 1825, Union Bank *v.* Knapp, 3 Pick. 109.

[4] In Taylor *v.* R. Co., 80 Ia. 435, 46 N. W. 64 (1890), where it was a railroad-employee's duty to make an entry of certain things and the entrant was kept away by illness, the entries were rejected; but the opinion does not indicate an apprehension of the real points involved.

In Griffin *v.* Boston & M. R. Co. (1913), 87 Vt. 278, 89 Atl. 220 (cited more fully *post*, § 1530, n. 3), the view in the text above is approved.

[5] 1833, North Bank *v.* Abbot, 13 Pick. Mass. 471: Shaw, C. J.: "It was satisfactorily

in a particular case be required to show the witness' unwillingness to return and testify, or perhaps the inability to obtain a deposition; but this requirement is not sanctioned.

Other cases of unavailability may no doubt be presented;[6] to all of them applies the broad language of Chief Justice Shaw: "The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." In some of the statutes (quoted *ante*, § 1519), other grounds of unavailability are expressly named; occasionally the broad principle is laid down that the statements are usable "if sufficient reason is given" for the entrant's non-production.[7]

The practical impossibility, on grounds of *mercantile inconvenience*, of producing all the clerks, salesmen, teamsters, or the like, who have contributed their knowledge on making up the items of voluminous accounts is by some Courts recognized as a sufficient ground for non-production; but this ground can better be examined in considering the use of entries resting on the combined knowledge of two or more persons (*post*, § 1530). The policy of these rulings, so far as it exempts from the production of all but one verifying person, on the ground of mercantile convenience, is deserving of common adoption. The general principle should recognize practical inconvenience as an excuse, subject to the judge's discretion to require the entrant's production for cross-examination where the nature of the dispute renders it desirable.

proved, not merely that the witness was out of the jurisdiction of the Court, but that it had become impossible to procure his testimony. We cannot distinguish this, in principle, from the case of death or alienation of mind. The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial."

Accord: Federal: 1865, Fennerstein's Champagne, 3 Wall. 149, *semble; Ala.* 1837, Moore *v.* Andrews, 5 Port. 108 (permanent absence); 1884, Elliott *v.* Dycke, 78 Ala. 157; 1890, McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919 ("indefinite absence from the State" suffices); *Ark.* 1893, St. Louis, I. M. & S. R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878 (absence from jurisdiction, sufficient; but here no effort had been made to find him, and the entries were excluded); *Conn.* 1874, Bartholomew *v.* Farwell, 41 Conn. 109; *Haw.* 1906, Godfrey *v.* Rowland, 17 Haw. 577, 581 (baptismal record by a clergyman in Australia, admitted); *Ind.* 1889, Culver *v.* Marks, 122 Ind. 565, 23 N. E. 1086; *Ia.* 1871, Karr *v.* Stivers, 34 Ia. 125; *Kan.* 1903, Haas *v.* Chubb, 67 Kan. 787, 74 Pac. 230, *semble* (railroad-agent's entries, excluded, the entrant being out of the county but in the State); *Ky.* Poor *v.* Robinson, 13 Bush 290, 294 ("died or absconded" suffices); *Mich.* 1902, Cameron Lumber Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346; *Pa.* 1808, Sterrett *v.* Bull, 1 Binn. 237; *S. C.* 1823, Elms *v.* Cheirs, 2 McC. 349; 1896, Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; *Tex.* 1908, Consolidated K. C. S. & R. Co. *v.* Gonzales, 50 Tex. Civ. App. 79, 109 S. W. 946 (entrant absconded and his whereabouts unknown); *W. Va.* 1883, Vinal *v.* Green, 21 W. Va. 313 (temporary absence does not suffice).

Contra: 1793, Cooper *v.* Marsden, 1 Esp. 1; 1894, Little Rock Granite Co. *v.* Dallas Co., 13 C. C. A. 620, 66 Fed. 522, *semble;* 1919, People *v.* Geister, 289 Ill. 249, 124 N. E. 530 (the entrant was in another State "temporarily absent in one of the training-camps of the Government"; held inadmissible; the entrant must be "permanently out of the State"; no precedent cited, and the language of the Illinois statute not noticed); 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 572; 1826, Wilbur *v.* Selden, 6 Cow. N. Y. 163; 1902, McKeen *v.* Bank, 24 R. I. 542, 54 Atl. 49 (account-books of a third person out of the State, excluded; but the Court proceeds also on the ground that the entries must be against interest; this radical misconception of the whole principle of this Exception is scarcely palliated by the circumstance that it rests on a further misunderstanding of Mr. Greenleaf's original language on this point).

[6] 1921, Stringer *v.* Com., 192 Ky. 318, 233 S. W. 718 (larceny from a railroad car; to prove the shipment, railroad books were admitted on proof that the entrant had left the railroad's employ and his whereabouts was unknown).

[7] Applied in Volker *v.* Bank, 26 Nebr. 605, 42 N. W. 732.

(3) The foregoing type of Necessity is the creation of judicial interpretation. But the same policy of necessity is seen recognized by legislation in statutes which provide for the admission of *corporation-books*, either in general or as against stockholders (*ante*, § 1074), of *banker's books* in general (*post*, § 1683), of *hospital books* (*post*, § 1707), and of *common carriers'* books, specifically to evidence the transportation of intoxicating liquor (*post*, § 1708). In the judiciary's application of the principle, the necessity must be shown to exist in each instance of a book's offering (*post*, § 1530). But in the legislative measures, a rule-of-thumb is provided, admitting those classes of books unconditionally; the policy is merely the underlying reason for the rules. The rules therefore, in those instances, occupy an anomalous status in the system of Evidence; the authorities are more conveniently placed under the heads above cited.

2. The Circumstantial Guarantee of Trustworthiness

§ 1522. **Reasons of the Principle.** The reasons justifying the admission of this class of statements, untested as they are by cross-examination, have not been as clearly defined by the judges as in other Hearsay exceptions; but they seem fairly clear. They fall within the second general type already described (*ante*, § 1422), *i.e.* the situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy overpower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct though related motives which operate to secure in the long run a sufficient degree of probable trustworthiness and make the statements fairly trustworthy:

(1) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to counteract the possible temptation to mis-statements. This reason has been referred to in the following passage:

> 1835, TINDAL, C. J., in *Poole v. Dicas*, 1 Bing. N. C. 649: "It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred."

(2) Since the entries record a regular course of business transactions, an error or mis-statement is almost certain to be detected and the result disputed by those dealing with the entrant; mis-statements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained) would deter all but the most daring and unscrupulous from attempting the task; the ordinary man may be assumed to decline to undertake it. In the long run this operates with fair effect to secure accuracy.

(3) If, in addition to this, the entrant makes the record under a duty to an

employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies, — a motive on the whole the most powerful and most palpable of the three. This reason has been more than once mentioned:

1835, TINDAL, C. J., in *Poole* v. *Dicas*, 1 Bing. N. C. 649: "The clerk had no interest to make a false entry; if he had any interest, it was rather to make a true entry; . . . a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery."

1819, PARKER, C. J., in *Welsh* v. *Barrett*, 15 Mass. 380: "What a man has said when not under oath may not in general be given in evidence when he is dead. . . . But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury."

1865, SWAYNE, J., in *Fennerstein's Champagne*, 3 Wall. 149: "The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. . . . In all [the cases] he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath."

This last motive was most highly thought of in the earlier stages of the exception's history, and in England it has come to be regarded as indispensable.

From these general motives and reasons, forming the policy on which the principle rests, are developed certain specific requirements and limitations.

§ 1523. **Regular Course of Business; (1) Business or Occupation.** The first general requirement is that the entry must have been made in the *regular course of business*. The judicial phrasings of this requirement vary in terms.[1]

The entry must have been, therefore, in the way of *business*. This may be defined to mean a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood. It would probably exclude, for instance, a diary of doings kept merely for one's personal satisfaction; but it would not exclude any regular record that was helpful, though not essential nor usual in the same occupation as followed

§ 1523. [1] *Eng.* 1832, Doe *v.* Turford, 3 B. & Ad. 890 (Parke, J., and Taunton, J.: "in the ordinary course of business"); 1835, Poole *v.* Dicas, 1 Bing. N. C. 649 (Tindal, C. J., "made in the usual course and routine of business"); 1860, Rawlins *v.* Rickards, 28 Beav. 373 (Romilly, M. R., admitting a solicitor's books: "in the exercise of his business and duty, . . . and in the regular course of his business"); *U. S.* 1823, Nicholls *v.* Webb, 8 Wheat. 326 (Story, J., of a notary's book of protests: ". . . an employment in which he was usually engaged; . . . memorandums in the ordinary discharge of their duty and employment; . . . memorandums, made by a person in the ordinary course of his business, of acts which his duty in such business requires him to do for others"); 1844, Watts *v.* Howard, 7 Metc. Mass. 481 (Shaw, C. J.: "in the usual and ordinary course of their business, in relation to acts coming within the scope of their authority and duty"); 1848, Dow *v.* Sawyer, 29 Me. 119 ("as he had occasion to make them in the course of his business"); 1865, Kennedy *v.* Doyle, 10 All. Mass. 161 ("in the ordinary course of his business occupation"); 1875, State *v.* Phair, 48 Vt. 378 (Royce, J., "made by him in the regular course of business and it was his business to make them").

by others.[2] There is, therefore, no special limitation as to the *nature of the occupation*.[3]

Since it is thus not essential that the occupation should be a mercantile or industrial one, nor even that it should be a secular one, it follows that a *register of marriages* or the like, kept by a priest or minister, is admissible.[4] The admission of a non-official marriage-register, however, is not recognized in England, partly because of another principle (*post*, § 1524), nor in some of the American courts; and such books are therefore admissible in those courts so far only as they are made under a legal duty, *i.e.* on the principle of Official Statements (*post*, § 1644). A *ship's log-book* is admissible under the present exception; but as it is in some jurisdictions required by statute to be kept, it is thus also admissible as an Official Statement (*post*, § 1641). Records of a *hospital* satisfy the present principle; but in another aspect they present difficulties (*post*, § 1530). *Corporation* books, in the present aspect, stand no differently from others; but they may also involve the doctrine of Parties' Admissions in a peculiar way, and have been specially dealt with by legislation, and are therefore considered *ante*, § 1074. *Bankers'* books

[2] 1876, Fisher *v.* Mayor, 67 N. Y. 77 (Andrews, J.: "It is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it").

The following ruling belongs here: 1904, Elliott *v.* Sheppard, 179 Mo. 382, 78 S. W. 627 (forgery of an acknowledged deed; to overthrow the certificate of acknowledgment, the deceased grantor's diary, with entries showing him to have been in Kentucky on the day in question, was offered; excluded, because "not in the nature of a book account"; no authority cited; the ruling is of no value, because the present point is not considered, and on the facts the ruling is thoroughly unsound).

[3] The following have been *admitted: Eng.* 1816, Champneys *v.* Peck, 1 Stark. 326 (memorandum of delivery of copy of a bill by a clerk who usually made such a memorandum upon the copy kept); 1835, R. *v.* Cope, 7 C. & P. 726 (indorsement of service on an order of the aldermen, the writer's duty being to serve orders and indorse them when served); *U. S.* 1915, Sharp *v.* Blanton, 194 Ala. 460, 69 So. 889 (whether a person's age entitled him to disaffirm a sale; to evidence the date of birth, books of a physician, a prior party in defendant's chain of title, were admitted; elaborate survey of the history of the rule, by Thomas, J.); 1886, Bridgewater *v.* Roxbury, 54 Conn. 217, 6 Atl. 415 (physician's entries of services rendered); 1905, Hagarty *v.* Webber, 100 Me. 305, 61 Atl. 685 (scale-books of a timber-surveyor); 1853, Sasscer *v.* Farmers' Bank, 4 Md. 418 (notary's entries); 1858, Perkins *v.* Augusta Co., 10 Grav Mass. 324 (certificate of a marine inspector as to a vessel's condition); 1875, De Armond *v.* Neasmith, 32 Mich. 233 (weather-record at an insane asylum); 1894, Hart *v.* Walker, 100 Mich. 406, 410, 59 N. W. 174 (weather-records kept at an asylum, received); 1917, State *v.* Bowman, 272 Mo. 494, 199 S. W. 161 (rape under age; doctor's charge-book, admitted to show the date of a birth); 1899, Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237 (insurance-agent's register of policies); 1822, Halliday *v.* Martinet, 20 Johns. N. Y. 172 (notary's record of protests); 1831, Nichols *v.* Goldsmith, 7 Wend. N. Y. 161 (cashier's notice of non-payment of note); 1865, Leland *v.* Cameron, 31 N. Y. 121 (entry in a lawyer's record-book of the proceedings in a cause); 1874, Livingston *v.* Arnoux, 56 N. Y. 518 (receipt by a sheriff for money paid by a judgment-debtor in redemption of land sold on execution); 1876, Fisher *v.* Mayor, 67 N. Y. 77 (attorney's books); 1920, O'Day *v.* Spencer, 96 Or. 73, 189 Pac. 394 (attorney's book of accounts); 1895, Dickens *v.* Winter, 169 Pa. 126, 32 Atl. 292 (time-book of teaming done).

Excluded: 1913, Arnold *v.* Hussey, 111 Me. 224, 88 Atl. 724 (a diary of weather conditions, regularly entered twice daily, by a deceased person, but not in pursuance of any business or duty, excluded).

For a *notary's* entries, see further *post*, §§ 1525, 1675.

For *prices current*, see *post*, § 1704.

For *surveyors' notes*, see further *post*, §§ 1524, 1566, 1665.

[4] 1865, Gray, J., in Kennedy *v.* Doyle, 10 All. Mass. 161 ("An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation").

(*post*, § 1683), and *common carriers'* books (*post*, 1708), have also been given a special legislative status.

§ 1524. **Same: English Rule; Duty to a Third Person.** The further limitation exists in England and Canada that there should have been a duty to a third person, in the course of which the report or record was made.[1] A suggestion of this appears in the language of the early American cases;[2] but, though it did not with us survive, it was in England later emphasized and insisted upon.

Its requirements are strict. First, there must have been a *duty to do the very thing* recorded.[3] Secondly, there must have been a *duty to record or otherwise report the very thing*.[4] Thirdly, the duty must have been to record or otherwise report it *at the time*.[5] This limitation is a reminiscence of the early history (*ante*, § 1517), and is needlessly strict.

§ 1525. **Same: (2) Regularity.** The entry offered must of course be a part of a system of entries, not a casual or isolated one. This is necessarily involved in the reasons (*ante*, § 1522) on which the rule is founded. Thus, a single entry in a book, made after it has been closed or put away, or without using it again, or a memorandum casually made, would not answer this requirement.[1] This regularity of the record may be evidenced by inspection

§ 1524. [1] *England:* 1831, Chambers *v.* Bernasconi, 1 C. & J. 451; on app. 1 C. M. & R. 347; 1843, R. *v.* Worth, 4 Q. B. 132 (rejecting a farmer's book of his farm-laborers' work done, because not "made in the discharge of some duty for which he is responsible"; "actually in the discharge of a duty to another person"); 1887, Lyell *v.* Kennedy, 35 W. R. 725; 1904, Mellor *v.* Walmesley, 2 Ch. 525 (to identify a boundary, a field-book of a deceased surveyor, employed by the Local Board to survey, was excluded); 1904, Mercer *v.* Denne, 2 Ch. 534, 541 (reports of a surveyor in 1610–1625, excluded); 1905, Mellor *v.* Walmesley, 2 Ch. 164, 166 (Mellor *v.* Walmesley, *supra*, reversed on appeal; Vaughan Williams, L. J.: "Here the duty of the surveyor was . . . to record everything without which he could not arrive at that ultimate conclusion. If it was his duty to record those matters at the time, and he in fact did so contemporaneously, I think the rule as to admissibility applies"); 1905, Mercer *v.* Denne, 2 Ch. 538, 554 (Mercer *v.* Denne, *supra*, affirmed on appeal).

Canada: 1877, O'Connor *v.* Dunn, 2 Ont. App. 247 (deceased surveyor's notes made as a part of his regular entries, not admitted on the facts); 1883, Canada C. R. Co. *v.* McLaren, 8 id. 564 (engineer's entry in a repairs-book, made in the course of duty after a fire; opinions inconclusive).

[2] *E.g.* Story, J., in Nicholls *v.* Webb, quoted *ante*, § 1523.

[3] 1867, Smith *v.* Blakey, L. R. 2 Q. B. 332 (Blackburn, J.: "The duty must be to do the very thing to which the entry relates, and then to make a report or record of it"); 1879, Polini *v.* Gray, L. R. 12 Ch. D. 431; 1887, Lyell *v.* Kennedy, *supra*, per Bowen, L. J.; 1885, McGregor *v.* Keiller, 9 Ont. 677 (deceased surveyor's field notes, not made in execution of a specific duty, excluded).

[4] 1831, Chambers *v.* Bernasconi, *supra* (rejecting a deputy's return of the place of arrest, because "it may be the duty of the sheriff's officer to make a return to the sheriff that he has made the arrest, but it is not a necessary part of that duty that he should state the particular place of the arrest"; "the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstanees"); 1867, Smith *v.* Blakey, *supra;* 1879, Polini *v.* Gray, L. R. 12 Ch. D. 420, 426, 431; 1879, Trotter *v.* McLean, L. R. 13 id. 579; 1879, Massey *v.* Allen, ib. 558; 1887, Lyell *v.* Kennedy, *supra*.

[5] 1867, Smith *v.* Blakey, *supra;* 1879, Polini *v.* Gray, *supra*.

§ 1525. [1] 1816, Dickson *v.* Lodge, 1 Stark. 226 (bill of lading signed by a captain, not received to show the shipping of goods for the plaintiff); 1865, Barton *v.* Dundas, 24 U. C. Q. B. 275 (excluding a notice sent in unusual course); 1880, Lilly *v.* Larkin, 66 Ala. 115 (admitting an attorney's indorsement to a note among an administrator's papers, stating the date of the account-settlement); 1895, Culver *v.* R. Co., 108 Ala. 330, 18 So. 827 (written report on a railroad accident by an employee to his employer, the maker not being accounted for, excluded); 1914, Wilcox *v.* Downing, 88 Conn. 368, 91 Atl. 262 (memorandum book with irregular en-

of the book; and the fulfilment of this requirement is for the Court to pass upon in each case.[2]

§ 1526. **Contemporaneous with the Transaction.** The entry should have been made at or near the time of the transaction recorded,[1] — not merely because this is necessary in order to assure a fairly accurate recollection of the matter, but because any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously. The rule fixes no precise time; each case must depend on its own circumstances.

§ 1527. **No Motive to Misrepresent.** It is often added that there must have been no motive to misrepresent.[1] This does not mean that the offeror must show an absence of all such motives; but merely that if the existence of a fairly positive counter-motive to misrepresent is made to appear in a particular instance the entry would be excluded. This limitation is a fair one, provided it be not interpreted with over-strictness. The exclusion of the notorious Fleet registers of marriage (*post*, § 1642) illustrates the kind of circumstances that call for the application of this requirement.

§ 1528. **Written or Oral Statement.** That the statement admissible under the present exception must be a written statement has been generally assumed in the United States in the judicial phrasings of the rule.[1] In England, however, it seems to be settled that an oral statement is equally admissible.[2] Since in that jurisdiction the third motive of trustworthiness (*ante*, § 1522) is regarded as most important, and the statement must be made under a duty to a third person (*ante*, § 1524), it may be conceded that an oral statement would be scarcely inferior to a written one in trustworthiness. In this country, however, where that limitation does not obtain, the trustworthiness of

tries, excluded on the facts); 1875, Kibbe *v.* Bancroft, 77 Ill. 19 (entry made in an account-book not used for ten years, and laid aside in the meantime, excluded); 1874, Walker *v.* Curtis, 116 Mass. 101 (memoranda by a surveyor in the course of his employment on a particular enterprise, admitted); 1901, Sexton *v.* Perrigo, 126 Mich. 542, 85 N. W. 1096 (under Comp. L. § 2635, a deceased notary's certificate of protest is not admissible as a regular entry, when the fact of notice is denied by affidavit); 1905, U. S. *v.* Dayutal, 4 P. I. 93 (insurrection; defendant asserted an alibi working in a quarry; a record composed of loose leaves unnumbered, excluded); 1897, Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329 (memorandum by Bushrod Washington, as agent for James Wilson, receipting for the possession of a deed; excluded, because not found in a book of "entries of the daily business regularly made"); 1901, Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296 (Stats. § 4189 applied, to exclude entries not shown to be in the usual course of business, etc.).

For *stenographic reports* of testimony, see *post*, § 1669.

[2] 1914, Wilcox *v.* Downing, 88 Conn. 368, 91 Atl. 262; 1848, Dow *v.* Sawyer, 29 Me. 119.

§ **1526.** [1] 1816, Champneys *v.* Peck, 1 Stark. 326; 1832, Doe *v.* Turford, 3 B. & Ad. 890; 1920, Dameron *v.* Harris, 281 Mo. 247, 219 S. W. 954 (entries held sufficiently near in time); 1878, Ray *v.* Castle, 79 N. C. 580.

Compare the citations *post*, § 1550, under the other branch of this Exception.

§ **1527.** [1] *Eng.* 1835, Poole *v.* Dicas, 1 Bing. N. C. 649; 1839, Malone *v.* L'Estrange, 2 Ir. Eq. 16; 1879, Polini *v.* Gray, L. R. 12 Ch. D. 430, per Brett, L. J.; *U. S.* 1854, Lord *v.* Moore, 37 Me. 220; 1865, Kennedy *v.* Doyle, 10 All. 161; 1890, Lassone *v.* R. Co., 66 N. H. 345, 354, 24 Atl. 902.

§ **1528.** [1] But see the passage from Swayne, J., in Fennerstein's Champagne, *ante*, § 1522.

[2] 1844, Lord Campbell, in Sussex Peerage Case, 11 Cl. & F. 113 ("a declaration by word of mouth or by writing made in the course of the business"); 1873, R. *v.* Buckley, 13 Cox Cr. 293 (oral report of a constable).

an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*ante*, § 1522).

Nevertheless, in the actual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the element of duty (as required in England) does in fact exist; and where it does exist, the case seems a proper one for the adoption of the broader English rule admitting oral statements. Apart from the above considerations, there is no reason for distinguishing between oral and written statements to the disadvantage of the former; no such distinction is made in most of the other Exceptions. In those Courts admitting entries based on joint knowledge (*post*, § 1530) there is in effect an acceptance of oral reports.

3. Testimonial Qualifications, and Other Independent Rules of Evidence

§ 1530. **Personal Knowledge of Entrant; Entries by Bookkeeper, etc., on report of Salesman, Teamster, etc.** (1) There can be no doubt that the general principle of testimonial evidence (*ante*, § 657) should apply here as elsewhere, namely, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle has often been invoked in excluding entries made by a person who had *no personal knowledge* of the supposed facts recorded.[1]

(2) But does this principle necessarily exclude all entries made by persons not having personal knowledge of the facts entered? May not this act of personal knowledge on the part of the entrant be supplemented by the personal knowledge of some other person whose knowledge is in fact represented in the entry? In other words, if the element of personal knowledge can somehow be adequately supplied by a *second person*, it is material that the *entrant himself did not have this personal knowledge.*

In order to work out this problem, it is necessary to keep in mind the results already established in connection with the doctrine about memoranda of past recollection (*ante*, § 571). It was there noticed that a memorandum whose correctness was established by composite testimony could be used; for example, if S has made a written memorandum of a transaction done by him,

§ 1530. [1] 1873, Avery's Ex'rs *v.* Avery, 49 Ala. 195. Peters, J.: "Such a book must contain the registration of some fact . . . by one who would at the time have been a competent witness to the fact which he registered." *Accord:* 1873, Chaffee *v.* U. S., 18 Wall. 542 (entries excluded of a collector of freight noting arrivals of whiskey, but made merely on a perusal of the B. L. offered by the ship-captains, who themselves had no personal knowledge that the freight had even been shipped); 1876, Connecticut M. L. I. Co. *v.* Schwenk, 94 U. S. 598 (entry by a lodge secretary of the age of a member, in a minute-book of an Odd Fellows' Lodge, excluded); 1842. Batre *v.* Simpson, 4 Ala. 312; 1880, Davis *v.* Tarver, 65 Ala. 102 (entries by a clerk of an alleged lunatic were not admitted to show that the goods received were necessaries and were the consideration of a note); 1890, McDonald *v.* Carnes, 90 Ala. 148, 7 So. 919 ("all matters within the knowledge of the person making the entries"); 1900, Walling *v.* Morgan Co., 126 Ala. 326, 28 So. 433 (bank-book containing an account with W., not admitted on the mere testimony of a cashier who did not keep it or receive or pay the money); 1842, Livingston *v.* Tyler, 14 Conn. 498; 1854, Lord *v.* Moore, 37 Me. 220.

and has given the writing to B, who has copied it and destroyed the original, then if S swears the original to have been accurately made, and if B swears the copy to be correct, the copy produced is thus by their joint testimony rendered an accurate record of the transaction, although B alone has no personal knowledge of the transaction, and although S alone does not know the copy to be correct. Furthermore, it was seen to be the generally and properly accepted extension of that doctrine that the same result ensues where S's original statement to B was an oral report, not a written memorandum, as in the typical case of a salesman and a bookkeeper; because in this case S swears that his report of the transaction to B was an accurate statement of what he did, and B swears that his entry was a correct record of what B reported to him; B's written entry thus being in truth a copy of S's report, as effectually as it would have been a copy of a memorandum. Now this doctrine suffices only for cases where both S and B are produced, and by their joint testimony on the stand verify the writing as a memorandum of past recollection (under § 751, *ante*). If either S or B does not come to the stand, then the offer contains an element of hearsay assertion, and therefore the writing can be admissible, if at all, only under the present Exception. Is there any fatal objection in the way of this? By no means. There are three possible situations:

(*a*) Suppose B, the *entrant,* to be *deceased;* here, if S, the actor in the transaction, swears to the correctness of his original memorandum or oral-report, the element of personal knowledge is sufficiently supplied; and the entry of B is then admissible if it was made in the regular course of business.

(*b*) Suppose S, the *transactor,* to be *deceased*, but B, the entrant, to swear to the entry as correctly representing B's memorandum or oral report; here B's entry, if based on a memorandum, would be sufficient, as supplying the element of S's personal knowledge, if made in the regular course of business; its production being impossible by destruction, and S being unavailable by decease. If S's statement were an oral report (as often in the case of salesmen, teamsters, foremen, tallymen, and the like), it would be none the less made in the regular course of business; but here, although, as already seen (*ante,* § 1528), the Exception does not ordinarily in the United States cover oral statements, nevertheless the reasons of the Exception (*ante,* § 1522) apply to admit it. In the first place, it is made in the course of a duty to a third person, which in England suffices to admit oral statements; secondly, the immediate reduction to writing by B removes in the main the objections which might otherwise exist to admitting merely oral statements, and brings into play with practically full effect the two reasons already mentioned (*ante,* § 1522) as obtaining for written entries. In short, there is every reason for taking as admissible these oral reports of a deceased person in the regular course of business and duty, supplying the element of personal knowledge, and correctly recorded in the entry sworn to by B.

(*c*) Suppose both B and S, *entrant* and *transactor*, to be *deceased;* here

there is presented merely the first and the second case combined; if we concede admissibility for those two cases, it must be conceded for this also.

(3) One more consideration remains to be noted. The supposition in the above cases was that B or S or both were *deceased*. But suppose, instead, that S, the salesman, teamster, or the like, is otherwise unavailable; is the result to be any different? It need not be. In the language of Chief Justice Shaw, already quoted (*ante*, § 1521): "The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." Now the ordinary conditions of mercantile and industrial life in some offices do in fact constantly present just such a case of practical impossibility. Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employees have in many cases changed and the former ones cannot be found; in the next place, it cannot always be ascertained accurately which employee was concerned in each one of the transactions represented by the hundreds of entries; in the third place, even if they could be ascertained, the production of the scores of employees, to attend court and identify in tedious succession the detailed items of transactions would interrupt and derange the work of the establishment, and the evidence would be obtained at a cost practically prohibitory; and finally, the memory of such persons, when summoned, would usually afford little real aid. If unavailability or impossibility is the general principle that controls (*ante*, § 1521), is not this a real case of unavailability? Having regard to the fact of mercantile and industrial life, it cannot be doubted that it is. In such a case, it should be sufficient if the books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in that establishment; thus the production on the stand of a regiment of bookkeepers, salesmen, shipping-clerks, teamsters, foremen, or other subordinate employees, should be dispensed with. No doubt much should be left to the discretion of the trial Court; production may be required for cross-examination, where the nature of the controversy seems to require it. But the important thing is to realize that upon principle there is no objection to regarding this situation as rendering in a given case the production of all the persons practically as impossible as in the case of death.

(4) The conclusion is, then, that *where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present Exception, verified by the testimony of the former person only, provided the practical inconvenience of producing on the stand the numerous other persons thus concerned would in the particular case outweigh the probable utility* of doing so.

Why should not this conclusion be accepted by the Courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment,

and general confidence in every business enterprise. Nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by Courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court-room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, Courts must here cease to be pedantic and endeavor to be practical.

In the following judicial passages are expounded some of the reasons that have led Courts to sanction the principles here involved:

1853, LUMPKIN, J., in *Fielder* v. *Collier*, 13 Ga. 499: "Shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the sub-agents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of the business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to secure? We have no hesitation in holding that propriety, justice, and convenience require it to be admitted. The weighers, wharfingers, and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. . . . To impose a different rule upon these establishments, whether at home or abroad, and to require them at all times, within the statutory period of limitations, to be prepared with original 'aliunde' evidence to prove the terms of sale of all the property consigned to them, each item of expense, etc., would trammel commerce and amount to a denial of justice."

1895, THAYER, J., in *Mississippi River Logging Co.* v. *Robson*, C. C. A., 69 Fed. 773 (books of camp-scalers; the scalers measured the logs and entered the amounts on cards; each day these cards were copied into the scale-book; inspectors periodically verified them by measuring a portion of the logs sufficient to test the book's accuracy; the scale-book was sent to the log-owner, and payment made by him on the faith of it to the log-cutters; the inspectors testified to the book's correctness; the opinion quotes from the Court below): "'It is said that the camp-scalers should have been hunted up and their testimony introduced. . . . When the scalers made the count and measurement, two records thereof were made, — one in the memory of the scaler, the other in the scale-book. Which is now the best evidence? Years have elapsed. The entries on the scale-book remain unchanged; they are now just what they were when originally made. Can the same be said of the record made upon the memory of the scalers? If the scalers had been produced and had testified that . . . as they now remembered it the number and quantity were so and so, but upon the production of the scale-books they showed a different quantity and measurement, which should control? . . . It cannot be maintained that there is more reliable evidence than the scale-book.' For the reasons so well stated by the trial judge, we entertain no doubt that the scale-books in question were properly received in evidence.' They appear to have been kept under conditions that were calculated to prevent mistakes therein, and to ensure high degree of accuracy. They were also identified by witnesses who were familiar with

their contents, and whose special duty it was to see they were properly and accurately kept."

1902, WILKES, J., in *Continental National Bank* v. *First National Bank*, 108 Tenn. 374, 68 S. W. 497 (holding a bank's books sufficiently verified by the cashier, without calling the bookkeeper): "We think it not necessary that the bookkeeper who made the entries should be examined as to their correctness. At most he could only testify that the entries made by him are true entries of transactions reported to him by others. In other words, he could only testify that he wrote down what others told him. The Court knows, as a matter of common information, that there are many persons in the employ of banks, and each has his different department, and each transaction passes through the hands of several — it may be, of many — persons. We take a deposit, for instance. It goes into the hands of the receiving teller, thence into the hands of a journal clerk, thence to the individual bookkeeper, or such other officials as perform the functions of these officers. When it reaches the hands of the bookkeeper, who makes the final entry, which stands as the true statement between the bank and depositor, it has gone through the hands of a dozen parties, perhaps; and the last party only records what comes to him through so many hands, and knows nothing, it may be, of the actual transaction. It would seem that the cashier, whose function it is to overlook all transactions at the counter and over the books, and test each transaction through all its stages, would be the person most competent to produce the books and vouch for their accuracy."

1909, HAMMOND, J., in *Delaney* v. *Framingham Gas, Fuel, and Power Co.*, 202 Mass. 359, 88 N. E. 776 (excluding certain hospital records): "The rule applicable to such records ordinarily is that the entries must be made by a person having personal knowledge of the truthfulness of the statements. . . . And the rule has been adhered to quite generally, except where in the course of the business the clerk making the entry receives his information either orally or in writing from various persons whom he cannot expect to remember and whom it will be impracticable to call. To apply the rule in such a case and to require the evidence of every person in the long line of persons who have had anything to do with the transaction recorded, would be practically impossible, and so as a practical necessity the record is admitted upon the oath of the recorder, if alive, or upon proof of handwriting if he be dead. It is probable that the exception has been carried farther elsewhere than in this State. . . . In the present case the records were produced by the witness Gahagan. It appeared that the records were made by her, and that she was the proper custodian of them. But it further appeared that she never had any personal knowledge of the facts stated therein; that she received slips of paper from Dr. Painter, the physician, and copied them into the record; and that was all she knew about them. The record was offered as evidence to show that the statements therein made were true. As handed to the witness by the physician they were simply statements of the physician as to what the patient had said to him, or as to the diagnosis made by the physician. The records were comparatively recent. It was not shown that the physician was not living and within the jurisdiction of the court. No necessity was shown, therefore, for the introduction of this hearsay testimony. For aught that appeared there was better evidence. Under these circumstances the reason upon which the general rule was based, namely, that the record should be a record of facts of which the writer had personal knowledge, should be applied. The case is not within the above mentioned exception to the general rule."

1917, PRENTIS, J., in *French* v. *Virginian R. Co.*, 121 Va. 383, 93 S. E. 585: "In this case they [the train sheets] were verified by the claim adjuster, an employe of the defendant company, who testified that he had access to all of the books and records, and that he had obtained the dispatcher's register of trains for Sunday, November 21, 1915, from the division office of the company at Princeton, W. Va. He testified that the register produced was kept by the dispatcher of the said division office from information received by him from other employes of the defendant by telegraph or telephone from stations along its line, and that it was in the handwriting of three men, who were the dispatchers on duty on the said

date. So that the question to be determined is whether or not this document was sufficiently verified to justify its admission as evidence. . . .

"The train sheets of a properly operated railroad must be accurately and properly kept by the train dispatchers, or else the lives and property of its passengers, the safety of its employes, and its own property are all imperiled. Indeed, a railway cannot be operated unless the train dispatchers are kept informed as to the location and movements of its trains. Outside of the courtroom no one would question the value of these records, for no other practical method has been devised to prevent collisions. Were these particular train sheets sufficiently identified as the record kept by those whose duty it was to keep them? While they should have been proved by the train dispatchers who kept them, failure to do so affects, not their admissibility, but their credibility, and the vital question is, not by whom they were proved, but whether or not they were the original train sheets. . . . We have here, then, the practical impossibility, on the ground of inconvenience, of producing all the persons who have contributed their knowledge in making up the various entries upon these train sheets, and we also have the circumstantial guaranty of trustworthiness growing out of the fact that the entries were made in the regular performance of duty, and that errors and misstatements in train sheets are almost certain to be promptly detected and to result disastrously. When there is this practical necessity and this circumstantial guaranty of trustworthiness, then such records are admissible, when sufficiently verified. . . . Of course, extreme caution must be exercised by the trial Courts, and no evidence of this character should be admitted, unless the document comes from the proper custody and it is proved that it is a record kept in accordance with the established rule of business, made contemporaneously before the controversy arose, by persons under the very highest duty and responsibility to keep a true record."

(5) The rulings upon the subject are not yet harmonious: (*a*) There are, first, a number of States accepting with practical completeness the conclusion above reached, *i.e.* in given cases admitting verified regular entries without requiring the salesmen, time-keepers, or other original observers having personal knowledge, to be produced or accounted for.[2]

[2] CANADA: 1908, Cummings *v.* Gourlay, 1 Alta. 86 (timber scale-books, admitted).

UNITED STATES: *Federal:* 1895, Mississippi River Logging Co. *v.* Robson, 16 C. C. A. 425, 69 Fed. 805 (see quotation *supra*); 1898, Northern P. R. Co. *v.* Keyes, C. C., 91 Fed. 47 (tables of railroad business prepared under direction of general officers by 40 or 50 clerks; officers called, but clerks not called, though available and willing to testify; admitted; good opinion); 1902, Continental Nat'l Bank *v.* First Nat'l Bank, 108 Tenn. 374, 68 S. W. 497 (bank account books held to be sufficiently verified by the cashier, without calling the bookkeeper; see quotation *supra*); 1903, United States *v.* Venable C. Co., C. C., 124 Fed. 267 (a constructing engineer's tables of work and materials, based chiefly on the regular written reports of numerous subordinates, admitted, without calling the latter); 1906, Grundberg *v.* U. S., 145 Fed. 81, 97 (invoices, ledgers, etc.; principle apparently recognized); 1907, Greene *v.* U. S., 5th C. C. A., 154 Fed. 401, 415 (bank-books showing the accounts of the defendants with the bank, proved by the chief bookkeeper who had no personal knowledge, without calling or accounting for the 13 under-bookkeepers, admitted; Pardee, J., diss.; the majority opinion does not discuss the point); 1909, Reyburn *v.* Queen City S. B. & T. Co., 3d C. C. A., 171 Fed. 609, 616 (bank entries in the discount register, the discount ledger, and the individual ledger, verified by the clerks in charge, admitted, without calling all persons concerned in the matters recorded; the above principle approved); 1911 Heike *v.* U. S., C. C. A., 192 Fed. 83 (weighers' records, and "pink books", admitted, affirming 175 Fed. 852); 1913, Wisconsin Steel Co. *v.* Maryland Steel Co., 7th C. C. A., 203 Fed. 403 (cost of manufacture; workmen marked their job-time on cards; from these the bookkeepers made up the payroll, and sheets distributing the wages-amount paid for each job; from these sheets the account-books were made up; the books, with time-cards, etc., were held admissible, both by Federal common law and under Wis. Stats. §§ 4186–9); 1916, Rutan *v.* Johnson, 3d C. C. A., 231 Fed. 369, 279 (amount of taxation due; the various entrants being called, except for certain periods when they were absent on vacations, the records were nevertheless held admissible);

(*b*) There are rulings admitting verified regular entries after a showing

Alabama: 1910, St. Louis & S. F. R. Co. *v.* Sutton, 169 Ala. 389, 55 So. 989 (defendant's trainsheet kept by the operators at stations, recording times of arrival and departure of trains, admitted for the plaintiff without calling the operators, on the testimony of the engineer; the opinion confuses the present principle and those of 'res gestæ' and parties' admissions); 1916, Shirley *v.* Southern R. Co., 198 Ala. 102, 73 So. 430 (mine payroll, in handwriting of A., out of the State, held admissible without accounting for the other persons making up the roll; citing the above text with approval; liberal opinion by Thomas, J.); 1920, Little *v.* Thomas, 204 Ala. 66, 85 So. 490 (mortgage payment; ledger of bank, admitted to show payments made; verified by one witness only);

California: 1911, People *v.* Walker, 15 Cal. App. 400, 114 Pac. 1009 (bank-books admitted to show that M. was not a depositor); 1920, Patrick *v.* Tetztaff, — Cal. App. —, 189 Pac. 115 (books of an automobile repair-shop, admitted, without calling the workmen);

Columbia (Dist.): 1892, U. S. *v.* Cross, 20 D. C. 379 (the marshal's office kept a record of measurements of convicted persons, the clerk writing down the measurement as called out by the subordinate taking it; the clerk C. alone was called; Cox, J.: "It was said that it was hearsay on the part of Carroll, because he did not take the measurement. . . . In a complicated transaction in which two persons participate, we do not think it is essential that each one should have personal knowledge of all the steps in the transaction. For example, a merchant in his store selling goods calls out the price and the character of his goods, and his clerk writes them down; that is in the regular course of business; and it would not be necessary that the clerk should follow the merchant around and have a personal knowledge of all that passed between him and his customer");

Georgia: 1853, Fielder *v.* Collier, 13 Ga. 496, 499 (see quotation *supra*); 1880, Schaefer *v.* R. Co., 66 id. 39, 43 (witness making records of receipts and shipments of cotton by his subordinates in the office; admitted, without accounting for the others, on the ground of public convenience; following Fielder *v.* Collier);

Illinois: 1896, Chisholm *v.* Machine Co., 160 Ill. 101, 43 N. E. 796 (workmen made out time-slips of work done, foremen examined and checked them, and bookkeepers entered them in time-books, errors being checked and corrected throughout; the bookkeepers testified to the correctness of the books, and the foremen the slips, but not the workmen; the books were held admissible); 1907, Cooke *v.* People, 231 Ill. 9, 82 N. E. 863 (to show deposits to the defendant's account, the books of a bank were admitted, verified by the cashier, who had not personally made them; here the bank had ceased doing business, and the different clerks and bookkeepers "were not at the time of the trial in the employ of the bank, but were living in different places, many of them being in foreign States"; following Chisholm *v.* Machine Co., *supra*); 1908, Richardson Fueling Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496 (delivery-book of a tugboat captain, verified by him, admitted; the wheelbarrow-loads were checked off by him, or by "some one else", in which case he "got a ticket signed by some one on the boat"; the delivery tickets had been lost); 1909, Pittsburg C. C. & St. L. R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022 (destruction of numerous freight-cars by a mob; issue as to their loads and contents; reports of arrival etc. of cars, made up in parts from various employees' reports, verified by the clerk who transcribed them and the conductors who handed in the originals, the originals being destroyed in course of business, admitted under the circumstances);

Iowa: 1922, Farmers Nat'l Bank *v.* Pratt, — Ia. —, 186 N. W. 924 (false representatives; book entries testified to by the bookkeeper, admitted without calling other participants); *Kansas:* 1904, State *v.* Stephenson, 69 Kan. 405, 76 Pac. 905 (ledger verified by the bookkeeper, admitted, without calling salesmen, shipping clerks, etc.);

Kentucky: 1906, Louisville & N. R. Co. *v.* Daniel, 122 Ky. 256, 91 S. W. 691 (train-movements at M., allowed to be evidenced by the trainsheet record of the train-dispatcher at E., based chiefly on telegraphic reports from others, but verified on the stand by the train-dispatcher as a correct record, without calling the various employees making the reports; lucid and forceful opinion by O'Rear, J., one of the best on the subject);

Maine: 1907, Madunkeunk D. & I. Co. *v.* Allen C. Co., 102 Me. 257, 66 Atl. 537 (logging scale-book, made up by an assistant, used by the surveyor, without calling the assistant);

Massachusetts: The bizarre piece of patchwork legislation in 1913, quoted *ante*, § 1519, was probably meant to affect this topic: 1893, Donovan *v.* R. Co., 158 Mass. 450, 452, 33 N. E. 583 (trainsheet, made up by combined reports of operators at various stations, and showing whereabouts of trains; received on verification by the collector, without accounting for operators); 1909, Delaney *v.* F. G. F. & P. Co., 202 Mass. 359, 88 N. E. 776 (quoted *supra*); 1916, Bradford *v.* Boston & M. R. Co., 225 Mass. 129, 113 N. E. 1042 (fire set by defendant's locomotives; the train-dispatcher's testimony, verifying a record based on telegrams from station agents, admitted);

Montana: 1920, Smith *v.* Sullivan, 58 Mont.

that the original observer was deceased; possibly absence from the jurisdiction, insanity, or the like, would equally have sufficed.[3]

77, 190 Pac. 288 (services rendered by the plaintiff owing a repair-garage; his books were kept by a bookkeeper, who made up loose-leaf ledger accounts from the time-cards filed by the mechanics; held admissible, on testimony of the bookkeeper, without calling or accounting for the mechanics; citing and accepting the full principle of the text above; liberal opinion, per Holloway, J.);
North Carolina: 1905, Firemen's Ins. Co. *v.* Seaboard A. L. Co., 138 N. C. 42, 50 S. E. 452 (time of arrival of a train at H.; the trainsheet, verified by the train-dispatcher at R., admitted, without calling the operator at H. who reported the arrival; one of the best modern opinions, by Connor, J.); 1908, Jones *v.* Atlantic C. L. R. Co., 148 N. C. 449, 62 S. E. 521 (conductor's train record, not admitted to show condition of stock, solely because the conductor himself was not offered);
North Dakota: Comp. L. 1913, § 7909 (quoted *ante*, § 1519);
Ohio: 1919, Leonard *v.* State, 100 Oh. 456, 127 N. E. 464 (cold storage; exhibits verified by an auditor, showing receipts and deliveries, admitted on the facts);
Pennsylvania: 1904, Wells Whip Co. *v.* Tanners' M. F. Ins. Co., 209 Pa. 488, 58 Atl. 894 (testimony to the amount of a stock of goods, by the secretary of the company, based on an inventory compiled in part by clerks, received without calling the clerks);
Texas: 1906, Pelican Lumber Co. *v.* Johnson, 44 Tex. Civ. App. 6, 98 S. W. 207 (a secretary-manager allowed to testify that the books were to his own knowledge correct, though he was not the bookkeeper making the entries and the bookkeeper was not called);
Vermont: 1916, Squires *v.* O'Connell, 91 Vt. 35, 99 Atl. 268 (services in cutting lumber; a book of entries made in part from tallies reported by C., admitted, C. being absent from the State, on the above principle);
Virginia: 1917, French *v.* Virginian R. Co., 121 Va. 383, 93 S. E. 585 (timber burned by fire set by defendant's locomotive; to show the passage of a train, the trainsheet made up by train-dispatchers from station agents, was admitted, though verified only by the claim adjuster, not the train dispatcher; quoted *supra*);
Wisconsin: 1897, Dohmen Co. *v.* Ins. Co., 96 Wis. 38, 71 N. W. 69 (to show the amount of goods on hand, a set of books properly verified by the bookkeeper and the manager of the business, held admissible, though neither has actual knowledge of the specific transactions; the opinion specifies in full certain conditions, and is worth careful reading); Stats. 1919, § 4189 (quoted *ante*, § 1519).

[3] ENGLAND: 1899, R. *v.* Dexter, 19 Cox Cr. 360 (a witness, who was a solicitor, had had interviews with the accused, and had after each interview dictated to his stenographer an account of what was said, and the stenographer had written out the notes in longhand; the solicitor had within three weeks after such interview gone over the notes and could say that he believed them correct; the stenographer was now in New Zealand; Grantham, J., allowed the solicitor to use the notes, saying that "the shorthand clerk is his 'alter ego'"; but the opinion pays no attention to the distinction between the two kinds of recollection, and rests in part on the circumstance that the solicitor had himself verified the notes within a short time after taking, thus invoking the principle of § 748, *ante*).

UNITED STATES: *Federal:* 1896, American Surety Co. *v.* Pauly, 18 C. C. A. 644, 72 Fed. 470 (a ledger of receipts and payments kept by the bookkeeper of a bank, from checks and deposit-tags handed him by the teller, and representing the moneys received and paid out by the teller; the teller being dead, the bookkeeper verified his entries, which were received to show the amounts received and paid out by the teller); *Arkansas:* 1897, Stanley *v.* Wilkerson, 63 Ark. 556, 39 S. W. 1043 (salesmen's books were burned and the salesmen deceased; journal and ledger copies, verified by the bookkeepers, were admitted);
Michigan: 1902, Meyer *v.* Brown, 130 Mich. 449, 90 N. W. 285 (record of car-weights, testified to by the weighmaster, admitted without calling the weigher, the original card being lost and the weigher's identity impossible to ascertain); *Missouri:* 1920, Dameron *v.* Harris, 281 Mo. 247, 219 S. W. 954 (entries made by other persons in the deceased proprietor's presence and under his orders, admitted as his, the entrants testifying); *New Hampshire:* 1917, Roberts *v.* Claremont Power Co., 78 N. H. 491, 102 Atl. 537 (pollution of a river; certain sales sheets were prepared by H. on reports from others, one of whom was dead and the others out of the jurisdiction; admitted; careful opinion by Peaslee, J.);
New York: 1920, Shmargon *v.* Rosenstein, App. Div. 182 N. Y. Suppl. 343 (goods supplied; plaintiff's books kept by three clerks, held improperly admitted on the testimony of one only); *North Dakota:* 1916, Northern Trust Co. *v.* First Nat'l Bank, 33 N. D. 1, 156 N. W. 212 (county account-books, proved by the deputy treasurer, the treasurer being in the penitentiary, admitted); *Tennessee:* 1823, McNeill *v.* Elam, Peck Tenn. 268 (deceased notary made protests and notices, and his daughter entered them under his instructions; admitted; whether the daughter was called does not appear); *Vermont:* 1913, Griffin *v.* Boston & Maine R. Co., 87 Vt. 278, 89 Atl. 220 (train registers kept at stations,

(c) There are rulings excluding such entries because the original observer was in no way accounted for, or declaring that he must be produced, without deciding what excuse, if any, for non-production would suffice.[4]

the entries made by the conductor of each train as it passed, offered to show who was the engineer on a certain train on certain days; the conductors were called, except one, and he was proved to be unable by illness to attend; held admissible not only as "confirmatory" evidence for the witnesses who testified, but as "independent" evidence); *West Virginia:* 1911, West Virginia Architects & Builders *v.* Stewart, 68 W. Va. 506, 70 S. E. 113 (bookkeeper's entries of labor in performance of a contract, based on reports from M., the corporation president, and W. the foreman; M. the bookkeeper testified; M. was offered as a witness but was disqualified as an interested survivor; W. was not called; held, that the entries were admissible; quoting the principle of the text above).

[4] CANADA: *N. Br.* 1869, Leslie *v.* Hanson, 1 Han. N. Br. 263 (book made from numbers marked by different persons on logs sawn, not admitted, in the absence of satisfactory testimony from all the persons who had measured and marked the logs); *Que.* 1913, Canadian Pacific R. Co. *v.* Quinn, 11 D. L. R. 600 (hospital chart of the plaintiff's case, verified by the nurse-superintendent and one other nurse, but containing entries by a nurse not called and not available, held not admissible on the facts; the opinion shows no familiarity with the subject).

UNITED STATES: *Federal:* 1894, The Norma, 15 C. C. A. 553, 68 Fed. 509 (foreman and bookkeeper); 1911, Southern R. Co. *v.* Mooresville C. Mills, C. C. A., 187 Fed. 72 (chief freight clerk's memorandum of a weighing not personally known to him, excluded); 1921, Crowell *v.* Panhandle G. & El. Co., 8th C. C. A., 271 Fed. 129 (R.'s record of freight-samples, based on reports of subordinates not called, excluded; unsound);
Alabama: 1919, Loveman Joseph & Loeb *v.* McQueen, 203 Ala. 280, 82 So. 530 (loose-leaf ledger transcribed by bookkeepers from salesmen's slips; two bookkeepers testified, two could not be found, and one was ill; the salesmen were not produced nor accounted for; held that Code 1907, § 4003, required the salesmen to be produced or accounted for; but "we approve the reasoning . . . of the modern decisions" which apart from statute do not require this);
Arizona: 1906, Matko *v.* Daley, 10 Ariz. 175, 85 Pac. 721 (certain pay-rolls, in part kept by a former paymaster not accounted for, excluded);
California: 1899, Butler *v.* Estrella R. V. Co., 124 Cal. 239, 56 Pac. 1040 (salesbooks kept by witness from report of manager not called, excluded);
Georgia: 1902, Whitley Grocery Co. *v.* Roach, 115 Ga. 918, 42 S. E. 282 (an inventory made by three persons, one or two examining the articles and one or two entering the items, but only two of the three testifying, held not admissible); 1902, Meadows *v.* Frost, 115 Ga. 1002, 42 S. E. 390 (books kept by one who merely copied slips handed to her by another person not called, held inadmissible);
Illinois: 1898, Pennsylvania Co. *v.* McCaffrey, 173 Ill. 169, 50 N. E. 713 (book kept by a desk-sergeant of police made from reports of accidents by other policemen based on hearsay, excluded; probably correctly, because the policemen themselves had not personal knowledge);
Iowa: 1905, Monarch Mfg. Co. *v.* Omaha, C. B. & S. R. Co., 127 Ia. 511, 103 N. W. 493 (weather records, kept by a railroad, but not verified by the agent in charge at the time in issue, excluded; opinion obscure, and erroneous on principle, though correct on the facts);
Kentucky: 1909, Fidelity & D. Co. *v.* Champion I. M. & C. S. Co., 133 Ky. 74, 117 S. W. 393 (a storage company's employee entered the names of the depositors, but not the amounts received from them; these sums he embezzled; to prove the amount embezzled, in an action against the surety company, the storage company offered a witness who had taken the list of some one hundred depositors, visited each one, heard their statements of the sum paid by each, and then prepared a list of these items; this list, as verified by that witness, held inadmissible; theoretically correct, practically unsound, because the amount was virtually undisputed);
Louisiana: 1857, White *v.* Wilkinson, 12 La. An. 360 (bookkeeper and salesman; apparently oral reports by the latter);
Massachusetts: 1905, Gould *v.* Hartley, 187 Mass. 561, 73 N. E. 656 (bill for cigars, liquor, etc.; the plaintiff offered an original book, sworn to by the clerk keeping it, and made up by him from tickets punched by a registering machine operated by the salesman, who sent the tickets to the clerk, who made up the entries; neither the tickets nor the salesman were produced; excluded; thus the Court refused a plain opportunity to make a liberal and safe application of the principle to modern business methods); 1909, Delaney *v.* Framingham G. F. & P. Co., 202 Mass. 359, 88 N. E. 773 (certain hospital records of medical cases, made by a clerk testifying but based on slips handed to her by a specific physician who was not shown to be unavailable, excluded: otherwise, perhaps, where the entrant clerk receives the information "from various persons whom he cannot expect to remember and

(*d*) Finally, a few rulings inexorably exclude such entries even where the original observer is accounted for as absent from the jurisdiction, or the like,[5] *i.e.* declining to excuse his non-production on such grounds, and thus inconsistent with the general principle (*ante*, § 1521).

(6) A similar question is presented for *parties'* books (*post*, § 1555).

whom it will be impracticable to call"); St. 1905, c. 330, as now embodied in Gen. L. 1920, c. 233, § 79 (certain hospital records to be admissible; quoted *post*, § 1707); 1913, Butcher's S. & M. Ass'n *v.* Boston, 214 Mass. 254, 101 N. E. 426 (drawtenders' official record of vessels passing, not admissible so far as founded on reports of substitute drawtenders; see *post*, § 1635); 1917, Rhoades *v.* N. Y. C. & H. R. R. Co., 227 Mass. 138, 116 N. E. 244 (death of employee; on the issue of interstate commerce, to evidence interstate shipment, the express messenger's testimony to a book made up by him from waybills, etc., on the packages, held not admissible: this is unsound, from any point of view);
Michigan: Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1023 (books testified to by a bookkeeper, who made the entries upon the salesmen's reports; excluded, as not founded upon personal knowledge);
Minnesota: 1901, Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85 (book made up by A on information furnished by memoranda from a workman B, excluded, as not based on personal knowledge; but here neither A nor B was called or shown to be unavailable); 1903, Price *v.* Standard L. & A. Ins. Co., — id. —, 95 N. W. 1118 (hospital register, with entries by a superintendent based on reports of a physician, but verified by the former only, without calling the latter, excluded);
Missouri: 1906, Einstein *v.* Holladay K. L. & L. Co., 118 Mo. App. 184, 94 S. W. 296 (abstracts of title, made partly by S. and partly by K., but verified by S. only, excluded);
Montana: 1921, Gallatin Co. Farmers' Alliance *v.* Flannery, 59 Mont. 534, 197 Pac. 996 (chief bookkeeper, making only a few of the entries, and bookkeeper making most of them, on reports from men at the grain elevators; the chief bookkeeper only being called, held that the other bookkeeper should have been called also);
New Hampshire: 1920, Mason *v.* Dover S. & R. St. R. Co., 79 N. H. 300, 109 Atl. 841 (record of street lights, kept by persons not named nor produced nor accounted for, excluded);
New Jersey: 1896, New Jersey Zinc & I. Co. *v.* L. Z. & I. Co., 59 N. J. L. 189, 35 Atl. 915 (bookkeeper's entries of deliveries of which he knew nothing, excluded);
New York: 1886, Mayor of New York *v.* R. Co., 102 N. Y. 572, 7 N. E. 905 (sub-foreman's oral reports to foreman);
North Dakota: 1916, Starke *v.* Stewart, 33 N. D. 359, 157 N. W. 302 (goods sold; receiver's books not proved by any one having personal knowledge, excluded);
Oklahoma: 1909, Missouri K. & T. R. Co. *v.* Davis, 24 Okl. 677, 104 Pac. 34 (stockyards book of stock deliveries, kept by a clerk on reports from the foreman and other persons; the foreman alone was offered, and the clerk was not accounted for; held that the present principle was not applicable, and also that under Wilson's Rev. & Ann. Stats. 1903, § 4574, the clerk must be accounted for);
Oregon: 1905, Manchester Assur. Co. *v.* Oregon R. & N. Co., 46 Or. 152, 79 Pac. 60 (shop-book record of engine inspections, by E. and W. and a clerk; *semble*, the testimony of all three required; opinion confused);
Pennsylvania: 1918, Caffery *v.* Philadelphia & R. R. Co., 261 Pa. 251, 104 Atl. 569 (personal injury; photographer's record, verified by the manager, but not by the operator who was unaccounted for, excluded);
Vermont: 1911, Coolidge *v.* Taylor, 85 Vt. 39, 80 Atl. 1038 (to prove the delivery of milk to T., a book of entries of such delivery, verified on the stand by the company's secretary, who transcribed them from the delivery-clerk's daily memoranda, was excluded, because the secretary had no personal knowledge and the delivery-clerk was not called nor accounted for); 1913, Osborne *v.* Grand Trunk R. Co., 87 Vt. 104, 88 Atl. 512 (hospital record; one of the entrant nurses testifying, but the others being unaccounted for, it was excluded);
Virginia: 1919, Lavenstein Bros. *v.* Hartford Fire Ins. Co., 125 Va. 191, 99 S. E. 579 (insurance policy; whether plaintiff's inventory was admissible on the present principle, not decided);
Washington: 1894, Tingley *v.* Land Co., 9 Wash. 34, 42, 36 Pac. 1098 (entries in book made by witness from memoranda partly by scalers of logs, excluded);
West Virginia: 1922, Woodrum H. O. Co. *v.* Adams Exp. Co., — W. Va. —, 110 S. E. 549 (delivery of goods to a carrier).

[5] 1894, Chicago Lumbering Co. *v.* Hewitt, 12 C. C. A. 129, 64 Fed. 314 (tallies of logs reported in writing by F., copied by M.; F. had disappeared, through what the Court considered the negligence of the party offering the books); 1854, Kent *v.* Garvin, 1 Gray Mass. 150 (drayman orally reporting to clerk, the former being in California).

For the same question arising for *parties'* books, see *post*, § 1555; the cases are not usually discriminated, and indeed involve the same principle.

(7) *Hospital* records of a patient's treatment often involve the present principle, and have frequently been excluded in consequence.[6] But in view of the special circumstances which involve their preparation and use, they have in some States been given (as they should be) by legislation a special status, and thus form an exception of their own (*post*, § 1707).

(8) *Bankers'* books (*post*, § 1683) and *corporation*-books (*ante*, § 1074) have also been given a special legislative status.

(9) A *common carrier's* records stand on no better and no worse footing at common law than any other person's business-records; if the entries satisfy the conditions of the present principle on the facts as shown, they become admissible, but not otherwise. However, in an issue where the carrier is a disinterested third person there is good practical reason for dispensing with any showing of the necessary conditions; the presumption being that a common carrier's records are ordinarily of the composite character that would satisfy the present principle. If such an application of it be made, it should admit a common carrier's records of consignment, carriage, and delivery, in all manner of litigated issues.

Thus far the only application of it is confined to *shipments of intoxicating liquors*. Under the modern prohibitory legislation, the records of a railroad or express carrier have been made admissible, without calling the various employees whose personal knowledge goes to make up the entries.[7] Legislation 'ad hoc', changing settled rules of procedure in the zealous pursuit of a particular measure, is seldom wise; moreover, it is a mark of unbalanced judgment to deem a liquor-offence more urgent for speedy and practicable proof than the offences of anarchists, thugs, plunderers, forgers, and cheats. But in this case the rule of Evidence adopted is one that merits wider extension.

§ 1531. **Form or Language of the Entry; Impeaching the Entrant's Credit.** Apart from the general rule, already dealt with (*ante*, § 1528), that the statement must be in writing, there is no limitation as to the mode of written expression. Any *mark* or sign that is interpretable as having a definite meaning will suffice.[1] The *absence of an entry*, where an entry would naturally have been made if a transaction had occurred, should ordinarily be equivalent to an assertion that no such transaction occurred, and therefore should be admissible in evidence for that purpose;[2] the same question arises for other kinds of evidence (*post*, §§ 1556, 1639).

The rules for *impeaching the credit* of the entrant would presumably be those accepted for parties' books (*post*, § 1557).

[6] Cases cited *supra*, notes 2 to 5.

[7] The authorities are collected *post*, § 1708.

§ 1531. [1] 1833, North Bank *v.* Abbot, 13 Pick. 471. Compare the same principle applied to parties' books, *post*, § 1556.

[2] 1886. Bridgewater *v.* Roxbury, 54 Conn. 217, 6 Atl. 415 (said obiter); 1896, State *v.* McCormick, 57 Kan. 440, 46 Pac. 777 (a book of depositors, admitted to show that J. was not a depositer); 1901, Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164 (bank's deposit-entries, held evidence that no other sums than there recorded had been received by it). *Contra:* 1903, Vandyke *v.* R. Co., — Ky. —, 71 S. W. 441 ("usually admitted only as affirmative evidence"); 1860, Sanborn *v.* Ins. Co., 16 Gray 448, 452, 455 (absence of an entry in a risk-book regularly kept, not received to show that the contract was not made).

§ 1532. **Production of Original Book.** The general rule requiring the production of the original of a writing (*ante*, § 1179), applies no less to entries offered under this Exception than to other writings;[1] but the rule is of course satisfied where the original is accounted for as lost or otherwise unavailable.[2] As between different kinds of account-books, — a ledger, a journal, and the like, — the question will arise which of them is to be considered as the original; and upon this point the rule developed for parties' books (*post*, § 1558) would presumably be regarded as here applicable.

§ 1533. **Opinion Rule.** The Opinion rule (*post*, § 1917) doubtless applies in theory to this class of testimonial evidence as to others.[1] But as the entrant is not before the Court, being deceased or otherwise unavailable, the rule will usually not properly exclude the entry, since (as already noted for Dying Declarations, *ante*, § 1447) there is no opportunity by questions to obtain from the witness the data of bare facts separated from his inference or opinion thereon. To apply the much misused Opinion rule in this connection can hardly ever be justified.

B. Parties' Account-Books

§ 1536. **In General.** The history (*ante*, § 1518) of that branch of the Exception which admits parties' account-books or shop-books gave to it a development and a series of precedents distinct from that of the general Exception. Nevertheless, the principles upon which this branch was developed in the Courts of the United States show equally a recognition of the two traditional features of hearsay exceptions in general, namely, the Necessity principle (*ante*, 1431), and the Circumstantial Guarantee of Trustworthiness (*ante*, § 1422). The application of the principle of necessity lay in this, that since a party was disqualified as a witness for himself, and since in certain classes of transactions he was thus totally without evidence obtainable from others, certain past statements of his must be admitted by very necessity. Moreover, his own shop-books were regarded as being more or less trustworthy, for reasons analogous to those already examined (*ante*, § 1522). Thus, the principle of necessity and the principle of a circumstantial guarantee were both recognized; and the case stood on the ordinary footing of an exception to the Hearsay rule, without reference to other specific exceptions.

§ 1532. [1] *Can.* 1908, Cummings *v.* Gourlay, 1 Alta. 86 (ledger entries made from scale-books; doubted); 1909, Claudet *v.* Golden Giant Mines, 15 Br. C. 13 (copy of minutes of directors' meeting kept by deceased secretary, excluded on the facts); *U. S.* 1859, Churchill *v.* Fulliam, 8 Ia. 45; 1879, Peck *v.* Parchen, 52 Ia. 46, 54, 2 N. W. 597; 1826, Herring *v.* Levy, 4 Mart. N. S. La. 386.

So also the rule (*post*, § 2129) requiring the *genuineness* of the book or entries to be evidenced: 1906, Nolan *v.* Salas, 7 P. I. 1 (applying C. C. P. § 378).

[2] 1873, Burton *v.* Driggs, 20 Wall. 135 (original jurisdiction); 1831, Holmes *v.* Marsden, 12 Pick. Mass. 171 (original burned); 1905, Manchester Assur. Co. *v.* Oregon R. & N. Co., 46 Or. 162, 79 Pac. 60; 1896, Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56 (ledger admitted, the original entry being burned).

Consult the rules and citations *ante*, §§ 1192–1230.

§ 1533. [1] 1888, Bradford *v.* S. S. Co., 147 Mass. 57, 16 N. E. 719 (report of an appraiser, made in the regular course of employment, stating the amount of damage, excluded).

When parties were made competent, on their own behalf, a main reason — the necessity — disappeared; but the form of the rule was established before this change was made; and its limitations can therefore be understood only by keeping in mind that the original attitude of the Courts in establishing it was precisely analogous to their attitude towards other Hearsay exceptions.

It may be noted here that in a few jurisdictions this branch of the Exception was never judicially recognized,[1] apart from modern statutes.

1. The Necessity Principle

§ 1537. **Nature of the Necessity.** The foundation of the admission of parties' shop-books or account-books in the United States was a necessity, resting in two circumstances; first, the disqualification of the party to take the stand as a witness, and, secondly, the conditions of mercantile and industrial life in the early days, which left the party generally without other evidence than his own statements in the books. This appears in the language of the judges in all the jurisdictions and epochs; and the specific rules of limitation grew directly out of this living principle:[1]

1808, TILGHMAN, C. J., in *Starrett* v. *Bull*, 1 Binn. 237: "In consideration of the mode of doing business in the infancy of the country, when many people kept their own books, it has been permitted from the necessity of the case to offer these books in evidence. . . . No such necessity exists when the fact is that clerks have been employed and the entries made by them."

1810, SWIFT, C. J., Conn., Evidence, 81: "The provision of the statute is grounded on the necessity of the thing; for in many instances it would be very difficult to obtain other or better proof."

1816, PARKER, C. J., in *Faxon* v. *Hollis*, 13 Mass. 427: "[The exception] is necessary for the security of tradesmen and small dealers, who are generally unable to support clerks on whose testimony they might establish their claims."

1838, HITCHCOCK, J., in *Cram* v. *Spear*, 8 Hamm. 497: "The mischief to be remedied was the extreme difficulty, and in many cases the utter impossibility of proving the quantity, quality, or delivery of articles passing from one person to another upon credit and which are ordinarily charged upon book. The merchant does not always keep a clerk by whom this proof could be made; the farmer or mechanic rarely if ever. Hence the necessity of the statute."

1882, DEVENS, J., in *Pratt* v. *White*, 132 Mass. 477: "It has been sanctioned as an exception to the general rule of law, as it formerly existed, that a party should not be a witness in his own cause, and from supposed necessity in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses."

1892, ANDREWS, J., in *Smith* v. *Rentz*, 131 N. Y. 169, 30 N. E. 54: "It was founded upon a supposed necessity, and was intended for small traders who kept no clerks."

§ 1536. [1] *Ala.* 1842, Nolley *v.* Holmes, 3 Ala. 642; 1845, Grant *v.* Cole, 8 Ala. 521; 1846, Turnipseed *v.* Goodwin, 9 Ala. 378; 1873, Avery's Ex'rs *v.* Avery, 49 Ala. 195; *Fla.* 1852, Higgs *v.* Shehee, 4 Fla. 385; *Ind.* 1836, De Camp *v.* Vandegrift, 4 Blackf. 272; *La.* 1844, Martinstein *v.* Creditors, 8 Rob. 8; *Md.* 1833, Owings *v.* Low, 5 G. & J. 142; *Mo.* 1855, Hissrick *v.* McPherson, 20 Mo. 310.

§ 1537. [1] *Accord:* 1860, Landis *v.* Turner, 14 Cal. 575; 1825, Beach *v.* Mills, 5 Conn. 496; 1832, Terrill *v.* Beecher, 9 Conn. 348; 1833, Dunn *v.* Whitney, 10 Me. 14; 1852, Cole *v.* Dial, 8 Tex. 349.

What, then, were the specific rules of limitation growing out of this principle of necessity?

§ 1538. **Not admissible where a Clerk was Kept.** The party must have been his own bookkeeper;[1] moreover he must have had no clerk helping him;[2] for if he had, the clerk could be called if living, or, if deceased, his book-entry could be used.

This limitation has been enforced even in modern times. But the tendency has been to lose sight of it, — a result partly due to the legislation on the subject (*ante*, § 1519), which in many jurisdictions has expressly provided in the same statutory passage for the admission of a party's books and also of books kept by a deceased clerk. Now the entries of a clerk were already admissible at common law, either as memoranda of a past recollection verified by the clerk on the stand (*ante*, § 745), or, the clerk being deceased or otherwise unavailable, as regular entries in the course of business, under the main Exception just treated (*ante*, §§ 1521–1529). The result, then, of the statutory enactments, so far as entries by a clerk are effected, is left uncertain. Either it may be thought that the statute merely sanctioned in part the common-law exception for regular entries by a deceased person; or it may be thought that the statute abolished for parties' books the limitation to persons having no clerk and acting as their own bookkeepers. The latter would be the more natural inference, and would involve less doubt and confusion as to the effect of the change.[3] Nevertheless, the limitation in some statutes to clerks deceased or absent is inconsistent with this interpretation.

The truth is that the statutory enactments often leave it impossible to say what is the precise significance of the change. It hardly matters, for the books of the clerk, living or dead, are available in any event, in the modes above noted.

§ 1539. **Not admissible for Cash Payments or Loans.** On the same prin-

§ 1538. [1] 1871, Kerr *v.* Stivers, 34 Ia. 125. *Contra:* 1882, McGolderick *v.* Traphagen, 88 N. Y. 334, 338 (lack of a "clerk" does not mean lack of a mere bookkeeper, but of "one who had something to do with and had knowledge generally of the business of his employer with reference to goods sold or work done, so that he could testify on that subject, . . . and thus is able to prove an account"; two judges diss.).

[2] *Cal.* 1860, Landis *v.* Turner, 14 Cal. 576; 1886, Watrous *v.* Cunningham, 71 Cal. 32, 11 Pac. 811; *Mich.* 1860, Jackson *v.* Evans, 8 Mich. 476, 481; *Ill.* 1841, Boyer *v.* Sweet, 3 Scam. 122; 1859, Waggeman *v.* Peters, 22 Ill. 42, *semble;* 1869, Ruggles *v.* Gatton, 50 Ill. 416; *Me.* 1833, Dunn *v.* Whitney, 10 Me. 14; *N. M.* 1910, Radcliffe *v.* Chavez, 15 N. M. 258, 110 Pac. 699 (a wife held not a clerk); *N. Y.* 1815, Vosburgh *v.* Thayer, 12 John. 461; 1834, Linnell *v.* Sutherland, 11 Wend. 568; 1838, Sickles *v.* Mather, 20 Wend. 74; 1900, Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300 (but a wife is not a clerk).

Contra, semble: 1831, Martin *v.* Fyffe, Dudley Ga. 16; 1907, Hinkle *v.* Smith, 127 Ga. 437, 56 S. E. 464.

In the following cases entries actually made by clerks were treated as the party's: 1845, Littlefield *v.* Rice, 10 Metc. Mass. 209; 1834, Rhoads *v.* Gaul, 4 Rawle Pa. 407; 1841, Cummings *v.* Fullam, 13 Vt. 439.

Of course if there *is* a clerk, who made the entries, he may take the stand and use them as his own memoranda of recollection; 1853, Humphreys *v.* Spear, 15 Ill. 275; and cases cited *post*, § 1561.

[3] 1892, House *v.* Beak, 141 Ill. 290, 297, 30 N. E. 1065 ("It was not the intention of the statute to prohibit the introduction in evidence of books of account kept by a clerk", if living in the State and able to testify); 1910, Radcliffe *v.* Chavez, 15 N. M. 258, 110 Pac. 699 (not decided; noting prior inconsistent rulings).

Compare § 1561, *post*.

ciple of necessity, it was usually held that entries of cash payments or loans could not be used; because notes or receipts would have been or ought to have been taken, and thus other evidence would be extant:[1]

1852, POTTS, J., in *Inslee* v. *Prall's Executor*, 23 N. J. L. 463 (rejecting a series of cash entries): "We must endeavor to solve the question by a resort to first principles. . . . The consideration of necessity introduced the rule in reference to the admission of books of account. . . . I hold, first, that there is not and never was a necessity for making books of entry evidence of the payment or the lending of money. There is no such great and overruling amount of inconvenience in requiring that men should take a receipt for money when they pay it, or a note or memorandum for money when they lend it, as that the safe, sound principle of legal evidence should be overturned on account of it. It is the ordinary mode in which all careful, prudent men transact such business."

Nevertheless, a few Courts, while applying the same principle, have regarded it as leading to the opposite result, *i.e.* they have thought that there is as much necessity for admitting cash entries as for admitting others:[2]

1858, LUMPKIN, J., in *Ganahl* v. *Shore*, 24 Ga. 24: "In the nature of things no such principle can be maintained. . . . The business of banking is confined almost entirely to money items; so of the books of factors and commission merchants; so of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops; the customer sends an order for a thousand dollars; it is forwarded and charged to the planter's account; true, the factor has the written order, but the cash advanced depends upon the evidence of his books. Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the particularity and consequent delay in the obtaining of receipts, etc. . . . He that so affirms [the rejection of money items] is half a century behind the age in which he lives; and to get up with it, he must forget the things that are behind, and press forward, for it will never stop or come back to him."

1822, KIRKPATRICK, C. J., in *Wilson* v. *Wilson*, 1 Halst. 99: "Upon principle I can see no reason why a book should be lawful evidence of one item and not of another; why it

§ 1539. [1] *Accord:* 1861, Bank *v.* Plannett, 37 Ala. 222, 226 (excluded, where the bank's custom was "to pay out moneys on the checks of its depositors, and not otherwise"); 1899, Harrold *v.* Smith, 107 Ga. 849, 33 S. E. 640; 1851, Brannin *v.* Force's Adm'rs, 12 B. Monr. 509; 1904, Galbraith *v.* Starks, 117 Ky. 915, 79 S. W. 1191; 1904, Proctor *v.* Proctor's Adm'r, 118 Ky. 474, 81 S. W. 272; 1906, Clark *v.* Clark, 122 Ky. 145, 91 S. W. 284; 1901, Waldron *v.* Priest, 96 Me. 36, 51 Atl. 235 (lawyer's office docket, with entry of payment); 1887, Oberg *v.* Breen, 50 N. J. L. 145, 12 Atl. 203; 1898, Hauser *v.* Leviness, 62 N. J. L. 518, 41 Atl. 725; 1892, Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54; 1794, Ducoign *v.* Schreppel, 1 Yeates 347; 1819, Juniata Bank *v.* Brown, 5 S. & R. 231; 1912, Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195; 1905, Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869 (loan items, admitted).

Accord: without giving a reason: 1857, Le Franc *v.* Hewitt, 7 Cal. 186; 1841, Boyer *v.* Sweet, 3 Scam. 122; 1863, Ruggles *v.* Gatton, 50 Ill. 416; 1862, Maine *v.* Harper, 4 All. 115.

In *Massachusetts*, *Maine*, and *New Hampshire*, cash entries of amounts above 40*s.* or $6.66 are excluded: 1901, Waldron *v.* Priest, 96 Me. 36, 51 Atl. 235; 1825, Union Bank *v.* Knapp, 3 Pick. 109; 1833, Burns *v.* Fay, 14 Pick. 12; 1840, Bassett *v.* Spofford, 11 N. H. 267; 1860, Rich *v.* Eldredge, 42 N. H. 158. So too in *Wisconsin*, for amounts over $5: 1903, Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17.

[2] *Admitted:* 1887, Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281 (entries of the drawing of a bill of exchange and its payment, admitted); 1893, Peck *v.* Pierce, 63 Conn. 310, 313, 28 Atl. 524; 1918, Stockwell *v.* Stockwell's Estate, — Conn. —, 105 Atl. 30 (loans); 1869, Taliaferro *v.* Ives, 51 Ill. 247 (books admitted to show "how he had paid the notes"); 1907, Cooke *v.* People, 231 Ill. 9, 82 N. E. 863 (books, deposit-entries of a bank, verified by the cashier, admitted); 1912, Levi *v.* Levi, 156 Ia. 297, 136 N. W. 696; 1902, Stephen *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; 1893, Gleason *v.* Kinney, 65 Vt. 560, 563, 27 Atl. 208; 1896, Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073.

should be evidence of goods sold and delivered, and not of money paid or advanced. Why should there be witnesses called or receipts taken in the one case more than in the other? If necessity be pleaded for the one, may it not be for the other also? For they are both transactions in the common course of business, equally necessary and, I should think, equally frequent or nearly so."

In many Courts, the use of cash entries is commonly considered, not from the present point of view, but from that of the principle of regularity in the course of business; and cash entries are admitted or excluded according as they are thought to fulfil that principle or not (*post*, § 1549).

§ 1540. **Not admissible for Goods delivered to Others on the Defendant's Credit.** Entries of goods delivered to third persons but charged to the defendant as the guarantor or the principal, and, in general, entries of a guaranty by the defendant, cannot be used; for the third person's evidence is available and there is no necessity for a resort to the books.[1]

§ 1541. **Not admissible for Terms of Special Contract.** Where there were special terms to the contract, the entry cannot be used, because there would usually be a writing between the parties, containing the terms of the special contract and the book-entry would be unnecessary.[1]

§ 1542. **Not admissible in Certain Occupations.** The principle of necessity may, by the nature of the occupation, exclude entirely books in certain occupations. Thus, a schoolmaster's books have been excluded:

§ 1540. [1] *Colo.* 1915, Young *v.* U. S. Bank & Trust Co., 27 Colo. 331, 148 Pac. 919 (attorney's books); *Conn.* 1836, Green *v.* Pratt, 11 Conn. 205; *Me.* 1921, Mansfield *v.* Gushee, 120 Me. 333, 114 Atl. 296 (goods delivered to third persons); *Mass.* 1808, Prince *v.* Smith, 4 Mass. 458; 1838, Faunce *v.* Gray, 21 Pick. 247; 1852, Keith *v.* Kibbe, 10 Cush. 36; 1861, Gorman *v.* Montgomery, 1 All. 416; 1873, Somers *v.* Wright, 114 Mass. 174; 1875, Field *v.* Thompson, 119 Mass. 151; 1887, Kaiser *v.* Alexander, 144 Mass. 71, 78, 12 N. E. 209; *Pa.* 1788, Poultney *v.* Ross, 1 Dall. 238; 1795, Tenbroke *v.* Johnson, Coxe 288; 1819, Juniata Bank *v.* Brown, 5 S. & R. 231; *S. Car.* 1912, Wells *v.* Hays, 93 S. C. 168, 76 S. E. 195; *Tenn.* 1872, Black *v.* Fizer, 66 Tenn. 50; *Vt.* 1830, Skinner *v.* Conant, 2 Vt. 454; *Wis.* 1903, Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17 (money paid to third persons).

Contra: 1910, Kamm *v.* Rees, 9th C. C. A., 177 Fed. 14, 22; 1899, Coleman *v.* Ins. Ass'n, 77 Minn. 31, 79 N. W. 588 (plaintiff's books of purchases and sales from and to third persons, admitted under statute to show the amount of stock on hand); 1897, Richmond U. P. R. Co. *v.* R. Co., 95 Va. 386, 28 S. E. 573 (to whom credit was furnished; admitted).

In *Massachusetts* a statute has changed the law: 1914, Brooks Co. *v.* Wilson, 218 Mass. 205, 105 N. E. 607 (following St. 1913, c. 288, quoted *ante*, § 1519, and admitting an entry in the plaintiff's account book charging to the defendant certain printed matter ordered by the defendant, an attorney for a corporation).

In general, the transaction must have been with the defendants: 1819, Rogers *v.* Old, 5 S. & R. 408; 1869, Wall *v.* Dovey, 60 Pa. 212. Compare the cases cited *post*, § 1544.

§ 1541. [1] 1901, Snow Hardware Co. *v.* Loveman, 131 Ala. 221, 31 So. 19; 1832, Terrill *v.* Beecher, 9 Conn. 348; 1870, Hart *v.* Livingston, 29 Ia. 221; 1833, Dunn *v.* Whitney, 10 Me. 15; 1889, Ward's Estate, 73 Mich. 225, 41 N. W. 431; 1900, Collins *v.* Shaw, 124 Mich. 474, 83 N. W. 146; 1907, Jacobs *v.* Morgenthaler, 149 Mich. 1, 112 N. W. 492 (not admitted to show the payment of money for stock upon a special contract); 1914, Davis *v.* McClelland, 185 Mo. App. 130, 170 S. W. 691 (attorney's contract for services); N. J. L. 1838, Dauser *v.* Boyle, 16 N. J. L. 395; 1896, Wait *v.* Krewson, 59 Pa. 71, 35 Atl. 742; 1841, Lonergan *v.* Whitehead, 10 Watts Pa. 249; 1842, Nickle *v.* Baldwin, 4 W. & S. Pa. 290; 1898, Hall *v.* Woolen Co., 187 Pa. 18, 40 Atl. 986, *semble* (treated as secondary evidence to the contract's terms); 1896, Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720.

But this does not forbid using the entry to show the delivery of goods, under a special contract otherwise proved: 1922, Newton *v.* Consolidated Gas. Co., 258 U. S. 165, 42 Sup. 264 (rate of charge for gas; the plaintiff's books, kept under supervision of the State public service commission, admitted); 1843, Cummings *v.* Nichols, 13 N. H. 425; 1860, Swain *v.* Cheney, 41 N. H. 236.

1823, COLCOCK, J., in *Pelzer* v. *Cranston*, 2 McC. 128: "The Court have always kept in view the necessity of the evidence. Now there are few persons in business who are furnished with as many witnesses as a schoolmaster may command, and there is no necessity for admitting his books to be produced in evidence."

Yet the books of an attorney have been admitted:

1850, WELLS, J., in *Codman* v. *Caldwell*, 31 Me. 561: "One objection . . . is that from the nature of the case, there must be better evidence [in existence]. But the book and oath of a party are often received to prove sales or services known to other persons and provable by them. . . . The demands of attorneys are sustainable by any mode of proof applicable to other descriptions of persons." [1]

Books of a *corporation* here stand on no different footing from that of a natural person. But owing to their special use under the doctrine of Parties' Admissions they are considered *ante*, § 1074. So, too, *bankers'* books (*post*, § 1683), *common carriers'* books (*post*, § 1708), and *hospital* records (*post*, § 1707), have been given by legislation a special status.

§ 1543. **Not admissible for Large Items, nor for Immoral Transactions.** The foregoing are the chief limitations generally acknowledged. But sundry different transactions have been from time to time ruled upon as exemplifying the necessity or non-necessity of using the entries.[1]

So far as any further generalizations can be made, two may be noticed: (1) Where the item involves so *large an amount* of goods sold that other evidence of its delivery must have existed, the entry cannot be used.[2] (2) Where the transaction is one not to be encouraged on general grounds of *morality* or policy, there is no necessity for helping to the recovery of the charge by admitting the entry.[3] But it cannot be said that these applications of the principle are generally accepted.

§ 1544. **Rules not Flexible; Existence of Other Testimony in Specific Instances does not exclude Books.** The principle of Necessity leading to these limitations naturally suggests the question whether the principle is to be ap-

§ **1542**. [1] *Accord:* 1861, Wells *v.* Hatch, 43 N. H. 248, *semble*. *Contra*, *semble:* 1864, Hale's Ex'rs *v.* Ard's Ex'rs, 48 Pa. 22.

Books in the following occupations have been ruled on: 1900, Produce Exchange T. Co. *v.* Bieberbach, 176 Mass. 577, 587, 58 N. E. 162 (whether entries in bank-books fall within the rule; not decided); 1896, Fulton's Estate, 178 Pa. 78, 35 Atl. 880 (physician; left undecided); 1820, Frazier *v.* Drayton, 2 Nott & McC. S. C. 472 (a ferryman; admitted).

Compare the rulings upon the kind of occupation as affected by the principle of regularity, *post*, § 1547. For *corporation books*, see *ante*, § 1074.

§ **1543**. [1] *Excluded:* 1856, Lynch *v.* Cronan, 6 Gray Mass. 532 (mechanic's lien); 1851, Batchelder *v.* Sanborn, 22 N. H. 328 (collateral purposes generally); 1823, Swing *v.* Sparks, 2 Halst. 61 (loss by injury to property); 1811, Wilmer *v.* Israel, 1 Browne Pa. 257 (wharfage dues); 1871, Godding *v.* Orcutt, 50 Vt. 56 (sundries).

[2] 1876, Petit *v.* Teal, 57 Ga. 145 (rejected for large items, *e.g.* $50, except where usage authorizes, as in banking); 1882, Carr *v.* Sellers, 100 Pa. 170 (Mercur, J.: "We will not now designate the maximum sum for which a book may be received in evidence. . . . Much more depends on the nature and character of the subject matter of the item, and on the evidence, outside of the book, which naturally exists to prove the items"); 1872, Winner *v.* Bauman, 28 Wis. 563, 566 (statute applied to exclude large items).

[3] 1897, Frank *v.* Pennie, 117 Cal. 254, 49 Pac. 208 (a gambler's "Poker Book" of accounts, excluded); 1826, Boyd *v.* Ladson, 4 McC. S. C. 76 (billiard-games; excluded); this case probably overrules Herlock's Adm'r *v.* Riser, 1821, 1 McC. 481 (whiskey sales; admitted).

plied as an open one outside of the above accepted applications, and whether in those classes it is to be regarded as a fixed rule of thumb or whether the question of necessity may be raised anew in a given case under its particular circumstances. The answer to both questions is in the negative; the rules are no longer flexible; in certain classes the entries are once for all excluded, in others admitted:

1836, WILLIAMS, C. J., in *Peck* v. *Abbe*, 11 Conn. 210: "This necessity is not the necessity of the individual case on trial, but of the class of cases to which it belongs. One man sells a bushel of corn to his neighbor, no other being present; he charges it on his book; and could never recover, unless his book or his oath or both were sufficient evidence. Necessity, therefore, requires this evidence. Another sells corn to his neighbor, surrounded with his family; of course, the same necessity of his oath or book does not exist. Still the charge is of the same class with the other, and may be supported in the same way. . . . The enquiry is not whether the party in that case could not have other testimony, but whether the case itself is of the class or character which will support the action."

It follows that it is immaterial, in a given case in the admissible classes, that *other witnesses* of the transaction are actually available, or that, in a case in the excluded classes, other witnesses were in fact not available.[1] There are contrary rulings;[2] but the general judicial attitude seems to be plain. Usually, it may be added, this sort of attitude is to be deprecated; it results in deadening and mutilating the living principles of Evidence, and serves no good purpose. But here the general principle itself is a mere survival, without any living function in the law of Evidence; and there can be no object in attempting to develop further that which has no reason for development, and no harm in accepting it, so long as it survives, in its fixed and traditional limitations.

2. The Circumstantial Guarantee of Trustworthiness

§ 1546. **General Principle; Regularity of Entry in Course of Business.** The general principle which suffices to admit parties' books as fairly trustworthy is the same as that recognized for the main Exception for regular entries.

§ 1544. [1] 1844, Mathes *v.* Robinson, 8 Metc. 271; 1838, Sickles *v.* Mather, 20 Wend. 75.

[2] On each occasion the absence of other evidence must be sworn to: 1869, Neville *v.* Northcutt, 47 Tenn. 296. In particular cases, entries of a guaranty of credit may be received: 1847, Ball *v.* Gates, 12 Metc. 493; 1851, Tremain *v.* Edwards, 7 Cush. 415.

It has also been ruled that if the *work* was *done by a servant* of the plaintiff, or the goods *delivered* to a servant of the defendant, the entry was inadmissible; but this would probably not be followed in other jurisdictions: 1921, Mansfield *v.* Gushee, 120 Me. 333, 114 Atl. 296 (not ordinarily admissible to prove delivery; this learned opinion is a model of the antique learning which does so much to exhibit the law of Evidence to the modern world as a rusty worn-out tool). *N. H.* 1825, Eastman *v.* Moulton, 3 N. H. 156; *Pa.* 1811, Wright *v.* Sharp, 1 Browne 344 ("it is from necessity that a book of original entries, proved by a plaintiff's oath, is admitted in evidence at all; and where the work has been done by a third person, this necessity does not exist"); 1840, Lonergan *v.* Whitehead, 10 Watts 249 (entries of delivery of goods, as performance of prior contract, excluded; "the reasons on which the cases cited are ruled do not apply, for there is no necessity to resort to such proofs, and it is not according to the usual course of business; the delivery is a matter of notoriety, done through the agency of others, and therefore easily proved through disinterested witnesses"); 1842, Nickle *v.* Baldwin, 4 W. & S. 290 (same); 1898, Hall *v.* Woolen Co., 187 Pa. 18, 40 Atl. 986 (delivery of large quantities of goods; books rejected; "Lonergan *v.* Whitehead has been followed ever since it was decided").

The motives and results by which that principle is supposed to operate have already been sufficiently considered (*ante*, § 1522).[1] In general, it is thought that the regularity of habit, the difficulty of falsification, and the fair certainty of ultimate detection, give in a sufficient degree a probability of trustworthiness. The particular element of self-interest and partisanship that might be supposed to diminish trustworthiness in the case of a party himself is supposed to be balanced by certain additional requirements here made for this class of books, — for example, the existence of a reputation for honest bookkeeping, fair appearance of the books, and the like.

In applying the general principle of Regularity of Entry, different circumstances may come into question, — the kind of occupation, the kind of book, the kind of item. These circumstances may now be taken in order.

§ 1547. **Regularity, as Affecting Kind of Occupation or Business.** There can be no definite limitations as to the business or occupation of the entrant. The Court should decide, for each occupation, whether it involves the regular keeping of books:

1858, LUMPKIN, J., in *Ganahl* v. *Shore*, 24 Ga. 17: "We hold that any occupation which makes it necessary for books to be kept as the record of its transactions, the monuments of its daily business, — as factories, foundries, forges, gas-works, banks, factorage, no matter what, — if books are required 'ex necessitate rei' to be kept, these books are to be let in under the law . . . for the same purpose and to the same extent that a merchant or shop-keeper's books are received in evidence; and that is, to prove those matters which appertain to the ordinary business of the concern, which require to be charged, and which in fact constitute its 'res gestæ.'" [1]

Courts have ruled from time to time in the different jurisdictions upon various occupations.[2] In general, a mere casual rendering of services is not enough; there must be a regular occupation.[3] The principle of Necessity, it must be noted, may also affect the kind of occupation in which books are allowed to be used (*ante*, § 1542). Moreover, statutes have in many instances (*ante*, § 1519) expressly defined the kinds of occupation.

§ **1546.** [1] Compare additionally the following: 1822, Kirkpatrick, C. J., in Wilson *v.* Wilson, 1 Halst. N. J. 98 ("The credit to which a book of the sort last mentioned is entitled as matter of evidence is derived from the presumption that though a man in the warmth of controversy or the heat of passion, might be disposed to raise up false charges against his adversaries, yet that no one is so abandoned as in his cooler moments, without such excitement and in the course of his daily business, deliberately to contrive and meditate a fraud against his neighbor").

§ **1547.** [1] *Accord:* 1846, Taylor *v.* Tucker, 1 Kelly 233, per Nisbit, J.; 1838, Sickles *v.* Mather, 20 Wend. 75 (Cowen, J.: " . . . . whether he be a merchant or engaged in any other business").

[2] *Admitted:* 1856, Richardson *v.* Dorman's Ex'x, 28 Ala. 681 (physician; under the Code); 1916, James *v.* State, 125 Ark. 269, 188 S. W. 806 (physician's books, verified by himself, admitted to show date of a birth). *Excluded:* 1899, Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574 (diary of services performed, expenses paid, etc., by plaintiff as employee of defendant's intestate); 1790, Spence *v.* Sanders, 1 Bay 119 (physician); 1818, Thomas *v.* Dyott, 1 Nott & McC. S. C. 186 (printer); 1901, Bass *v.* Gobert, 113 Ga. 262, 38 S. E. 834 (books of a party not doing any "regular business"); 1835, Thayer *v.* Deen, 2 Hill S. C. 677 (pedlar).

[3] 1871, Karr *v.* Stivers, 34 Ia. 127; 1898, Atkins *v.* Seeley, 54 Nebr. 688, 74 N. W. 1100 (continuous dealing, etc., not shown); 1839, Walter *v.* Bollman, 8 Watts 544.

§ 1548. **Regularity, as Affecting the Kind of Book; Ledger or Daybook.** *Any form* of book, if regularly kept, is sufficient. A mere individual memorandum does not satisfy this principle; but obviously there may be separate books for separate classes of transactions, and of these a regularity can be predicated. It is thus often difficult to distinguish between books which are properly admissible because, though not comprehensive, they are nevertheless a complete and regular record of an integral series of transactions, and books which are inadmissible because they appear to have been kept apart from the general course of bookkeeping and thus are not likely to be affected by the considerations (*ante*, § 1522) that give trustworthiness to the ordinary records of transactions.[1]

The fact that the book is kept in *ledger-form*, with each person's account separate, or in daybook form, with the items in the actual order of the transactions, is immaterial; though it may perhaps lessen the credit to be given to the book.[2] But a ledger-book may be open to the independent objection that it is not the original book, and may on that ground be excluded (*post*, § 1558).

Finally, the record offered being a collected series of entries, it does not

§ 1548. [1] *Ala.* 1919, McWhorter *v.* Tyson, 203 Ala. 509, 83 So. 330 (entries, on stubs of a personal check-book, held to be shop-books under the statute; three judges diss.); 1916, Warten *v.* Black, 195 Ala. 93, 70 So. 758 (memoranda as to feeding etc. of cattle, made for a temporary purpose, held not a shop-book); *Cal.* 1901, Thompson *v.* Ruiz, 134 Cal. 26, 66 Pac. 24 ("private memorandum-book" of money collections, excluded); *Conn.* 1893, Barber's Appeal, 63 Conn. 393, 410, 412, 27 Atl. 973 (ordinary diary, excluded); 1868, Ward *v.* Leitch, 30 Md. 326, 333 (entries made by one casually employed for the purpose and doing it "once a week and sometimes once a fortnight", not admissible; unsound); *Mass.* 1844, Mathes *v.* Robinson, 8 Metc. 270 (a time-book of work done by laborers, admitted); 1885, Costello *v.* Crowell, 139 Mass. 592, 2 N. E. 698 (memorandum-book, excluded); 1896, Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84 (small pocket-memorandum-book used for sundry memoranda, held not improperly excluded); *Mich.* 1894, Countryman *v.* Bunker, 101 Mich. 218, 59 N. W. 422 (book not covering all transactions with the opponent, excluded); *Nebr.* 1897, Anderson *v.* Beeman, 52 Nebr. 387, 72 N. W. 361 (there must be "a continuous dealing with persons generally"); *N. H.* 1851, Richardson *v.* Emery, 23 N. H. 223 (excluding separate books kept for different lots of wood sold, thus "not affording security against interpolations" that a single book would give); *Pa.* 1896, Fulton's Estate, 178 Pa. 78, 35 Atl. 880 (a separate book from the regular books, containing charges against one person only, excluded); *Tenn.* 1872, Callaway *v.* McMillian, 11 Heisk. 557, 560 (entries in a private memorandum-book, excluded); *Vt.* 1886, Barber *v.* Bennett, 58 Vt. 483, 4 Atl. 231 (entries of account upon "a loose strip of paper" found in a desk, excluded); 1893, Gleason *v.* Kinney, 65 Vt. 560, 563, 27 Atl. 208 (entry in a diary, of money paid, there being a separate book of accounts, admitted; the nature of the item, not of the book, being material; this seems erroneous); 1896, Re Diggins' Estate, 68 Vt. 198, 34 Atl. 696 (a small book dealing with a special stock of goods, admitted); 1900, Post *v.* Kenerson, 72 Vt. 341, 47 Atl. 1072 (entries held to form a regular book, on the facts); 1904, Freehart *v.* Stanford, 77 Vt. 36, 58 Atl. 790 (Post *v.* Kenerson approved); *Wyo.* 1896, Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073 (a calendar containing two entries of payment, excluded, because not a regular account-book, and because the entries were not continuous).

Compare the cases cited *ante*, § 1525.

Distinguish the question whether a *trustee's accounts*, to be satisfactory, may be kept in the form of separate memoranda not serially entered in a single book: 1917, Wylie *v.* Bushnell, 277 Ill. 484, 115 N. E. 618.

[2] 1806, Coggswell *v.* Dolliver, 2 Mass. 221 (per Sewall, J.: "though the one method leaves a greater opening to fraud and falsehood than the other"); 1860, Swain *v.* Cheney, 41 N. H. 234; 1861, Wells *v.* Hatch, 43 N. H. 248; 1921, Fargo Mercantile Co. *v.* Johnson, — N. D. —, 181 N. W. 953 (ledger-entries admitted, under Comp. L. 1913, § 7909); 1869, Hoover *v.* Gehr, 62 Pa. 136; 1850, Toomer *v.* Gadsden, 4 St. robh. L. S. C. 195.

But a general account drawn up at a *later date* is inadmissible: 1808, Prince *v.* Smith, 4 Mass. 458.

matter of what *material* the record is made, nor whether it is a record to which in ordinary parlance the word "book" would be applied.[3]

§ 1549. **Regularity, as Affecting the Kind of Item or Entry; Cash Entry.** In the first place, the entry must have been a part of a *regular series* of entries, — not, for example, a casual sale of an article not regularly dealt in, nor a casual entry at the beginning of a blank book or at the end of a book already finished and laid aside.[1] Again, the entry is not usable if it shows that it embraces in one item a number of *separate transactions*, or is in any other way so loosely made that regularity of entry cannot be predicated.[2]

The question already examined from the point of view of the principle of Necessity, namely, whether entries of *cash payments* are admissible (*ante*, § 1539), is often by some Courts discussed instead from this point of view; and here, as before, opinions differ in the application of the principle. The better opinion is that while as a general rule such entries are not to be regarded as admissible, yet in particular cases the ordinary course of business may involve cash entries and they may then be used:[3]

1838, HITCHCOCK, J., *Cram* v. *Spear*, 8 Hammond 497: "Money lent or paid is not ordinarily charged upon book. The person lending or paying usually takes a note or receipt. An individual, it is true, might be engaged in a business that would seem to justify such charges, and in such case I am not prepared to say that he might not be examined as a witness."

1859, STOCKTON, J., in *Veiths* v. *Hagge*, 8 Ia. 187: "The general rule is clearly established by these authorities that a charge for money paid or money lent cannot be proved by a party's book of accounts, that such transactions are not usually the subject of a charge in account, and that charges of that nature are not such as are made in the ordinary course of business by one party against another. . . . An individual might be engaged in business that would seem to justify such charges, as where one's ordinary business may be said to consist in receiving money on deposit and paying it out for others. . . . This would not, however, apply to the case of a party engaged in the mere business of keeping a retail store, whose customers purchase goods of him on credit, which are charged to them in a running

[1] 1846, Taylor v. Tucker, 1 Kelly Ga. 231 (slips of paper); 1836, Kendall v. Field, 14 Me. 30 (shingle).

§ 1549. [1] 1825, Beach v. Mills, 5 Conn. 496 (receipt of rent); 1864, Davis v. Sanford, 9 All. 216; 1822, Wilson v. Wilson, 1 Halst. 95; 1888, Stuckslager v. Neel, 123 Pa. 60, 16 Atl. 94; 1786, Lynch v. M'Hugo, 1 Bay 33; 1835, Thayer v. Deen, 2 Hill S. C. 677; 1901, Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. 544 (book made up "several years after the business").

[2] 1921, Mansfield v. Gushee, 120 Me. 333, 114 Atl. 290 (items with no prices carried out, excluded); 1921, Adkins v. Hastings, 138 Md. 454, 114 Atl. 288 (items for "goods", etc., without naming measure, weight, or quantity, admitted); 1842, Winsor v. Dilloway, 4 Metc. Mass. 222; 1849, Henshaw v. Davis, 5 Cush. Mass. 146 (three months' services in one item, excluded); 1853, Bustin v. Rogers, 11 Cush. 346; 1882, Pratt v. White, 132 Mass. 477 (measure, weight, and quantity lacking; but admitted); 1889, Woolsey v. Bohn, 41 Minn. 238, 42 N. W. 1022; 1840, Bassett v. Spofford, 11 N. H. 267; 1825, Sawyer v. Miller, 3 Halst. N. J. 139; 1794, Ducoign v. Schreppel, 1 Yeates Pa. 347; 1882, Carr v. Sellers, 100 Pa. 171; 1904, McKnight v. Newell, 207 Pa. 562, 57 Atl. 39; 1893, Cargill v. Atwood, 18 R. I. 303, 305 ("lump" charges, excluded); 1818, Lynch's Adm'r v. Petrie, 1 Nott & McC. S. C. 731; 1859, Johnson v. Price, 40 Tenn. 549; 1887, Baldridge v. Penland, 68 Tex. 441, 4 S. W. 565.

[3] *Accord:* 1909, Reyburn v. Queen City S. B. & T. Co., 3d C. C. A., 171 Fed. 609 (bank-books admissible; the limitation as to cash entries held not applicable); 1902, Harmon v. Decker, 41 Or. 587, 68 Pac. 11, 1111 (large cash items, held not provable by the party's books, unless custom sanctions such entries in a particular business); 1893, Cargill v. Atwood, 18 R. I. 303, 304 (admissible, provided such transactions formed part of the ordinary course of business)

account. . . . They would not ordinarily expect to find themselves charged in their accounts with sums of money lent or paid. . . . Yet if the jury should judge that small money-charges were legitimately made in the ordinary course of business, we should not be inclined to hold that they might not so determine."

But the general tendency of Courts is to regard such entries as absolutely excluded, without any allowance for exceptional cases in special occupations.[4] On the same principle, an entry of *payment by note* given would seem to be admissible.[5]

§ 1550. **Contemporaneousness.** Not merely regularity is required; the entry must have been fairly contemporaneous with the transaction entered.[1] This is another circumstance very properly required as tending to accuracy, and is similar to the requirement in the general Exception (*ante*, § 1526) as to entries by deceased persons. But no unvarying limitation need be fixed; the entry must merely have been made near enough to indicate a likelihood of accuracy; and thus each ruling must depend chiefly on the circumstances of the case:

1834, SERGEANT, J., in *Jones* v. *Long*, 3 Watts 326: "The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, unimpaired. The law fixes no precise instant when the entry should be made."

1852, BIGELOW, J., in *Barker* v. *Haskell*, 9 Cush. 221: "The rule does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. In this particular, every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort much must be left to the judgment and discretion of the judge who presides at the trial."

[4] *Conn.* 1803, Bradley *v.* Goodyear, 1 Day 104; *Ia.* 1859, Young *v.* Jones, 8 Ia. 222; 1859, Sloan *v.* Ault, ib. 230; 1859, Snell *v.* Eckerson, ib. 284; 1892, Security Co. *v.* Graybeal, 85 id. 543, 546, 52 N. W. 497 (register of loans); 1894, M. S. Bank *v.* Burson, 90 id. 191, 193, 57 N. W. 705; 1894, Shaffer *v.* McCracken, ib. 578, 580, 58 N. W. 910 (payment to attorney); 1909, Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47 (not decided): *N. H.* 1825, Eastman *v.* Moulton, 3 N. H. 156; 1851, Richardson *v.* Emery, 23 N. H. 223; 1907, Page *v.* Hazelton, 74 N. H. 252, 66 Atl. 1049; *N. J.* 1830, Carman *v.* Dunham, 6 Halst. 191 (single entry of cash lent in a regular book of entries containing no other dealings with the alleged debtor); *N. Y.* 1811, Case *v.* Potter, 8 John. 212; *Pa.* 1898, Fifth Mut. B. Soc. *v.* Holt, 184 Pa. 572, 39 Atl. 293 (entry of consideration received); *Tex.* 1852, Cole *v.* Deal, 8 Tex. 349; 1872, Kotwitz *v.* Wright, 37 Tex. 83; *W. Va.* 1911, West Virginia Architects & Builders *v.* Stewart, 68 W. Va. 506, 70 S. E. 113 (not decided).

Compare the cases cited *ante*, § 1539.

[5] 1899, Estes *v.* Jackson, — Ky. —, 53 S. W. 271 (entry that an account was settled by note, excluded). *Contra:* 1898, Borgess Inv. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754 (admitting an entry of a note secured by deed of trust).

§ **1550.** [1] 1910, Kamm *v.* Rees, 9th C. C. A., 177 Fed. 14, 22; 1899, Lane *v.* M. & T. Hardware Co., 121 Ala. 296, 25 So. 809; 1895, St. Louis, I. M. & S. R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419; 1860, Landis *v.* Turner, 14 Cal. 575 (admitted. where the transfer from a slate to the book was made irregularly, but generally in from one to three days afterwards); 1881, Redlick *v.* Bauerlee, 98 Ill. 134, 138 ("the authorities do not establish any precise length of time"; here entries transferred monthly from memoranda at the time of manufacture were admitted); 1858, Anderson *v.* Ames, 6 Ia. 488; 1887, Rumsey *v.* Telephone Co., 49 N. J. L. 325, 8 Atl. 290; 1818, Curren *v.* Crawford, 4 S. & R. Pa. 3; 1829, Kessler *v.* M'Conachy, 1 Rawle Pa. 441; 1839, Walter *v.* Bollman, 8 Watts Pa. 544; 1865, Yearsley's Appeal, 48 Pa. 535.

§ 1551. **Book must bear an Honest Appearance.** The appearance of the book of entries must be honest;[1] no suspicion of false dealing must be apparent. But the trial Court's determination of this ought to be final.[2]

§ 1552. **Reputation of Correct and Honest Bookkeeping.** The tradition requires also that preliminary testimony be offered as to the good reputation of the party for correct and honest accounting.[1] Whether this would always be required is in some jurisdictions doubtful to-day, apart from express statute.[2]

3. **Testimonial Qualifications, and Other Independent Rules of Evidence**

§ 1554. **Party's Suppletory Oath; Cross-examination of Party; Use of**

§ 1551. [1] 1861, Caldwell *v.* McDermit, 17 Cal. 466 (excluded, "when suspicious circumstances exist upon the face of the entries, and these circumstances are not explained by disinterested persons"); 1810, Swift, 1. idence, Conn., 81; 1880, Robinson *v.* Dibble's Adm'r, 17 Fla. 462; 1889, Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871; 1891, L'Engle *v.* Reed, 27 Fla. 345, 3579 So. 213; 1899, Harrold *v.* Smith, 107 Ga. 849, 33 S. E. 540 (unfastened portion of a book, with leaves mutilated or missing, excluded); 1896, Gutherless *v.* Ripley, 98 Ia. 290, 67 N. W. 109; 1806, Cogswell *v.* Dolliver, 2 Mass. 221, per Sewall, J.; 1844, Mathes *v.* Robinson, 8 Metc. Mass. 270; 1882, Pratt *v.* White, 132 Mass. 477; 1878, Robinson *v.* Hoyt, 39 Mich. 405 (entries all on the last page of a book having many pages blank and many torn out, held "insufficient" for proof); 1896, Levine *v.* Ins. Co., 66 Minn. 138, 68 N. W. 855; 1825, Eastman *v.* Moulton, 3 N. H. 156; 1863, Funk *v.* Ely, 45 Pa. 444, 448 ("The Court examines it to see if it appears 'prima facie' to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the Court may reject it").

But a mere *error* need not exclude: 1866, Schettler *v.* Jones, 20 Wis. 412, 415 (entries charged against a person not the opponent are admissible "if such mistake is fairly and satisfactorily explained by other competent evidence").

[2] 1806, Cogswell *v.* Dolliver, 2 Mass. 223 (Sedgwick, J.: "The true ground . . . is that the judge or court before whom the case is tried, should on inspection, determine that the book was proper for that purpose, and that such determination renders it competent evidence. . . . To suffer our inquiries to go behind that decision would be throwing things into too loose a state").

§ 1552. [1] The precise tenor of this requirement varies; some Courts hold that the proof must be by persons who have settled with the party, and that, too, directly upon his books; *Arkansas:* 1898, Atkinson *v.* Burt, 65 Ark. 316, 46 S. W. 986, 53 S. W. 404 (must be shown correctly and contemporaneously kept); 1895, St. Louis, I. M. & S. R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419; *California:* 1860, Landis *v.* Turner, 14 Cal. 576; 1886, Watrous *v.* Cunningham, 71 Cal. 32, 11 Pac. 811; 1894, Webster *v.* Lumber Co., 101 Cal. 326, 329, 35 Pac. 871 (absconding of the party's bookkeeper, who had falsified the books to defraud him, not sufficient to exclude); *Illinois:* 1841, Boyer *v.* Sweet, 3 Scam. 122; 1869, Ruggles *v.* Gatton, 50 Ill. 416; 1876, Patrick *v.* Jack, 82 Ill. 82; 1892, House *v.* Beak, 141 Ill. 290, 299, 30 N. E. 1065 (held here not essential, where the opponent had admitted the correctness of the account); *Michigan:* 1860, Jackson *v.* Evans, 8 Mich. 476, 487 (the rule is "to require evidence of the correctness and fairness of the books offered, founded on information gained by an actual inspection of and settlement by them", and not merely of "the character of the party whose books they are"); 1893, Seventh D. A. P. A. *v.* Fisher, 95 Mich. 274, 276, 54 N. W. 759 (may be shown by himself, without calling others); *New Mexico:* 1910, Radcliffe *v.* Chavez, 15 N. M. 258, 110 Pac. 699 (testimony by two customers as to correctness, here held sufficient); *New York:* 1815, Vosburgh *v.* Thayer, 12 Johns. 461; 1834, Linnell *v.* Sutherland, 18 Wend. 568; 1855, Morrill *v.* Whitehead, 4 E. D. Smith 241; 1882, McGoldrick *v.* Traphagen, 88 N. Y. 334, 336 (proof by several witnesses testifying to settlement by bills, and by another witness to settlement by the books themselves, held sufficient, the last witness being the bookkeeper of the party himself; two judges diss.); 1900, Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300; *Texas:* 1868, Werbiskie *v.* McManus, 31 Tex. 116, 124 (proof required that "his reputation as an honest man and correct bookkeeper is untarnished").

[2] 1888, Montague *v.* Dougan, 68 Mich. 98, 100, 35 N. W. 840 (proof by other persons, held not necessary "since the statute allows parties to testify generally in the case"); 1909, Bresler's Estate, 155 Mich. 567, 119 N. W. 1104 (similar to Montague *v.* Dougan).

This amounts to no more than a verification of correctness on oath (*post*, § 1554).

Books by or against Surviving Party. (1) Since the preliminary facts rendering evidence admissible must of course always be proved somehow in advance of its admission, the identity and character of parties' books, as fulfilling the foregoing conditions, must first be shown. But if the books were, by hypothesis, kept by the party himself, and without a clerk, it is obvious that they cannot be satisfactorily shown to be his books without calling in the aid of his own testimony. By very necessity, therefore, and for the purpose of identifying the books, the party, though otherwise disqualified (under the older law) as a witness, was allowed [1] to make a so-called *suppletory oath* of identification.[2] Moreover, this oath, by way of precaution, was made to involve an assertion that the books were correctly kept, and from this point of view the oath was not only allowed but required;[3] it could only be dispensed with where the party was dead, or insane, or out of the jurisdiction (*post*, § 1561). In many of the statutes (*ante*, § 1519) that have dealt with the subject, this suppletory oath is still retained as a requirement.

(2) As a necessary concession to the allowance of the suppletory oath, it was thought proper in a few jurisdictions by statute to allow a *cross-examination* of the party upon the transactions represented in the entries.[4]

(3) The modern statutory exception to a party's qualification, namely, the exclusion of a *survivor* from testifying to a *transaction with a deceased opponent* (*ante*, § 578) is commonly not thought to apply to the use of a party's books of account under the present Exception, for reasons elsewhere explained (*post*, § 1559). It follows that the surviving party may offer his books as against a deceased opponent;[5] and also that the use of a deceased party's books by his representative is not such a "testifying" by the representative as amounts to a waiver under the statute and permits the surviving opponent to take the stand against them.[6]

§ 1554. [1] Except in New York and New Jersey, where perhaps the Dutch tradition (*ante*, § 1518) accounts for the omission: 1838, Sickles *v.* Mather, 20 Wend. 75; 1859, Conklin *v.* Stamler, 8 Abb. Pr. 395.

[2] 1824, 3 Dane's Abr., Mass., Hutchinson's ed., 318; 1860, Landis *v.* Turner, 14 Cal. 573; 1886, Roche *v.* Ware, 71 Cal. 379, 12 Pac. 284; 1869, Neville *v.* Northcutt, 47 Tenn. 296; 1872, Marsh *v.* Case, 30 Wis. 531.

[3] 1913, Jackson *v.* Moore, 39 Okl. 234, 134 Pac. 1114 (requiring verification of the book's correctness).

[4] In addition to the statutes, *ante*, § 1519, see the following rulings: 1875, New Haven & H. Co. *v.* Goodwin, 42 Conn. 231; 1857, Betts *v.* Stevens, 6 Wis. 400 (no questions are to be asked the party except those authorized by the statute). In South Carolina the rulings varied: 1786, Foster *v.* Sinkler, 1 Bay 40; 1790, Spence *v.* Sanders, 1 Bay 117; Douglass *v.* Hart, 4 McCord S. C. 257; Thomson *v.* Porter, 4 Strobh. Eq. S. C. 65.

[5] 1886, Roche *v.* Ware, 71 Cal. 378, 12 Pac. 284, *semble;* 1901, Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883; 1902, Chapin *v.* Mitchell, 44 Fla. 225, 32 So. 875; 1894, Dysart *v.* Furrow, 90 Ia. 59, 57 N. W. 644; 1867, Anthony *v.* Stinson, 4 Kan. 220; 1861, Dexter *v.* Booth, 2 All. 559, 561 (but not admissible "for other purposes", *e.g.* to prove to whom credit was given); 1862, Green *v.* Gould, 3 All. 465, 467 (similar principles); 1904, Cather *v.* Damerell, — Nebr. —, 99 N. W. 35; 1893, Cargill *v.* Atwood, 18 R. I. 303, 304.

Contra: 1880, Dismukes *v.* Tolson, 67 Ala. 386; 1916, Warten *v.* Black, 195 Ala. 93, 70 So. 758 ("The precise point which D. *v.* T. decided has never since been brought into question"); 1899, Nance *v.* Callender, — Tenn. —, 51 S. W. 1025; 1893, Wyman *v.* Wilcox, 66 Vt. 26, 30, 28 Atl. 321 (plaintiff's entries made after decease of opponent's intestate, excluded).

[6] 1910, Winslow's Will, 146 Ia. 67, 124 N. W. 895; 1870, Kelton *v.* Hill, 58 Me. 116; 1889, Sheehan *v.* Hennessey, 65 N. H. 101, 18 Atl. 652; 1895, Stevens *v.* Moulton, 68

§ 1555. **Personal Knowledge of Entrant; Party and Salesman verifying jointly.** The use of a party's entries, like that of all the Hearsay exceptions, must be subject to the ordinary principles of testimonial qualifications (*ante*, § 1424). When the party is the entrant, then, he must have the elementary qualification, a *personal knowledge of the transaction* recorded (*ante*, § 657). This he would ordinarily have, in the situations for which the exception was peculiarly adapted and to which he is restricted in the ways just noticed. But it will often happen, even where the party is his own bookkeeper, that the goods are delivered or the services rendered by salesmen or workmen in his employ, and that thus the party, though the recorder, has no personal knowledge of the consummation of the transaction. This situation can be met in the way already examined (*ante*, § 751), in cases where a witness on the stand swears to the accuracy of a record but has no knowledge of the transaction recorded; *i.e.* by calling the other person, whose knowledge thus supplies the missing element and completes the testimony. This is a proceeding which, though correct on principle, has only with difficulty obtained recognition in the case of ordinary memoranda of a past recollection (*ante*, § 751). But, long before that recognition, it was perceived and adopted in the case of parties' entries. Where, then, the party has made the record but has not personal knowledge of the delivery of the goods or the rendering of the services charged, he may *call the person* having knowledge and use the latter's supplementary testimony.[1] If the salesman or teamster is *deceased*, or otherwise unavailable, or if the party is, or if both are, or if the conditions of the business make it impolitic to require the calling of every person concerned, still this need not prevent the use of the entry-book.[2] The

N. H. 254, 38 Atl. 732 (since the amendment of 1889, there is still no "election" to testify where an administrator offers and identifies the deceased's account-books).

As already stated (*ante*, § 578), there is here no attempt to collect fully the rulings interpreting this particular class of statutes.

§ 1555. [1] 1857, Harwood *v.* Mulry, 8 Gray Mass. 250 (one partner delivered the goods, the other made the charge in the books; Dewey, J.: "It is proper to introduce as witnesses all those persons who are thus connected with the transaction and whose testimony is necessary to establish those facts which would require to be proved by a single person"). *Accord: Conn.* 1880, Smith *v.* Law, 47 Conn. 431, 435 (entries made by the plaintiff's bookkeeper on report by a salesman, the salesman also testifying); *Ill.* 1892, House *v.* Beak, 141 Ill. 290, 299, 30 N. E. 1065 (entries by H., on reports of sales, etc., by B., H. and B. testifying); *Ind.* 1902, Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852 (books of log-measurement, kept by plaintiff, the measurements being made by plaintiff and M., and both testifying thereto); *Mass.* 1831, Smith *v.* Sanford, 12 Pick. 140 (one partner sold and made a note, the other entered; both testified); *N. Y.* 1900, Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300 (husband-party making deliveries, wife entering from his memoranda, and both testifying); *Pa.* 1823, Ingraham *v.* Bockius, 9 S. & R. 285 (clerk delivered and party entered; both testified); *S. C.* 1831, Clough *v.* Little, 3 Rich. L. 353 (same); 1850, Thomson *v.* Porter, Strobh. Eq. 65 (same); *Wis.* 1892, Taylor *v.* Davis, 82 Wis. 455, 459, 52 N. W. 756 (shipping-book of lumber, entered by the bookkeeper from scale-bills handed to him, the bookkeeper and the scaler testifying); *Wyo.* 1905, Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869 (entries in the business of an illiterate saloon-keeper, made by his wife, employees, and others, admitted).

[2] *Connecticut:* 1909, Mahoney *v.* Hartford Inv. Co., 82 Conn. 280, 73 Atl. 766 (books of a sewer-contractor, kept by a bookkeeper on slips from a foreman, admitted); *Iowa:* 1919, Coad *v.* Pennsylvania R. Co., 187 Ia. 1025, 175 N. W. 344 (shipper's books, not admitted on the facts; the opinion sets forth an elaborate set of rules); *Maine:* 1921, Mansfield *v.* Gushee, 120 Me. 333, 114 Atl. 296 (suppletory oath to books of account, by princi-

reasons for this conclusion have already been examined in considering the same problem for the main Exception for Regular Entries (*ante*, § 1530); here, as there, the rulings are not harmonious.

§ 1556. **Form and Language of the Entry; Absence of Entry.** The general principles already examined (*ante*, §§ 766–812) as to the mode of testimonial *communication*, or narration, have here also a certain application.

First, the entry must purport to record the whole of the transaction as alleged; in other words, a mere *order-book* or an *entry of an order*, not showing the delivery of the alleged goods or the rendering of the alleged services, could not be received.[1] Next, as to the *mode of recording*, any material or means

pal bookkeeper, without calling all the other clerks who made entries, held sufficient on the facts); *Maryland:* 1921, Adkins *v.* Hastings, 138 Md. 454, 114 Atl. 288 (book of account, verified by bookkeeper present at all the sales and making most of them, admitted; precise distinction obscure); *Massachusetts:* 1844, Mathes *v.* Robinson, 8 Metc. 269 (time-book kept by plaintiff for labor of himself and apprentice; held not necessary to call the apprentice); 1849, Morris *v.* Briggs, 3 Cush. 343 (workmen made memoranda and plaintiff copied them into the book; workmen not required to be called); 1852, Barker *v.* Haskell, 9 Cush. 218 (plaintiffs, partners, made entries of work done by workmen; plaintiffs both gave the suppletory oath; workmen not required to be called; 1887, Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468 (plaintiff kept a book of loads of sand delivered; teamster and plaintiff testify to items; said *obiter* that the teamster's testimony was "necessary"); 1911, Atlas Shoe Co. *v.* Bloom, 209 Mass. 563, 95 N. E. 952 (goods supplied on a guaranty of credit; memoranda in account-books, made by entry clerks, and testified to by these clerks — apparently — and the superintendent, but without calling for the clerks who actually made the sales and deliveries, excluded; this Court hung back too long in its recognition of liberal principles on this subject; the penalty that ensued was the legislative bungle, quoted *ante*, § 1519); *Michigan:* 1860, Jackson *v.* Evans, 8 Mich. 476, 484 (entries of brick, delivered, made by the party on reports from a foreman-teamster, the foreman-teamster who tallied the loading, being called, but not all the individual teamsters who hauled; held, that on the facts all the teamsters should be called or accounted for); 1901, Taylor-Woolfenden Co. *v.* Atkinson, 127 Mich. 633, 87 N. W. 89 (ledger made up from sale slips; admitted on certain conditions); 1912, Sullivan *v.* Godkin, 172 Mich. 257, 137 N. W. 521 (two men tallying lumber, one of them entering the data in a book; the entrant being deceased and the other on the stand, the book was admitted); *Minnesota:* 1903, Union Central L. Ins. Co. *v.* Prigge, 90 Minn. 252, 96 N. W. 917 (plaintiffs' entries based on memoranda furnished by the defendant, excluded; probably erroneous); *Missouri:* 1892, Anchor Milling Co. *v.* Walsh, 108 Mo. 284, 18 S. W. 904 (plaintiff's manager kept a shipping-book, in which most of the entries of deliveries were made on the knowledge of a shipping-clerk; the clerk had left the plaintiff's employment and was not called; admitted); 1906, Wright *v.* Chicago B. & Q. R. Co., 118 Mo. App. 392, 94 S. W. 555 (stockyards books made up from scale-tickets, admitted to show cattle-weight; who verified them is not stated); *New Jersey:* 1901, Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 455, 808 (books founded on slips containing reports from workmen, admitted, together with the slips, apparently without calling the workmen); 1908, Corkran *v.* Rutter, 76 N. J. L. 375, 69 Atl. 954 (see the citation *post*, § 1558, n. 2); 1908, Corkran *v.* Taylor, 77 N. J. L. 195, 71 Atl. 124 (see the citation *post*, § 1558, n. 2); 1908, Schlicher *v.* White, 74 N. J. L. 839, 71 Atl. 337 (ledger entries admitted, here on the doctrine of § 1074, n. 5, *ante*); *Pennsylvania:* 1834, Jones *v.* Long, 3 Watts 326 (like Morris *v.* Briggs, Mass.); *Virginia:* 1919, Lavenstein Bros. *v.* Hartford Fire Ins. Co., — Va. —, 101 S. E. 331 (whether the requirements of the present principle apply to an inventory, offered as satisfying the iron-safe clause, in an action on an insurance policy; not decided); *Washington:* 1897, Union Electric Co. *v.* Theatre Co., 18 Wash. 213, 51 Pac. 366 (books of an electric light company, recording the light furnished a theatre, made up from newspaper reports of number of performances per week and from collectors' reports, excluded); *Wisconsin:* 1862 Lynch *v.* State, 15 Wis. 40, 44 (certain voluminous accounts, testified to by the bookkeeper and a party, who had personal knowledge of most of the transactions, admitted.)

§ 1556. [1] 1882, Hancock *v.* Hintrager, 60 Ia. 376, 14 N. W. 725; 1834, Rhoads *v.* Gaul, 4 Rawle 467; 1835, Fairchild *v.* Dennison, 4 Watts 258; 1841, Parker *v.* Donaldson, 2 W. & S. 19; 1882, Laird *v.* Campbell, 100 Pa. 165. This rests perhaps equally on the principle of § 1541, *ante*.

The *price* need not be entered: 1885, Jones *v.* Orton, 65 Wis. 9, 14, 12 N. W. 172.

will suffice.[2] The entry must, however, be fairly intelligible; it must distinctly communicate the fact alleged; this requirement being satisfied, any kind of marks, capable of being interpreted, will suffice.[3]

The *absence* of a debit-entry, in a book containing both debits and credits, should be regarded as in effect a statement that no such goods or services had been received, and should therefore be admissible; [4] but some Courts, as also under the main Exception (*ante*, § 1531), take the opposite view.[5] Where, however, the book is offered by the opponent (*post*, § 1557), the absence of an entry of the transaction as claimed may properly be regarded as an admission that there was no such transaction (*ante*, § 1072).

§ 1557. **Impeaching the Book; Opponent's Use of the Book as containing Admissions.** (1) The party's book being virtually his testimonial assertions (*ante*, § 1361), the rules for impeaching testimonial evidence (*ante*, §§ 875–1087), so far as applicable, may be invoked. In particular, the party's *general character* for veracity (*ante*, § 920) may be impeached; [1] and the untrustworthiness of the book may be evidenced by demonstrating *specific errors* (*ante*, § 1000) in the entries.[2]

[2] That the entry need not be on paper or with ink has been noticed *ante*, § 1548.

[3] 1865, Barton *v.* Dundas, 24 U. C. Q. B. 275; 1887, Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468; 1904, Cather *v.* Damerell, — Nebr. —, 99 N. W. 35 (physician's book, the items noted by dots and crosses, admitted); 1843, Cummings *v.* Nichols, 13 N. H. 425; 1872, March *v.* Case, 30 Wis. 531.

[4] 1893, Peck *v.* Pierce, 63 Conn. 310, 314, 28 Atl. 524 (issue as to payment of interest on note; deceased's book contained entries of interest-payments to others, though not all; lack of entry of payment to P., admissible); 1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704; 1901, Waldron *v.* Priest, 96 Me. 36, 51 Atl. 235; 1902, Huebener *v.* Childs, 180 Mass. 483, 62 N. E. 729 (passbook and ledger admitted, to show no receipt of cash; "not every book of entries, if admitted, would lead to any inference from the omission of a matter; but we must assume that this book on inspection manifestly purported to contain all C.'s receipts, and if so it was a declaration by him, only less definite than if expressed in words, that he had received no other sums"; this book was admitted without specific reference to the present Hearsay exception).

[5] 1893, Shaffer *v.* McCracken, 90 Ia. 578, 580, 58 N. W. 910 (negative not to be proved by lack of entry in one book only out of several); 1874, Lawhorn *v.* Carter, 11 Bush Ky. 10; 1855, Morse *v.* Potter, 4 Gray Mass. 292; 1896, Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; 1852, Alexander *v.* Smoot, 13 Ired. N. C. 462; 1901, Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557; 1918, Brosius & Co. *v.* First Nat'l Bank, 65 Okl. 128, 174 Pac. 269 (action for a bank deposit; the bank's books of account and deposit slips, held not admissible with the cashier's testimony "that said books did not anywhere show that said deposit of $170 of April 29 was made"; absurd; this is the sort of ruling that sets the Courts apart from practical life as the devotees of a cult of esoteric logic); 1905, Conover *v.* Neher-R. Co., 38 Wash. 172, 80 Pac. 281 (time-book not admitted, to show that a witness was not employed on a certain day).

§ 1557. [1] 1823, Crouse *v.* Miller, 10 S. & R. Pa. 155, 158 ("his character was open to the same kind of animadversion that it would have been subject to if he had been a witness in the cause"); 1863, Funk *v.* Ely, 45 Pa. 444, 448 ("the plaintiff who swears to his original book of entries puts his general character for truth and veracity, and the general character of his book for honesty and accuracy, in evidence, and invites attack upon either or both").

Contra: 1853, Winne *v.* Nickerson, 1 Wis. 1, 6 (impeachment of the party's character "for truth and veracity", held proper at common law; but the statute making them 'prima facie' evidence held to forbid this; absurd); 1854, Nickerson *v.* Morin, 3 id. 243 (foregoing case approved); 1872, Winner *v.* Bauman, 28 Wis. 563, 567 (same).

[2] 1913, Northwestern Elev. Co. *v.* Great Northern R. Co., 121 Minn. 321, 141 N. W. 298 (conductor's train-books recording conditions of cars; to show the book untrustworthy testimony was received to defects existing in cars not marked defective in the train-book); 1863, Funk *v.* Ely, 45 Pa. 444, 448 ("It is competent for the adverse party to show its [the book's] general character by pointing to charges and entries affecting other parties

(2) A party's own statements may always be used against him as *admissions* (*ante*, § 1048); hence the opponent may always offer the party's books as containing admissions favoring the opponent's claim of facts.[3] In such a case, none of the foregoing limitations as to the kind of book or entry stand in the way; for the book is not offered under the present exception.[4]

§ 1558. **Production of Original Book; Ledger and Daybook.** The general rule requiring the production of the original of a writing (*ante*, § 1179), here as elsewhere, must be satisfied; *i.e.* the entry offered must be an original; if the original cannot be had, as determined by the ordinary rules (*ante*, §§ 1192–1230), a copy may be used.[1]

and by calling witnesses to prove such entries false and fraudulent. That this investigation may not turn into excessive departure from the issue on trial, the Court should limit it to the time, or near the time, covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book").

[3] *Canada:* 1905, Cairns *v.* Murray, 37 N. Sc. 451, 469; *U. S. Federal:* 1910, Foster *v.* U. S., 6th C. C. A., 178 Fed. 165; 1911, Louisville & N. R. Co. *v.* U. S., C. C. A., 186 Fed. 280 (penalty for using cars lacking a safety-appliance; to identify the contents of a specific car, as shown by a way-bill, the defendant, having failed on notice to produce the way-bill, the prosecution offered "an impression copy of an entry of the way-bill book", made as a part of the defendant's records by the defendant's agent; received as "an admission of the fact by the railroad company"); 1906, Worden *v.* U. S., 6th C. C. A., 204 Fed. 1, 6 (fraudulent investments); 1915, Bettman *v.* U. S., 6th C. C. A., 224 Fed. 819, 832 (fraudulent investment; pointing out that in this use of the books, the party's knowledge of their contents must be evidenced, on the principles of §§ 260, 1074, *ante*); 1917, Freeman *v.* U. S., 7th C. C. A., 244 Fed. 1, 11 (account books of defendant, admitted for the prosecution, regardless of the requirements of § 1530, *ante*, as a party's admissions, if kept "with the knowledge and under the general direction of the defendant"); *Colo.* 1899, Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565 (bank's account-books); *Ia.* 1902, Whisler *v.* Whisler, 117 Ia. 712, 89 N. W. 1110 (partition between heirs and devisees; ancestor's book-entries of advancements); *La.* Rev. Civ. C. 1920, § 2248; *Md.* 1868, Ward *v.* Leitch, 30 Md. 326, 333; *Nebr.* 1902, Globe Savings Bank *v.* Nat'l Bank, 64 Nebr. 413, 89 N. W. 1030; 1903, Gross *v.* Scheel, 67 Nebr. 223, 93 N. W. 418; *N. Y.* 1893, Doolittle *v.* Stone, 136 N. Y. 613, 616, 32 N. E. 639; *R. I.* 1921, State *v.* Pesce, — R. I. —, 112 Atl. 899 (keeping a house of ill-fame; defendant's record of "business done that night", admitted).

The following question is merely one of interpretation: 1916, Noel *v.* O'Neill, 128 Md. 202, 97 Atl. 513 (action for goods sold to defendant, a wife; whether the plaintiff's entry of credit to the wife is conclusive as to the sale being made upon her personal credit; authorities collected).

[4] Compare some of the cases cited under Admissions, *ante*, §§ 1060, 1072, 1073, 1074 (corporation or partnership books), 1082 (predecessor in title).

Whether the *whole of an account* may or must be offered is dealt with under Completeness (*post*, §§ 2104, 2118).

Wherever the issue in a *criminal case* involves the *accused's knowledge* of the contents of account-books, the problem may have several aspects (including that of § 260, *ante*) depending on the particular rule of substantive law involved; the following case collects some prior ones: 1915, Bettman *v.* U. S., 6th C. C. A., 224 Fed. 819, 832 (fraudulent investments).

Where a *duplicate original* of a delivery-entry is handed to the buyer at the time of a delivery of goods, his retention of it makes it an admission, like an account stated, and it is receivable on the principle of § 1073, *ante:* 1911, Federal U. Surety Co. *v.* Indiana L. & M. Co., 176 Ind. 328, 95 N. E. 1104.

§ 1558. [1] 1898, First N. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80; 1879, Peck *v.* Parchen, 52 Ia. 46, 2 N. W. 597 (copy attached to a deposition, excluded); 1848, Smiley *v.* Dewey, 17 Oh. 156; 1831, Furman *v.* Peay, 2 Bail. S. C. 394; 1887, Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; 1845, Downer *v.* Morrison, 2 Gratt. Va. 250, 256 (books in New York, proved by copy annexed to a deposition).

Undecided: 1882, Hancock *v.* Hintrager, 60 Ia. 376, 14 N. W. 725.

Not clear: 1876, Woodbury *v.* Woodbury's Estate, 50 Vt. 156.

Contra, but clearly wrong: 1807, Cooper *v.* Morrel, 4 Yeates Pa. 341 (original in England; copy excluded).

The party's *failure to produce* his book, when it would be relevant, may justify an inference: 1860, Harrison *v.* Doyle, 11 Wis. 283, 285, and cases cited *ante*, § 291.

It therefore becomes necessary to distinguish between the different processes and the different classes of books employed in bookkeeping, in order to determine whether the one offered is or is not the first and original book of regular entries. A *ledger*, though otherwise not objectionable (*ante*, § 1548), will usually not be the first book entered up; nevertheless, if the first book be in fact kept in ledger form, it will be none the less admissible. Furthermore, the record admissible is one consisting of a regular series (*ante*, § 1548); hence, the first regular and collected record is the original one, and it is immaterial that it was made up from casual or scattered memoranda preceding it. The application of the principle must depend much on the circumstances of the particular case.[2]

[2] *Admitted: Colo.* 1896, Plummer *v.* Mercantile Co., 23 Colo. 190, 47 Pac. 294 (entries made in pencil on sheets of paper, then copied into a book); *Conn.* 1909, Mahoney *v.* Hartford Inv. Co., 82 Conn. 280, 73 Atl. 766 (original slips destroyed in the course of business); *Ill.* 1881, Redlich *v.* Bauerlee, 98 Ill. 134, 138 (entries transferred from a slate to the book; the book held an original); *Ia.* 1920, Shea *v.* Biddle Improvement Co., 188 Ia. 952, 176 N. W. 948 (labor performed; defendant's books admitted under Code § 4623 without producing the memorandum slips from which the loose-leaf ledger was made); *Kan.* 1904, State *v.* Stephenson, 69 Kan. 405, 76 Pac. 905 (modern ledger made directly from order-slips, admitted as the original; good opinion by Johnston, C. J.); *Md.* 1916, Stevens *v.* Northern Cent. R. Co., 129 Md. 215, 98 Atl. 551 (sale of car of beans); *Mass.* 1816, Faxon *v.* Hollis, 13 Mass. 427 (entries made on a slate and transcribed into a ledger); 1831, Smith *v.* Sandford, 12 Pick. 140 (chalking sales on a butcher-cart and then entering them on the book when the cart returned); 1852, Barker *v.* Haskell, 9 Cush. 218 (entries on a slate, copied into a daybook); 1854, Kent *v.* Garvin, 1 Gray 148 (entries from a drayman's book into an account-book); 1887, Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468 (transferred to the book from marks on a sand-cart); *Mich.* 1860, Jackson *v.* Evans, 8 Mich. 476, 482 (account-book of brick delivered, made up from a tally-book or slate); *Minn.* 1896, Levine *v.* Ins. Co., 66 Minn. 138, 68 N. W. 855 (books founded on temporary slips furnished by salesmen); *N. J.* 1908, Corkran *v.* Rutter, 76 N. J. L. 375, 69 Atl. 954 (books made by the witness from time-sheets filled out by the workmen and handed in by the foreman; the books admitted, without requiring the original time-sheets); 1908, Corkran *v.* Taylor, 77 N. J. L. 195, 71 Atl. 124 (similar); *Okl.* 1911, Kasenberg *v.* Hartshorn, 30 Okl. 417, 120 Pac. 956 (bank account; original books required; copy-list of items excluded); *Vt.* 1916, Squires *v.* O'Connell, 91 Vt. 35, 99 Atl. 268 (book made up from tally-boards, etc.); *Wis.* 1853, Winne *v.* Nickerson, 1 Wis. 1, 5 (there being two books of original entries, only one was required to be produced, on the facts); 1917, Ott *v.* Cream City Sand Co., 166 Wis. 228, 164 N. W. 1005 (goods supplied; a certain ledger, not admissible under Stats. § 4186, allowed to be used to aid recollection); *Wyo.* 1905, Lewis *v.* England, 14 Wyo. 128, 82 Pac. 869 (ledger entries admitted on the facts, to explain the original slips of paper).

Excluded: Conn. 1911, Hawken *v.* Daley, 85 Conn. 16, 81 Atl. 1053 (single sheet copied from a page of a time-book, not admitted); *Ia.* 1881, Fitzgerald *v.* M'Carty, 55 Ia. 702, 8 N. W. 646 (ledger not admitted to show a single item not entered in the original books; but the Court declared it allowable for counsel to use the ledger in aiding the jury "the more readily to find the items charged in the account in the books of original entry"); 1895, Way *v.* Cross, 95 Ia. 258, 63 N. W. 683 (a ledger not showing the kind of goods sold, and made up directly from sale-slips); *Me.* 1906, Putnam *v.* Grant, 101 Me. 240, 63 Atl. 816 (a journal, made up by summarizing from certain prior books and bills, held not an original, on the facts); *N. J.* 1915, Hamilton *v.* Fusco Constr. Co., 87 N. J. L. 52, 94 Atl. 50 (certain loose-leaf books, held not original entries on the facts); *Pa.* 1854, Breinig *v.* Metzler, 23 Pa. 159 (a journal copied from a blotter).

Further illustrations are as follows: 1861, Caulfield *v.* Sanders, 17 Cal. 569, 573; 1916, Emeny Auto Co. *v.* Neiderhauser, 175 Ia. 219, 157 N. W. 143 (repairs done; certain ledger pages excluded, but workmen's slips, not bound in book form, admitted); 1874, Bentley *v.* Ward, 116 Mass. 337; 1889, Woolsey *v.* Bohn, 41 Minn. 239, 42 N. W. 1022; 1856, Pillsbury *v.* Locke, 33 N. H. 96; 1887, Rumsey *v.* Telephone Co., 49 N. J. L. 325, 8 Atl. 290; 1838, Sickles *v.* Mather, 20 Wend. N. Y. 76; 1882, McGoldrick *v.* Traphagen, 88 N. Y. 334, 336; 1823, Ingraham *v.* Bockius, 9 S. & R. Pa. 285; 1834, Patton *v.* Ryan, 4 Rawle Pa. 410; 1836, Forsythe *v.* Norcross, 5 Watts Pa. 432; 1869, Hoover *v.* Gehr, 62 Pa. 136.

Since the book is merely a statement about the transaction, and is not the transaction itself, the Parol Evidence rule does not apply, and therefore the transaction, as such, can be proved orally *without producing or accounting for the book*.[3]

4. Present Exception as affected by Parties' Statutory Competency

§ 1559. **Theory of Use of Parties' Books as Hearsay.** That there is in modern times a new adjustment to be made, arises from the fact that the party, being formerly disqualified and unavailable as a witness, and allowed only by the necessity of the case to use his extra-judicial or hearsay entries (*ante*, § 1537), has now everywhere been made competent by statute; so that the change of the law has removed the necessity for using such hearsay statements and has taken away the reason of the Exception. The question arises how far this result has been recognized by the Courts since the change of the law, and what its effects are with regard to the mode of using parties' entries.

In ascertaining this, it is necessary to keep in mind the extent to which, under the original practice, the entry was treated as hearsay. That it was so treated has already been noticed (*ante*, § 1537) and appears throughout the general tenor of this branch of the Exception. The consequences of this attitude were strictly followed out. If the party did not appear on the stand as a witness, if the entries are merely extra-judicial, hearsay statements, it followed that none of the consequences attached to a party's taking the stand could be enforced against him. This theory was so firmly implanted that when the statutes, which made parties competent, left a surviving party incompetent against a deceased opponent (*ante*, § 578), the use of parties' account-books was still not considered as a "testifying", within the statute; so that (as generally held) the surviving party's use of his books was not forbidden, on the one hand, and, on the other hand, the executor's use of the deceased opponent's books was not a testifying which amounted to a waiver and qualified the surviving party to take the stand (*ante*, § 1554). This result may well be questioned; but at least it shows the nature of the earlier theory.

Again, the suppletory or verifying oath of the party (*ante*, § 1554), by which he took the stand for the purpose of identifying the books and swearing that they contained true and just accounts, was expressly declared not to make the party a witness. It was treated as only a preliminary guarantee required as a matter of caution; and in effect it merely related back to the time of the entries and showed them to be proper for admission. His entries in the book, moreover, taken as made at a past time, were not entries made

In Prince *v.* Swett, 2 Mass. 569 (1793), and Bonnell *v.* Mayha, 22 N. J. L. 198 (1874), the anomalous ruling was made that the ledger or copy-entries also must be produced, if the entries had been posted into it from another book.

[3] 1899, Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221; 1899, Rissler *v.* Ins. Co., 150 Mo. 366, 51 S. W. 755 (cited *ante*, § 1339, n. 10); 1904, Halverson *v.* Seattle El. Co., 35 Wash. 600, 77 Pac. 1058; and cases cited *ante*, §§ 1245, 1339, *post*, § 2432; but compare the principles of §§ 1230, 1235, 1244, *ante*.

as a party; for he was not a party when he made them; and they thus could not be treated as tainted with his interest. Whatever may be thought today of the real effect of such an oath as incorporating the books into the party's infra-judicial statement and making them infra-judicial testimony, the Courts at any rate refused to take this view and accepted them as extra-judicial statements.[1]

The subjection to cross-examination (*ante*, § 1554) was a real inroad on the theory that the party was not a witness in his books; but it was made in a few States only, and by statute; and the fundamental theory was maintained as far as possible, for the liability of the party to cross-examination extended only to matters connected with the entries.

§ 1560. **Statutory Competency as Abolishing the Necessity for Parties' Books; Using the Books to aid Recollection.** Such being the consistent attitude of the Courts — that the books were used as hearsay or extra-judicial statements, and that the party did not take the stand as a witness —, how far is this branch of the Exception affected by the statutory abolition of a party's disqualification to take the stand? What has occurred is that the necessity for using his hearsay or extra-judicial statements in his books has been removed; he is free to relate as a witness all his knowledge on the subject of the transaction. Thus, the necessity having ceased, the whole basis of the Exception falls. There is now no excuse for offering his extra-judicial entries, not tested by cross-examination, while his infra-judicial testimony given under oath and subject to cross-examination, is available.

This does not mean that the party cannot use his entries at all. As a recorded past recollection (*ante*, § 745) he may swear to the accuracy of the book and use it to the fullest extent, incorporating it with his testimony and handing it to the jury as a part thereof (*ante*, § 754). The entries are no longer hearsay; they are adopted by the witness on the stand, and he is subject to full cross-examination on that as on all other parts of his testimony.

At the present day, then, the correct view is that the Hearsay exception in favor of parties' entries has disappeared with the parties' incompetency, and that the party uses them, if at all, as records of a past recollection adopted on the stand. A few Courts have recognized this result explicitly; others have ruled more or less in harmony with it:

1859, DALY, J., in *Conklin* v. *Stamler*, 8 Abb. Pr. 400: "The important change recently made in the law of this State, by which a party may testify the same as any other witness, has obviated the difficulty that was supposed to exist when the rule was made, and there is now no occasion for resorting to the books, unless it may be to refresh the party's memory as to the items, or in cases where there is a failure of recollection. In the latter case the books, if they contained the original entries of the transaction, would still, I apprehend, be evidence within the rule recognized in *Merrill* v. *I. & O. R. Co.*,[1] — that is, if the party

§ 1559. [1] 1844, Little *v.* Wyatt, 14 N. H. 26: "It is the book which is the evidence, and the party testifies in chief only to verify it. The party is not a witness who testifies to facts and then appeals to his book in corroboration of his story; but the book is the source of information."

§ 1560. [1] 16 Wend. N. Y. 586; cited *ante*, § 736.

who made the entries has entirely forgotten the facts which he recorded, but can swear that he would not have entered them if he had not known them at the time to be true, and that he believes them to be correct."

1875, Per CURIAM, in *Nichols* v. *Haynes*, 78 Pa. 176: "Questions relating to books of entry as evidence, since the Act of 1869 making parties witnesses, stand upon a different footing from that on which they stood before. . . . The party now stands by force of the act on the same plane of competency as the stranger stood upon, and therefore may make the same proof as a stranger could."

1898, HARRISON, J., in *Bushnell* v. *Simpson*, 119 Cal. 658, 51 Pac. 1080: "At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence, upon a proper showing of the mode in which they had been kept, and were treated as original evidence of the matters for which they were introduced; but, since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto constitutes primary evidence of these facts, and the books of account become merely secondary or supplementary evidence. The books are not excluded as incompetent, but will be received, either in corroboration of the testimony of the parties as entries made at the time, or upon the principles by which inferior evidence is received where the party is unable to produce evidence of a higher degree."

In several other Courts the tendency seems to be to put the use of such books on their natural footing of records of past recollections.[2] Yet the existence of statutes expressly sanctioning the use of parties' books (although these

[2] The following decisions treat the use of parties' entries from the point of view of records of past recollection, usually without complete recognition of the abolition of their use in the old manner: *Ala.* 1880, Dismukes *v.* Tolson, 67 Ala. 386; 1886, Hancock *v.* Kelly, 81 Ala. 378, 2 So. 281; 1892, Bolling *v.* Fannin, 97 Ala. 619, 621, 12 So. 59; *Cal.* 1886, Roche *v.* Ware, 71 Cal. 378, 12 Pac. 284, *semble;* 1898, Bushnell *v.* Simpson, 119 Cal. 658, 51 Pac. 1080 (action for salary and expenses as president of a corporation; plaintiff's books of account excluded as parties' books); but compare White *v.* Whitney, 1889, 82 Cal. 166, 22 Pac. 1138; *Conn.* 1896, Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998; 1911, Hawken *v.* Daley, 85 Conn. 16, 81 Atl. 1053; *Ill.* 1875, Wolcott *v.* Heath, 78 Ill. 434; *Ia.* 1909, Graham *v.* Dillon, 144 Ia. 82, 121 N. W. 47; *Mass.* 1875, Field *v.* Thompson, 119 Mass. 151; *Mich.* 1888, Montague *v.* Dougan, 68 Mich. 98, 35 N. W. 840; 1886, Brown *v.* Whitman, 62 Mich. 557, 29 N. W. 98; yet compare Lester *v.* Thompson, 1892, 91 Mich. 250, 51 N. W. 893; *Minn.* 1893, Culver *v.* Lumber Co., 53 Minn. 360, 365, 55 N. W. 552; *Mo.* 1892, Anchor Milling Co. *v.* Walsh, 108 Mo. 284, 18 S. W. 904 (plaintiff's shipping-book, sworn to by the general manager, admitted as justified by the doctrine of memoranda of recollection); 1892, Robinson *v.* Smith, 111 Mo. 205, 20 S. W. 29 (bank-books of plaintiff admitted, following the preceding case); 1897, Walsher *v.* Wear, 141 Mo. 443, 42 S. W. 928 (books by G., a contractor guaranteed by the defendant, receivable from the defendant; following Anchor Milling Co. *v.* Walsh); 1898, Borgess Inv. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754; *Nebr.* 1892, St. Paul, F. & M. I. Co. *v.* Gotthelf, 35 Nebr. 351, 356, 53 N. W. 137; *N. H.* 1860, Swain *v.* Cheney, 41 N. H. 237; 1855, Putnam *v.* Goodall, 31 N. H. 425; 1883, Pinkham *v.* Benton, 62 N. H. 690; *N. J.* 1887, Rumsey *v.* Telephone Co., 49 N. J. L. 326, 8 Atl. 290; *N. M.* 1885, Price *v.* Garland, 3 N. M. 505, 6 Pac. 472; *Okl.* 1911, McCants *v.* Thompson, 27 Okl. 706, 115 Pac. 600; *Pa.* 1888, Stuckslager *v.* Neel, 123 Pa. 61, 16 Atl. 94; *P. I.* 1904, Machan *v.* De La Trinidad, 3 P. I. 684 (plaintiff's books of account, admitted, citing C. C. P. §§ 328, 338); 1908, Garrido *v.* Asencio, 10 P. I. 691; 1916, Cang Yui *v.* Gardner, 34 P. I. 376 (partnership account; books admitted as memoranda to aid memory, even though not kept in pursuance to the Commercial Code requirements); *Wis.* 1866, Schettler *v.* Jones, 20 Wis. 412, 416; 1869, Riggs *v.* Weise, 24 Wis. 545 (preceding case approved); 1872, Winner *v.* Bauman, 28 Wis. 563, 567 (same); 1887, Curran *v.* Witler, 68 Wis. 16, 23, 31 N. W. 705 (same).

But under a statute declaring account-books to be "'prima facie' evidence", it has been held that their improper admission is a material error, even though they could have been used as memoranda to assist the memory: 1872, Winner *v.* Bauman, 28 Wis. 563, 567. Such a statute is anomalous and impolitic.

statutes in the older States were enacted before parties' incompetency was abolished) naturally renders it more difficult to reach the conclusion that the Hearsay exception covered by these statutes is abolished by implication from other statutes.

The important circumstance, however, is that whether or not the use of the books under the Hearsay exception is abolished, at any rate their use by the party as *memoranda of recollection* in connection with his testimony is now at his option, and that, when used from that point of view, the books would be *subject to none of the restrictions* of the present Exception (*ante*, §§ 1537–1552) regarding clerks, cash payments, credit guaranties, special contracts, kind of occupation, size of item, regularity of entries, reputation of correct bookkeeping, and the like. A survey of those restrictions seems to leave it certain that in no single respect is any advantage to be gained by using the book under the present Exception. Even when the book satisfies all these limitations, there appears to be no contingency in which the entry could be used under this branch of the Exception and yet could not also be used by adoption as a record of past recollection. Under the few anomalous rulings in which a clerk's entries were admitted as the party's, and in which the party's entries were held not to need personal knowledge, and under certain of the statutory enlargements (*ante*, § 1519), this might not be true. But apart from these and taking the Exception as it is applied at common law by orthodox authority, it is always preferable to offer the entries from the modern point of view. If the party himself made them, as the common law required (*ante*, § 1538), he may now take the stand with them; if a clerk made them, as permitted by some of the statutory enlargements (*ante*, § 1519), the clerk may take the stand with them.

It is perhaps singular that counsel have so frequently submitted to employ parties' books under the hampering restrictions of the present Exception. As for the Courts, their slowness in recognizing the full force of the change above judicially expounded is no doubt chiefly due to a rooted tendency to regard the books as independent or "original" evidence, distinct from the party's own testimony on the stand and thus to apply to them the only rule under which, in that view, they could be receivable.

§ 1561. **Relation of this Branch to the main Exception; Books of Deceased Party; Books of Party's Clerk.** The relation of this branch of the Exception, in favor of parties' entries, to the general Exception (*ante*, §§ 1521–1533) in favor of regular entries by persons in general, remains to be considered.

(1) The question arises first in this way: How shall we treat an offer of regular entries by a *deceased party?* On principle, they should be treated from the latter point of view; *i.e.* they should be treated as the ordinary case of a regular entry by a deceased person. This seems to have become the practice in England,[1] where the special Exception for parties' entries was

§ 1561. [1] 1812, Pritt *v.* Fairclough, 3 Camp. 305.

(except by statute) not recognized (*ante*, § 1518). But in the United States there has naturally been some confusion. One tendency is to rank them as parties' entries and to test them by the restrictions peculiar to the original practice in that branch of the Exception.[2] But several Courts have treated them according to the general exception in favor of regular entries by deceased persons.[3] In this view, absence from the jurisdiction,[4] as well as other circumstances (*ante*, § 1521), may suffice to admit the entries. No Court, however, seems to have declared with sufficient explicitness that this is the proper treatment;[5] though there can be no doubt of it, either as a matter of principle (because the party, when he made the entries, was not then a party), or as a matter of expediency for the person wishing to encounter the fewest restrictions for the evidence. For regular entries, then, by deceased or otherwise unavailable parties, the general exception (*ante*, § 1521) is the proper one to employ.

(2) Under the common-law limitations of this branch of the Exception, books kept by the *party's clerk* were not admitted as the party's books (*ante*, § 1538). There was thus at common law no confusion, as to a clerk's books, between the two branches of the Exception; they could come in only under the main Exception, if the clerk were deceased (*ante*, §§ 1521–1533), or to aid the recollection of the clerk, if living, who must then be called to the stand.[6] But many of the statutes dealing with parties' books (*ante*, § 1519) contain a clause admitting books kept by a clerk; sometimes the clerk is specified as the party's, sometimes as a "disinterested" person. In either case the question is presented whether the statute is to be construed as applying to the parties' books Exception and therefore as practically abolishing the exclusion of clerks' books (*ante*, § 1538), or whether it is to be construed as attempt-

[2] 1871, Bland *v.* Warren, 65 N. C. 373; 1817, Ash *v.* Patton, 3 S. & R. Pa. 303; 1869, Hoover *v.* Gehr, 62 Pa. 136. In this view, the only difficulty is the lack of the suppletory oath (*ante*, § 1554). But in the foregoing cases the decease was regarded as a sufficient reason for dispensing with the oath.

Absence from the jurisdiction ought equally to suffice. *Contra:* 1827, Douglass *v.* Hart, 4 McCord S. C. 257 (entries rejected; distinguishing Foster *v.* Sinkler, 1786, 1 Bay S. C. 38, and Spence *v.* Saunders, 1790, 1 Bay S. C. 110, and expressly refusing to assimilate the case to that of entries by absent clerks and other third parties; but in the later Thompson *v.* Porter, *infra*, the entries of a deceased partner were admitted).

Insanity ought equally to suffice: 1850, Holbrook *v.* Gay, 6 Cush. 216 (Dewey, J.: "The same necessity which justifies the introduction of the books of the party . . . alike seems to require and justify the admission of them where the party has become incapacitated to take the oath by reason of insanity").

[3] 1907, Davie *v.* Lloyd, 38 Colo. 250, 88 Pac. 446; 1898, Setchell *v.* Keigwin, 57 Conn. 478, 18 Atl. 594; 1837, Leighton *v.* Manson, 14 Me. 208; 1845, Odell *v.* Culbert, 9 W. & S. Pa. 67, *semble;* 1850, Thomson *v.* Porter, 4 Strobh. Eq. S. C. 65, *semble*.

[4] 1875, New Haven & H. Co. *v.* Goodwin, 42 Conn. 231; 1786, Foster *v.* Sinkler, 1 Bay S. C. 40 (but see the later Douglass *v.* Hart, *supra*, *contra*).

[5] In some modern decisions, it may be added, the two branches are hopelessly confounded: *e.g.*, 1889, Culver *v.* State, 122 Ind. 562; 1883, Vinal *v.* Green, 21 W. Va. 308.

[6] *E.g.:* 1880, Ford *v.* R. Co., 54 Ia. 723, 730, 7 N. W. 126 (time-books kept by defendant's officers or employees; persons keeping them required to be called); 1911, First National Bldg. Co. *v.* Vandenburg, 29 Okl. 583, 119 Pac. 224 (requiring the bookkeeper to be called, if alive and accessible); and cases cited *ante*, § 1521.

ing to re-state a portion of the general Exception for deceased persons' entries and therefore as merely declaratory of the common-law on that point. This question, with the few rulings on the subject, has already been considered (*ante*, §§ 1519, 1538). It is perhaps vain to attempt to construe statutes whose framers themselves seem not to have understood precisely the bearing of their enactments.

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC VI: SUNDRY STATEMENTS OF DECEASED PERSONS

CHAPTER LII.

§ 1562. **Introductory.** At this point may be considered a few Exceptions, recognized in a limited number of jurisdictions, admitting certain kinds of statements of individuals deceased or otherwise unavailable. These Exceptions are related to the general group of the foregoing ones, in that the admissibility of the statements is founded on the Necessity principle, *i.e.* that the declarant is deceased or otherwise unavailable. They are thus distinguished from all the ensuing Exceptions, in which the declarant need not be shown unavailable. They are distinguished from the Exception next following (Reputation), in that they involve individual statements, not reputation.

A. DECLARATIONS ABOUT PRIVATE BOUNDARIES

§ 1563. **History of the Exception.** The use of individual declarations about private boundary must be distinguished from the use of Reputation to prove boundaries, in the ensuing Exception (*post*, § 1582); historically, the former grew out of the latter, in some jurisdictions; but they now exist as separate, each with its peculiar limitations. Reputation, whether about boundaries or about other things, stands on its own ground as fulfilling the requirements of a distinct Hearsay Exception. The present Exception is concerned with ordinary individual statements, which in themselves show neither the kind of Necessity nor the kind of Circumstantial Guarantee later to be considered with reference to Reputation.

The present Exception had historically three sources, these distinct origins being now lost in one blended form:

(1) In some of the Southern States, the Reputation Exception for land-boundaries and customs (*post*, § 1582), as stated in early English and American treatises, was misunderstood or deliberately expanded, and came to be regarded as justifying the reception of individual statements taken solely on the credit of the individual declarant.[1]

(2) In Massachusetts, the 'res gestæ' doctrine, whether in the general and loose sense of something done (*post*, § 1795) or in some special relation to an adverse possessor's declarations (*post*, § 1778), was regarded as covering these statements.[2]

(3) In New England, and elsewhere, the custom of periodical perambulations (or "processioning") of town boundaries (brought over from England) was recognized as one vehicle of introducing reputation evidence (*post*, § 1592), and then statements of individuals, particularly surveyors, were taken as being of equal value with these perambulations.[3]

§ 1564. **General Scope of the Exception.** In the following passages from opinions in the various jurisdictions the general tenor and purpose of the Exception may be seen:[1]

§ **1563.** [1] See the quotations in the next section.

[2] See the citations in § 1567, *post*.

[3] 1829, Lawrence *v.* Haynes, 5 N. H. 36 (Richardson, C. J.: "It would be very singular if the circumstance that a line has been perambulated and marked as the true line by men who had the means of knowing whether it was the true line or not and whose duty and whose interests bound them to perambulate and mark no line but the true one, must be held to afford no evidence of its being the true line. It is in all cases evidence").

In a few States the statutes still recognize the proceeding: *Maine:* Rev. St. 1916, c. 4, § 134 (perambulation of town lines every five years); *Massachusetts:* Gen. L. 1920, c. 42, § 2 ("the boundary lines of every town shall be perambulated and run and the marks renewed, once in every 5 years", by the selectmen); *Wyoming:* Comp. St. 1920, § 2114 (proceedings to locate town boundaries by "survey or perambulation").

In *Georgia* and *Tennessee* this ancient custom is known as "processioning"; *Ga.* Rev. C. 1910, §§ 3817–3826 (prescribing the formalities for processioning); 1921, Tucker *v.* Roberts, 151 Ga. 753, 108 S. E. 222 (Civ. C. § 3818, as to procedure of running a boundary line by processioners, applied); *Tenn.* Shannon's Code 1916, §§ 3687–3690 (processioning to settle private boundaries).

§ **1564.** [1] Besides the rulings in the following sections, naming the specific limitations, the rule is recognized in the following cases and statutes: *Alabama:* Code 1907, § 3961 (quoted *post*, § 1597); *Georgia:* Rev. C. 1910, § 5770 (quoted *post*, § 1597); *Maryland:* 1735, Howell's Lessee *v.* Tilden, 1 Harr. & McH. 84; 1766, Bladen *v.* Cockey, 1 Harr. & McH. 230; 1770, Redding's Lessee *v.* M'Cubbin Harr. & McH. 368; 1874, Hawkins *v.* Hanson, 1 Harr. & McH. 531; 1778, Weems' Lessee *v.* Disney, 4 Harr. & McH. 156; 1909, Cadwalader *v.* Price, 111 Md. 310, 73 Atl. 273 (declarations of D., deceased, a landowner familiar with the place, while on the land pointing out the boundaries, admitted); *North Carolina:* 1805, Harris *v.* Powell, 2 Hayw. 349; 1837, Hartzog *v.* Hubbard, 32 Dev. & B. 241; 1859, Scoggin *v.* Dalrymple, 7 Jones L. 46; 1886, Bethea *v.* Byrd, 95 N. C. 310, and intervening cases cited; 1904, Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782 (collecting the cases); 1905, Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42; 1905, Hill *v.* Dalton, 140 N. C. 9, 52 S. E. 273; 1906, Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340; 1914, Sullivan *v.* Blount, 165 N. C. 7, 80 S. E. 892; 1919, Singleton *v.* Roebuck, 178 N. C. 201, 100 S. E. 313 (reciting the general rule as stated in Hemphill *v.* Hemphill, *supra*); *Pennsylvania:* 1815, Hamilton *v.* Mentor, 2 S. & R. 73; 1898, Mineral R. & M. Co. *v.* Auten, 188 Pa. 568, 41 Atl. 327 (ancient survey); *South Carolina:* 1825, Spear *v.* Coate, 3 McCord 229; 1886, Sexton *v.* Hollis, 26 S. C. 231, 236, 1 S. E. 893; *Tennessee:* 1812, Beard's Lessee *v.* Talbot, 1 Cooke 142; *Texas:* 1866, Stroud *v.* Springfield, 28 Tex. 666; 1878, Hurt *v.* Evans, 49 Tex. 316; 1887, Tucker *v.* Smith, 68 Tex. 478, 3 S. W. 671;

1813, TILGHMAN, C. J., in *Caufman* v. *Cedar Spring*, 6 Binn. 62: "Where boundary is the subject, what has been said by a deceased person is received as evidence. It forms an exception to the general rule."

1832, HENDERSON, C. J., in *Sasser* v. *Herring*, 3 Dev. L. 342: "We have in questions of boundary given to the single declarations of a deceased individual as to a line or corner the weight of common reputation. . . . Whether this is within the spirit and reason of the rule it is now too late to inquire."

1844, PARKER, C. J., in *Smith* v. *Powers*, 15 N. H. 563: "It is true that the decisions in England seem to restrict the evidence of the declarations of deceased persons respecting boundaries . . . to what the deceased said relative to the public opinion respecting the boundary. But the testimony has not been limited in this country. . . . The declarations of a person deceased, who appeared to have had means of knowledge and no interest in making the declarations, are competent evidence upon a question of boundary, even in a case of private right."

§ 1565. **Death of Declarant.** The principle of necessity (*ante*, § 1421) was found in the usual lack of other sufficient evidence for proving boundaries. The perishable nature of the landmarks, and the incompleteness of the records, rendered it necessary to resort to such statements, oral or written, as could be had from deceased persons having competent knowledge. Though the changed conditions of life in the later history of our communities have greatly diminished this necessity, it sufficed in the beginning to establish the exception in the law:

1859, MANLY, J., in *Scoggin* v. *Dalrymple*, 7 Jones L. 46: "Traditionary evidence has long been received by the courts of North Carolina in questions of private boundaries as well as public. . . . The necessity for such a departure from the common law principle grew out of the inartificial manner in which the lands of the State were originally surveyed and marked, making it necessary, in order to fix the position of the respective parcels, to resort more frequently to tradition, and to give this kind of evidence greater efficiency by enlarging its limits."

1864, PIERPONT, J., in *Wood* v. *Willard*, 37 Vt. 387: "In many of the States, and especially in this State, the territory within their limits was first divided into townships, and these were soon after subdivided into small lots and distributed between the several proprietors. Almost the only evidence left upon the land, to indicate the location of the lines either of the townships or of the divisions between the proprietors, was marks upon the trees standing thereon, and these evidences, from lapse of time, accidental causes, and the cutting off of the timber, are almost entirely obliterated. . . . If it be said that the lines must be established by witnesses who have personal knowledge of their original location, they cannot be proved at all, as in the great majority of cases all such persons are now dead."

Nevertheless, in fulfilling this condition of necessity, it was never required that the absence of other satisfactory evidence should in a given case be shown. That absence being assumed to be a general feature commonly ex-

Vermont: 1896, Martyn *v.* Curtis, 68 Vt. 397, 35 Atl. 333; *Virginia:* 1837, Harriman *v.* Brown, 8 Leigh 712.

This kind of evidence seems never to have obtained recognition in *England* or *Canada:* Mellor *v.* Walmesley, 1904, 2 Ch. 525, and 1905, 2 Ch. 164; Mercer *v.* Denne, 1904, 2 Ch. 535, 541, and 1905, 2 Ch. 538, 554; and cases cited *post*, § 1584; 1905, Bartlett *v.* Nova Scotia S. Co., 37 N. Sc. 259, 264.

In Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (1906), this Exception seems to have been forgotten in excluding a surveyor's map.

Compare the cases on *official surveys* (*post*, § 1665).

isting, the only requirement was that the *decease* of the specific person whose declarations were offered should be shown; [1] in other words, there was a necessity for all the evidence that could be had, and, if this person were deceased, the only evidence available from him was his hearsay statements. It would seem, however, that *insanity*, or *absence* from the jurisdiction, would here not suffice (as it does for some of the foregoing Exceptions); because the necessity in general is predicated of titles and boundaries of long standing, for which the lapse of time has operated to destroy other evidence; and hence if the matter is one of the present generation, or if the evidence in question comes from the present generation (as it would if the declarant were merely absent), this necessity could hardly be presumed to exist.

§ 1566. **No Interest to Misrepresent; Owner's Statement excluded.** The general principle of a circumstantial guarantee of trustworthiness (*ante*, § 1422) is seen in the requirement that the declarant shall have had no interest or no motive to misrepresent; the words "interest" and "motive" being here used by the Courts interchangeably. The general notion is that he must stand in such a position that the Court cannot see any reason to expect misrepresentation: [1]

1870, NESMITH, J., in *Smith* v. *Forrest*, 49 N. H. 239: "The party or declarant must have no interest to misrepresent. . . . It will be for the Court and jury to determine . . . whether they had any motives to misrepresent by a statement too favorable to their own pecuniary interest. . . . The evidence tends to show that the location of the bound where the father says it was established was in disparagement of the declarant's title; therefore it conveys or implies no purpose to misrepresent."

In particular, a statement by an *owner himself* about his own boundaries would thus be inadmissible: [2]

§ 1565. [1] This is mentioned in all the cases; see the quotations in the preceding section, and the following cases: 1901, Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824 (declarations of a person not shown to be deceased, excluded; the statement of the rule is hopelessly confused); 1915, Smith *v.* Bachus, 195 Ala. 8, 70 So. 261 (whether certain land passed by a description in a deed; the pointing out of the location, etc., by the plaintiff's deceased father-grantor, admitted; the precise point of law decided is not mentioned; this is a frequent occurrence in the opinions of the learned Court of this State; there are six or seven principles on which this offer could have been made or challenged, and numerous details under each principle, but none are mentioned; the only clue is the case cited as precedent; this opinion cites Barrett *v.* Kelly, *supra;* hence the case is placed here); 1901, O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580 (excluded, because the decease of the declarant was not shown); 1917, Mechanics' Bank & T. Co. *v.* Whilden, 175 N. C. 52, 94 S. E. 723.

§ 1566. [1] *Accord:* 1901, Tracy *v.* Eggleston, 47 C. C. A. 357, 108 Fed. 324 (declarations as to boundary by a deceased public surveyor, made on the land while pointing out a mound, admitted; Pardee, J., diss., because the declarant was at the time interested in a controversy as to the boundaries); 1888, Lawrence *v.* Tennant, 64 N. H. 540, 15 Atl. 543; 1917, Morrison *v.* Noone, 78 N. H. 338, 100 Atl. 45 (damage by flowage; statement by G., now deceased, as to limit of water-right, admitted); 1886, Bethea *v.* Byrd, 95 N. C. 310; 1915, Wilson W. & L. Co. *v.* Hinton, 171 N. C. 27, 86 S. E. 494 (here the additional requirement of 'ante litem motam' is made, without authority cited); 1825, Spear *v.* Coate, 3 McCord, S. C. 229; 1864, Wood *v.* Willard, 37 Vt. 387; 1868, Powers *v.* Silsby, 41 Vt. 291; 1873, Child *v.* Kingsbury, 46 Vt. 53; 1837, Harriman *v.* Brown, 8 Leigh Va. 713; 1895, Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347, *semble;* 1907, Douglas L. Co. *v.* Thayer Co., 107 Va. 292, 58 S. E. 1101 (Harriman *v.* Brown followed); 1877, Hill *v.* Proctor, 10 W. Va. 84.

[2] *Fed.* 1898, Scaife *v.* Land Co., 33 C. C. A. 47, 90 Fed. 238 (by an heir of the estate, ex-

1827, RICHARDSON, C. J., in *Shepherd* v. *Thompson*, 4 N. H. 215 (excluding declarations as to the boundary of their own land): "It must be presumed to have been their interest to extend the boundaries of the lot, and their declarations in favor of their interest were clearly not admissible."

Nevertheless, a few Courts will admit even an owner's declarations, provided he appears to have had at the time no motive to misrepresent.[3] This feature of the general rule distinguishes it sharply from the Massachusetts variant next noticed.

§ 1567. **Massachusetts Rule; Declaration must be made** (1) **on the Land, and** (2) **by the Owner in Possession.** The general rule, as first established in the Southern States and thence widely adopted elsewhere (*ante*, § 1563) made no other limitations than the preceding. But two other limitations, one of them in conflict with the preceding, obtained originally in Massachusetts; these were due to the associated notions of 'res gestæ' and verbal acts (*post*, § 1778) which in that jurisdiction, as already noticed (*ante*, § 1563), served as the parent for the present Exception.

(1) The declarant must have been, at the time of the declaration, *on the land and engaged in pointing out* the boundaries mentioned. This originally was purely a Massachusetts variant, of long standing.[1] Though it once obtained a footing in New Hampshire and Vermont, it has there since been repudiated.[2] But, by a not unnatural misunderstanding of the local nature

cluded); *Conn.* 1793, Porter *v.* Warner, 2 Root 23; 1910, Turgeon *v.* Woodward, 83 Conn. 537, 78 Atl. 577; *Md.* 1909, Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726 (guardian of infant owners; declaration excluded); *N. H.* 1827, Shepherd *v.* Thompson, 4 N. H. 215 (quoted *supra;* but see this doctrine repudiated in this State, *infra*, n. 3); *N. Car.* 1832, Sasser *v.* Herring, 3 Dev. L. 342; 1885, Halstead *v.* Mullen, 93 N. C. 252; 1905, Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42 (deed by the owner); *S. Car.* 1888, Taylor *v.* Glenn, 29 S. C. 292, 297, 7 S. E. 483; 1897, State *v.* Crocker, 49 S. C. 242, 27 S. E. 49 (lines on a plot inserted by the surveyor at the direction of a claimant, excluded); *Tex.* 1887, Tucker *v.* Smith, 68 Tex. 478, 3 S. W. 671; *Vt.* 1880, Evarts *v.* Young, 52 Vt. 334.

[3] 1895, Robinson *v.* Dewhurst, 15 C. C. A. 466, 68 Fed. 336 (but it will be noticed that this case, as cited *post*, § 1567, also follows the Massachusetts variant, and has evidently confused the two forms), 1910, Turgeon *v.* Woodward, 83 Conn. 537, 78 Atl. 577 (interesting and careful opinion by Wheeler, J.); 1899, Turner F. L. Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896 (declarations of owners, admitted on the facts); 1905, Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835 (owner's declarations as to boundary, admitted); 1883, Corbleys *v.* Ripley, 22 W. Va. 154 (owner's declarations inadmissible, unless at the time he had no interest to misrepresent); 1897, High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

And in New Hampshire, the above limitation has been repudiated (thus overruling, though not citing, Shepherd *v.* Thompson, *supra*): 1908, Keefe *v.* Sullivan Co. R. Co., 75 N. H. 116, 71 Atl. 379.

There have also been attempts to apply the 'post litem motam' restriction of other Hearsay exceptions: 1888, Taylor *v.* Glenn, 29 S. C. 292, 297; 1853, Smith *v.* Chapman, 10 Gratt. Va. 445, 455.

§ 1567. [1] *Mass.* 1832, Van Dusen *v.* Turner, 12 Pick. 532; 1842, Daggett *v.* Shaw, 5 Metc. 226; 1856, Bartlett *v.* Emerson, 7 Gray 175; 1856, Ware *v.* Brookhouse, 7 Gray 454; 1857, Flagg *v.* Mason, 8 Gray 556; 1857, Whitney *v.* Bacon, 9 Gray 206; 1864, Morrill *v.* Titcomb, 8 All. 100; 1875, Long *v.* Colton, 116 Mass. 414; 1886, Peck *v.* Clark, 142 Mass. 440, 8 N. E. 335; 1907, Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427 (declarations not made on the land, inadmissible).

But declarations not referring to boundaries, but merely asserting some *title*, are not hereunder admissible: Ware *v.* Brookhouse, Morrill *v.* Titcomb.

[2] *N. H.* 1870, Smith *v.* Forrest, 49 N. H. 237, overruling Melvin *v.* Marshall, 1851, 22 N. H. 382; 1908, Keefe *v.* Sullivan Co. R. Co., 75 N. H. 116, 71 Atl. 379; *Vt.* 1868, Powers *v.* Silsby, 41 Vt. 291, repudiating the 'dictum' in Wood *v.* Willard, 1864, 37 Vt. 387; but a later case looks backward again: 1899, Turner F. L. Co. *v.* Burns, 71 Vt. 354, 45 Atl. 896, *semble* (must be made "upon or in the vicinity of the boundaries, and pointing

of this limitation, it has since unfortunately been adopted thence in Maine,[3] New Jersey,[4] Pennsylvania,[5] and perhaps in other jurisdictions also.[6]

(2) In Massachusetts, further, an anomalous and meaningless restriction is observed that the declarant must also have been, at the time of the declaration, *in possession as owner;*[7] for example, a mere surveyor's statement will not be received; this doctrine, again, being due historically (*ante*, § 1563) to the parental relationship, in this jurisdiction, of the 'res gestæ' rule. It will be noted that this limitation is precisely the reverse of that of the usual rule (*ante*, § 1566); *i.e.* an owner's declaration is by that rule excluded, but by the Massachusetts rule is admitted; and 'vice versa' for a surveyor's statement. This element of the variant rule has apparently been adopted in only two other jurisdictions.[8] It is to be hoped that in due time this and the

them out"); the last aberration has now been repudiated in turn, and the rule of Powers *v.* Silsby restored, but with some obscurity of language: 1905, Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835.

[3] 1888, Royal *v.* Chandler, 81 Me. 119, 16 Atl. 410; 1899, Wilson *v.* Rowe, 93 Me. 205, 44 Atl. 615; 1905, Emmet *v.* Perry, 100 Me. 139, 60 Atl. 872 (preceding cases said to be "settled law").

[4] 1886, Curtis *v.* Aaronson, 49 N. J. L. 77, 7 Atl. 886.

[5] 1856, Bender *v.* Pitzer, 27 Pa. 335 (Knox, J.: "Nor was the boundary actually shown to the witness when the declaration was made"); followed in Kennedy *v.* Lubold, 88 Pa. 255 (1878); Kramer *v.* Goodlander, 98 Pa. 369 (1881); 1909, Collins *v.* Clough, 222 Pa. 472, 71 Atl. 1077 (confirming the preceding cases; the learned judge's suggestion that the term "variant", above applied in the text to this rule, is misapplied, seems to ignore the circumstances that the orthodox unlimited rule began in the 1700s and was recognized in several States, including Pennsylvania in 1815, and that the "variant" only came in Pennsylvania in 1856, by imitation of Daggett *v.* Shaw, Mass. That it is "unfortunate", as above termed, is respectfully maintained; that epithet suits any rule which narrows a wholesome exception to the Hearsay rule).

[6] *Fed.* By a misunderstanding of the Texas rule, which has no such limitation (*ante*, § 1566), this element was required in Hunnicutt *v.* Peyton, 1880, 102 U. S. 364; but it is doubtful since Clement *v.* Packer, 1887, 125 U. S. 325, 8 Sup. 907, whether this requirement would be insisted on where the law of the State did not prescribe it; in Ayres *v.* Watson, 1890, 137 U. S. 596, 11 Sup. 201, the doubt was left unsolved; in Robinson *v.* Dewhurst, 1895, 15 C. C. A. 466, 68 Fed. 336, it was held, thinking of this doctrine, that the declaration must be made while on the land and pointing out, or at least must be not a mere casual recital; so also Martin *v.* Hughes, 1898, 33 C. C. A. 198, 90 Fed. 632 (for Pennsylvania; declarant must be on the land; here a deceased surveyor).

Ala. 1902, Southern Iron Works *v.* Central of G. R. Co., 131 Ala. 649, 31 So. 723 (declarations as to private boundaries, held inadmissible, except when made by persons in possession and pointing out boundaries; following Hunnicutt *v.* Peyton, U. S., and adopting the Massachusetts rule); 1921, Murray *v.* Fowler, 205 Ala. 597, 88 So. 849 (plaintiff's deceased husband's declarations as to boundary while in possession, admitted); *Cal.* 1900, Smith *v.* Glenn, 129 Cal. 18, 62 Pac. 180 (owner's declarations while in possession and surveying, admitted).

Contra: N. C. 1909, Caldwell L. & L. Co. *v.* Triplett, 151 N. C. 409, 66 S. E. 343.

It is regrettable that this abnormal Massachusetts rule should be given such notice by other Courts to the confusion of the simple and settled rule of orthodox tradition.

[7] The full statement of the Massachusetts rule is as follows: 1842, Hubbard, J., in Daggett *v.* Shaw, 5 Metc. 226: "Declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested in thus pointing out their boundaries." *Accord:* 1856, Bartlett *v.* Emerson, 7 Gray 175; 1857, Whitney *v.* Bacon, 9 Gray 206; 1882, Boston Water P. Co. *v.* Hanlon, 132 Mass. 483 (deceased surveyor's field notes and plottings, excluded); 1886, Peck *v.* Clark, 142 Mass. 440, 8 N. E. 335, and cases *supra*, par. 1; 1913, Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067 (deceased owner's declarations as to use of land, tree as boundary, etc., admitted).

Compare the cases cited *post*, § 1573, which rest on a different doctrine.

[8] 1891, Royal *v.* Chandler, 83 Me. 152, 21 Atl. 842; 1899, Wilson *v.* Rowe, 93 Me. 205, 44 Atl. 615; 1886, Curtis *v.* Aaronson, 49 N. J. L. 77, 7 Atl. 886.

In *Canada*, no certain rule appears in the cases: 1847, Doe *v.* Murray, 3 Kerr N. Br.

preceding anomaly of the Massachusetts rule will cease to vex the legitimate course of precedent elsewhere, and that other Courts will fully appreciate that the rulings in that jurisdiction and its few followers must be wholly ignored in applying the present Exception.

§ 1568. **Knowledge of Declarant.** The declarant, upon general testimonial principles (*ante*, §§ 1424, 653) must appear to have had *knowledge of the boundary* spoken of, or to have been in a position to acquire such knowledge:[1]

1837, TUCKER, C. J., in *Harriman* v. *Brown*, 8 Leigh 713: "[Such declarations are admissible] provided such person had peculiar means of knowing the fact; as, for instance, the surveyor or chain carrier who were engaged upon the original survey; or owner of the tract, or of an adjoining tract calling for the same boundaries; and so of tenants, processioners, and others whose duty or interest would lead them to diligent inquiry and accurate information of the fact."

1856, LEE, J., in *Clements* v. *Kyles*, 13 Gratt. 478 (rejecting hearsay statements): "It is said that the declarant was living on the land at the time, but in what character is not stated. . . . That his living within the bounds of the survey gave him the opportunity to see trees marked as corners of some survey, found accidently or otherwise, would surely not be sufficient, unless some duty or interest can be traced to him by which he would have been prompted to make diligent inquiry and to obtain accurate information, within the meaning of the rule as propounded in *Harriman* v. *Brown*."

§ 1569. **Opinion Rule.** The Opinion rule (*post*, § 1956), for the reasons already indicated under the Exception for Dying Declarations (*ante*, § 1447), can hardly be thought to apply to these extra-judicial statements of deceased persons. Nevertheless, it is occasionally invoked.[1]

335 (declarations of a deceased surveyor while pointing out boundaries, admitted, "as part of the 'res gestæ'"); 1864, Sartell *v.* Scott, 6 All. N. Br. 166 (declarations of an owner in possession while pointing out the boundary of land he was selling, excluded); 1877, O'Connor *v.* Dunn, 2 Ont. App. 247 (deceased surveyor's notes, not admitted).

Whether the declarant must be *deceased* is not decided: 1910, Abbott *v.* Walker, 204 Mass. 71, 90 N. E. 405 (here the declarations were receivable against the declarant's successor, being admissions of a privy in title, under § 1082, *ante*).

§ **1568.** [1] *Fed.* 1880, Hunnicutt *v.* Peyton, 102 U. S. 364; 1895, Robinson *v.* Dewhurst, 15 C. C. A. 466, 68 Fed. 336; *Cal.* 1860, Morton *v.* Folger, 15 Cal. 279; *Kan.* 1916, Miller *v.* Moore, 98 Kan. 544, 158 Pac. 1108 (affidavit to a surveyor as to a boundary, some 30 years before, by owners having no personal knowledge, held "no independent evidence"); *N. H.* 1870, Smith *v.* Forrest, 49 N. H. 237; 1908, Keefe *v.* Sullivan Co. R. Co. 75 N. H. 116, 71 Atl. 379 (foreman of a railroad section, in charge of fences and roadbed, admitted); 1917, Morrison *v.* Noone, 78 N. H. 338, 100 Atl. 45 (right of flowage; statements by G., now deceased, as to an agreement for a high-water mark, excluded; too strict; the distinction here drawn had no relation to G.'s liability); *N. Car.* 1902, Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823 (declarations, as to a corner tree, not in view at the time of the declaration, admissible, if identification is practicable); *Pa.* 1856, Bender *v.* Pitzer, 27 Pa. 335 ("It was no part of the offer that A. J. had made the boundary, or that he was present when it was made, or that he had subsequently examined it, or had run the lines of either survey. . . . It was the mere declaration of one who did not appear to have correct information on the subject"); *S. C.* 1888, Taylor *v.* Glenn, 29 S. C. 292, 297 (declarations of a neighbor, not having special knowledge, excluded); *Tenn.* 1900, Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306 (declaration of former owner or surveyor, admissible; obscure); *Tex.* 1887, Tucker *v.* Smith, 68 Tex. 478, 3 S. W. 671; *Vt.* 1864, Wood *v.* Willard, 37 Vt. 387; 1868, Powers *v.* Sibley, 41 Vt. 291; 1873, Hadley *v.* Howe, 46 Vt. 142; *Va.* 1895, Fry *v.* Stowers, 92 Va. 13, 32 S. E. 500 (the son of an adjacent owner and a chain-bearer upon a different survey, excluded); 1912, Smith *v.* Stanley, 114 Va. 117, 75 S. E. 742 (declarations excluded for lack of means of knowledge); *W. Va.* 1877, Hill *v.* Proctor, 10 W. Va. 84.

§ **1569.** [1] 1835, Smith *v.* Chapman, 10 Gratt. Va. 445, 455 (chain-carrier's statement as to "the waters on which the P. survey should

§ 1570. **Form of the Declaration; Maps, Surveys, etc.** The declaration may be either oral or written; and statements in the form of maps, plans, surveys, and the like, have been constantly admitted under the present Exception.[1] From this is to be distinguished the use of surveys or maps under the Exception for Reputation (*post*, § 1592), and under the Exception for Official Statements (*post*, § 1665).

§ 1571. **Discriminations as to 'Res Gestæ', Admissions, etc.** From the use, under this Exception, of a deceased person's declarations as to boundaries, are to be discriminated other kinds of declarations about land, coming under other principles; these are chiefly:

(1) Declarations by deceased persons offered as the *vehicle of reputation* (*post*, § 1584);

(2) Declarations by deceased persons of facts *against* their *proprietary interest* (*ante*, § 1458);

(3) Declarations by a party or privy constituting *admissions* of title (*ante*, § 1082);

(4) Declarations made as *verbal acts*, coloring the nature of possession of land (*post*, §§ 1778–1780);

(5) Notes by an official *surveyor*, admissible as official statements (*post*, § 1665).

The practical differences in the operation of these distinct principles are elsewhere more fully pointed out (*ante*, §§ 1459, 1097, *post*, §§ 1665, 1780).

B. ANCIENT DEED-RECITALS

§ 1572. **Ancient Deed-Recitals, to prove a Lost Deed, or Boundary, or Pedigree, or Destroyed Records.** There is a limited use of deed-recitals, by way of exception to the Hearsay rule, which has its root in orthodox and ancient tradition, and yet has never received great encouragement, and finds recognition in only a small number of precedents. This use of deed-recitals seems to have been recognized for at least half a dozen distinct purposes.

(1) Where in one deed the *contents of another deed* are recited, the rule requiring production of the original (*ante*, § 1179) must of course first be satisfied; but, supposing it to be satisfied by proof that the other deed once existed and was lost, then the recital, according to an early and unquestioned ruling, is admissible as evidence of the contents and the execution of the lost

lie", excluded, as opinion); 1897, High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536 ("We must have a declaration establishing a fact, as a corner tree or particular marked line, not simply a statement that the land is within his boundary or the same conveyed in a certain deed, or that a line would cross a creek at a certain point, without more"). Compare the cases cited *post*, § 1956.

§ 1570. [1] *Examples:* 1860, Morton *v.* Folger, 15 Cal. 279; 1870, Smith *v.* Forrest 49 N. H. 239, 1866, Stroud *v.* Springfield, 28 Tex. 665; 1867, Welder *v.* Carroll, 29 Tex. 333.

The following statute belongs here rather than anywhere else: Kan. St. 1909, c. 114, Gen. St. 1915, § 8771 (where official road records are destroyed, and thereby the proceedings of road-establishment cannot be evidenced, "any map, plat, atlas, or diagram showing such road" is admissible, if made before destruction of records or if a copy of one so made; the county clerk's certificate under seal to be 'prima facie' evidence of time of making).

deed.[1] This precedent has been justified by eminent American judges in the following language: [2]

1811, TILGHMAN, C. J., in *Garwood* v. *Dennis*, 4 Binn. 314, 327 (admitting recitals, in an ancient deed, of the existence and contents of another deed, afterwards lost, by a predecessor in title 'ante litem motam', the reciter being a trustee to make partition): "The assertion of such persons must make a strong impression. But it is objected that, however impressive the declaration of a man of character may be, even without his oath, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation in cases of necessity or extreme inconvenience. How is it expected that a deed like the present is to be proved, when the subscribing witnesses have been dead eight and twenty years and the deed itself is not to be found? . . . Is it not necessary to resort to secondary evidence without oath?"

1830, STORY, J., in *Carver* v. *Jackson*, 4 Pet. 1, 83: "There are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not 'per se' evidence of the existence of the lease; but if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one and possession has been long held under such release and is not otherwise to be accounted for, there the recital will of itself materially fortify the presumption from lapse of time and length of possession of the original existence of the lease."

It would seem to be implied in this doctrine that the lost deed must be an ancient one (*post*, § 2137), or at least that no other evidence of execution or contents is available. Moreover, a few cases seem to impose the additional condition, analogous to that required for authenticating ancient deeds (*post*, § 2141), that the premises claimed should have been in possession of the claimant, as a necessary corroborative circumstance.[3] — That such a recital is

§ 1573. [1] 1704, Ford *v.* Grey, 6 Mod. 44, 1 Salk. 285 ("A fine was produced, but no deed declaring the uses; but a deed was offered in evidence which did recite a deed of limitation of the uses; and the question was whether that was evidence. And the Court said, that the bare recital of a deed was not evidence, but that if it could be proved that such a deed had been, and [was] lost, it would do if it were recited in another").

[2] *Accord: Federal:* 1830, Carver *v.* Jackson, 4 Pet. 1, 83 (admissible to show contents, if the original's existence is otherwise shown, and loss proved; see quotation *supra*); 1832, Crane *v.* Morris, 6 Pet. 598, 610 (same; lapse of time may be sufficient evidence of execution and loss); 1866, Deery *v.* Cray, 5 Wall. 795, 797, 805 (recital of a will, of seisin, etc., admitted; Carver *v.* Jackson followed); 1913, Wilson *v.* Snow, 228 U. S. 217, 33 Sup. 487 (deed's recital of executrix' authority under a will; Carver *v.* Jackson approved; see *post*, § 2145, n. 4); *Iowa:* Code 1919, § 8107 (recitals in deeds prior to Jan. 1, 1905, of other deeds executed in pursuance to contract, etc. to be presumptive evidence); *Michigan:* 1900, Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832 (recitals in a deed, a power of attorney, and a court order, of 1846, that title passed on S.'s death to survivors, etc., admitted); *Missouri:* 1921, Sawyer *v.* French, — Mo. —, 235 S. W. 126 (recitals of a lost deed in a deed of 1905; not decided); *New Jersey:* Comp. St. 1910, Conveyances, § 69 (recital of a letter of attorney in a deed recorded for ten years, admissible to prove its existence, on oath by the claimant that he has seen the letter); 1890, Havens *v.* Sea Shore L. Co., 47 N. J. Eq. 365, 375, 20 Atl. 497 (recital, "in an ancient deed or will, of any antecedent deed or document", admissible); *Pennsylvania:* 1811, Garwood *v.* Dennis, 4 Binn. 314, 327, 332, 340 (but Tilghman, C. J., alone takes this reason; Brackenridge, J., seems to take another reason, noted *ante*, § 1133; and Yeates, J., dissents); 1900, Dorff *v.* Schmunk, 197 Pa. 298, 47 Atl. 113 (after evidence of loss, a recital in a deed of 1860 was admitted to prove the lost deed).

[3] *Can.* 1912, Boehner *v.* Hirtle, N. Sc., 6 D. L. R. 548 (recital of an earlier title in a crown grant, held not admissible). *U. S.*

not admissible where the original deed recited is not accounted for as lost or the like, seems unquestioned.[4]

(2) In Massachusetts, a series of precedents admits a recital in an ancient deed to show the *location of a boundary or monument*,[5] though possibly the scope of the exception may be somewhat larger. But the basis of the rule is the probability of the recital's truth by reason of its having been acted upon in contemporaneous transactions; and this limitation is strictly applied.[6]

(3) A recital, in an ancient deed, of a *pedigree of inheritance* is by some Courts treated as admissible to show the state of the relationship.[7] Here also

N. J. 1906, Rollins *v.* Atlantic C. R. Co., 73 N. J. L. 64, 62 Atl. 929 (quoted *infra*, n. 7); *N. Y.* 1860, McKinnon *v.* Bliss, 21 N. Y. 206, 211 (recitals in a will of the plaintiff's predecessor, excluded; "assertions of title or claims of ownership made in deeds or wills may in some rare cases be evidence, . . . but only in connection with other proof of a long-continued and undisputed possession in accordance with the right or title claimed"); St. 1890, c. 158, § 1, C. P. A. 1920, § 376 (sheriff's deed; cited more fully *post*, § 1664); *S. Car.* 1798, Frost *v.* Brown, 2 Bay 135, 138 (recital, in a deed by the offeror's ancestor W., of a lost deed from S. to W., offered in corroboration, to show the latter deed's existence; the offeror not being in possession; the Court equally divided); 1831, Sims *v.* Meacham, 2 Bail. 101 (recitals in an old deed of a State grant of a certain date, the public records of that year being lost, held "insufficient" to raise a presumption of such grant).

[4] 1885, Calloway *v.* Cossart, 45 Ark. 81, 85 (recitals of payment and receipt of patent, excluded); 1823, Hite *v.* Shrader, 3 Litt. Ky. 445, 447; 1810, Bonnet *v.* Devebaugh, 4 Binn. Pa. 175, 178, 190 (recitals in warrant dated 1763, of survey on proprietaries' order, excluded, apparently because loss of original was not shown); 1856, Watrous *v.* McGrew, 16 Tex. 506, 513; 1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (certain recitals of confiscation in a petition of 1795 and 1799 excluded, the theory being obscure).

The following case stands on peculiar grounds: 1837, Jones *v.* Inge, 5 Port. Ala. 327, 335 (grantee of fee-patent from the U. S., the patent reciting that it was given to the grantee as purchaser from an Indian reservee; evidence of the Indian's incapacity to reserve and his infancy when selling was offered; held, (1) that recitals in general are not evidential against strangers; (2) that under the Indian treaties, the U. S. patent-recitals were intended to be admissible and indisputable as against strangers; (3) but that nevertheless the deed from the Indian to the patentee must be accounted for).

Compare the rules about *grantor's admissions* (*ante*, § 1082), and *oral admissions of a deed's contents* (*ante*, § 1256).

[5] 1840, Sparhawk *v.* Bullard, 1 Metc. Mass. 95, 101 ("Recitals in ancient deeds are always competent evidence"; here, of a boundary); 1870, Morris *v.* Callanan, 105 Mass. 129 (description of boundary in a deed more than 50 years old, admitted); 1879, Drury *v.* R. Co., 127 Mass. 571, 581 (plans of 1805 and 1816, showing the position of a creek, admitted); 1882, Randall *v.* Chase, 133 Mass. 210 (deed of 1839 admitted, reciting location of a way).

[6] 1882, Boston Water Power Co. *v.* Hanlon, 132 Mass. 483 (the document must be "of such a character as usually accompany transfers of title or acts of possession, and purport to form a part of actual transactions referring to coexisting subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated"; here excluding a deceased surveyor's field-notes and plotting, because not "acted on"); 1896, Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333 (a plan and field-notes, made in 1818, by a surveyor under the direction of the predecessors in title of either plaintiff or defendant, the latter claiming by adverse possession, as well as by deed, and the dispute involving a boundary line, admitted, as representing "actual transactions").

[7] *Federal:* 1826, Stokes *v.* Dawes, 4 Mason 268, Story, J. ("after 60 years, it is not too much to say that a fact of heirship, stated in a deed under which possession was held without question for 30 years, may well be admitted"); 1866, Deery *v.* Cray, 5 Wall. 795, 805 (heirship); 1886, Fulkerson *v.* Holmes, 117 U. S. 389, 399, 6 Sup. 780 (preceding case approved; but the rule is treated as if governed by the pedigree exception); 1902, Stockley *v.* Cissna, 56 C. C. A. 324, 119 Fed. 812, 824 (recitals of heirship in a deed of 1897, not admitted against a stranger; Carver *v.* Jackson, *supra*, approved); *Alabama:* 1921, McMillan *v.* Aiken, — Ala. —, 88 So. 135 (deed of 1845 reciting heirship, admitted); *Columbia (Dist.):* 1910, Wilson *v.* Snow, 35 D. C. App. 562 (recitals that the grantor was executrix, in a deed 50 years old, admitted); *Georgia:* 1905, Lanier *v.* Hobard, 123 Ga. 626, 51 S. E. 632 (recital of heirship in a deed of 1871, not admitted, at least without corroboration by possession or the like); *Hawaii:* 1901, Mist *v.* Kapiolani Estate, 13 Haw. 523 (deceased grantor's recitals of relationship, in a deed

the antiquity of the deed depends upon the rules of Authentication (*post*, § 2137). Moreover, in most of the precedents, the analogous requirement is mentioned (*post*, § 2141) that possession of the premises under the deed must also have existed as a corroborative circumstance.

later than 1853; "after a relationship and the death had been established by evidence 'aliunde', the recitals were properly admitted"); *Kansas:* 1913, Dyer *v.* Marriott, 89 Kan. 515, 131 Pac. 1185 (recital of a will, heir-at-law, etc., in a deed of recent but unspecified date, excluded); *Maine:* 1826, Little *v.* Palister, 4 Greenl. 209 ("after a long series of years", and with no contrary claimants in the meantime, the jury may "presume the pedigree as stated in deeds of conveyance"); *Missouri:* Rev. St. 1919, 5374 (recital of heirship or kinship in a deed, or affidavit thereof by a maker attached to deed, admissible if the maker is "dead or absent from the State or otherwise disqualified from testifying", and the deed was filed for record five years before suit, and claimant has paid taxes for three years); *Nebraska:* Rev. St. 1922, § 5610 (for deeds prior to Jan. 1, 1907, recitals of heirship, etc., are admissible on the issue of power to convey; recitals of the fact of husband and wife are admissible to show the grantors to be such; recitals identifying grantors with prior grantees are admissible to evidence identity of one in possession); *New Jersey:* 1906, Rollins *v.* Atlantic C. R. Co., 73 N. J. L. 64, 62 Atl. 929 (recital that "she being the issue and heir at law of G. A.", admitted; "The rule I think may be regarded as settled that a recital, whether of an ancient deed, will, lease, or pedigree, may be [admitted when] supported by any testimony which renders credible the truth of the fact recited"; here the recording of the deeds, etc., were held to suffice; the opinion does not properly distinguish the present question, that of par. (1) *supra*, and the general pedigree rule); *New York:* 1830, Jackson *v.* Russell, 4 Wend. 543, 548 (recitals in an old deed, used to show death of persons in interest); 1901, Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135 (recitals in an ancient deed, admitted to prove relationship; but the Court inconsistently proceeds to apply the limitations of the pedigree exception, *ante*, § 1480); St. 1913, c. 395, C. P. A. 1920, § 379 (recital of heirship in a deed, etc., more than 30 years old and duly recorded, to be evidence); *Pennsylvania:* 1782, Morris *v.* Vanderen, 1 Dall. 64, 67 (recital "with respect to a pedigree", but not recital of another deed, admissible); 1795, Paxton *v.* Price, 1 Yeates 500 ("recitals in a conveyance are evidence of pedigree, the rules in general being much relaxed in this particular"); 1844, James *v.* Letzler, 8 W. & S. 192 ("There is an exception in the case of an ancient deed containing a recital, where the possession has accompanied such deed; . . . in deeds there are often recitals of marriages, births, or deaths without issue, and other facts incident to the conveyance", which thus become admissible; here, a recital of one P.'s attainder and forfeiture); 1867, Bowser *v.* Cravener, 56 Pa. 132, 142 (approving Paxton *v.* Price); 1870, Scharff *v.* Keener, 64 Pa. 376, 378 (recitals of pedigree in an ancient deed accompanied by possession, admitted); *Tennessee:* 1916, Fielder *v.* Pemberton, 136 Tenn. 440, 189 S. W. 873 (ejectment; recitals of heirship in a deed of 1880, admitted "against all persons"); *Texas:* 1863, Chamblee *v.* Tarbox, 27 Tex. 139, 145 (marriage); *Vermont:* 1841, Potter *v.* Washburn, 13 Vt. 558, 564 (mere recital of heirship in a deed, not receivable, "especially where the deed is of recent date"); 1842, Bell *v.* Porter, 14 Vt. 307, 309 ("However it may be with such a recital uncorroborated", the sequence of 30 or 40 years' possession by subsequent grantees here sufficed for admission); 1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (recitals of descent in a petition to the Legislature, excluded, for lack of proof of the reciter's relationship); *West Virginia:* 1904, Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409 (recitals as to widow and heir, admitted); 1906, Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484 (recitals of heirship in a deed of 1843, admitted); *Wisconsin:* St. 1901, c. 28, Stats. 1919, § 2216 *c* ("Whenever any deed, mortgage, land contract, or other conveyance, shall contain a recital in respect to pedigree, consanguinity, marriage, celibacy, adoption, or descent, and shall have been recorded in the proper register's office for 20 years", and is otherwise admissible, it shall be received as evidence of the facts recited; so also a recital in "any will of real estate, or a copy thereof, foreign or domestic", if duly probated); 1885, Watts *v.* Owens, 62 Wis. 512, 524, 22 N. W. 720, *semble* (admissible).

Contra: Eng. 1826, Fort *v.* Clarke, 1 Russ. 601 (recitals of pedigree in a deed of 1793, excluded; *semble*, admissible if possession had been shown in the predecessors thus named); 1836, Slaney *v.* Wade, 1 Myl. & Cr. 338, 345, 358, per Eldon, L. C. (recitals of pedigree in an old deed, excluded); *U. S. Ga.* 1900, Dixon *v.* Monroe, 112 Ga. 158, 37 S. E. 180 (recital of heirship, excluded); *Pa.* 1838, Murphy *v.* Lloyd, 3 Whart. 538, 549 (recitals by a grantor of his own pedigree in an ancient deed, excluded); *Tex.* 1898, Watkins *v.* Smith, 91 Tex. 539, 45 S. W. 560 (recitals of heirship in predecessors' deeds, not admissible).

Compare the rule for hearsay statements of a deceased *member of a family* (*ante*, §§ 1480–1503).

(4) A recital, in an ancient deed, of a *consideration paid*, is admissible;[8] though many of the cases of this sort do not deal with ancient deeds, and may better be explained as merely laying down a rule of burden of proof presuming a consideration (*post*, § 2520).

(5) In Texas, a special doctrine admits a recital in an ancient instrument to evidence a *claim of ownership*.[9]

(6) By statute, occasionally, the contents of *destroyed records* in a chain of title may be evidenced by the recitals in a later deed, whether ancient or not.[10]

(7) By statute in *Canada*, an exception of large and indefinite scope is introduced for recitals in ancient deeds involved in completing *contracts for sale of land*.[11]

(8) In *mining claims*, a recital of discovery of a lode or vein, in a prior document of claim, may by custom be admissible.[12]

— Apart from the foregoing specific rules, a recital in an *ordinary deed or document of title* has no ground for being regarded as anything but inadmissible hearsay.

§ 1574. **Other Principles Discriminated.** From the foregoing use of deed-recitals as a hearsay exception, the application of certain other principles must be discriminated.

(1) From the hearsay use of ancient deed-recitals to prove the *contents of another deed* must be distinguished (*a*) the use of deed-recitals as *admissions* of the other deed's contents (*ante*, § 1082). The practical differences in the rules' limitations are three: by the former the deed must be ancient, but not by the latter; by the former the deed must be lost or destroyed, but probably not by the latter, though here there is much controversy (*ante*, § 1257); by the former the recitals are usable for or against any one, as is all evidence under hearsay exceptions, while by the latter they are usable only against

[8] 1911, Anderson *v.* Cole, 234 Mo. 1, 136 S. W. 395 (recital of consideration in a deed dated 1878, admitted).

[9] 1920, Magee *v.* Paul, 110 Tex. 470, 221 S. W. 254 (title to land; recitals in ancient archives admitted to show claim of ownership; collecting prior cases, in which "the principal reasons . . . are stated with such clearness and force in a series of opinions by the lamented Judge Reese, as to obviate the necessity for further discussion"; in this form of the rule, as in the orthodox one, actual possession is not required).

[10] *Indiana:* Burns' Ann. St. 1914, § 479 (administrator's deed, etc.; upon destruction of the courthouse containing the record of the decree, etc., the deed's recitals of such decree, etc., shall suffice); *North Carolina:* Con. St. 1919, § 380 (when courthouse records have been destroyed, recital of contents in "any deed of conveyance", etc., executed prior to such destruction, by executor, sheriff, etc., are admissible).

[11] *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 55 (like Ont. Rev. St. 1914, c. 122, § 2); *B. C.* Rev. St. 1911, c. 236, § 2 (like Ont. R. S. c. 122, § 2); *Ont.* Rev. St. 1914, c. 122, § 2 (in completing contracts for sale of land, "recitals, statements and description of facts, matters and parties, contained in deeds, instruments, acts of Parliament or statutory declarations 20 years old at the date of the contract" are evidence); 1906, Gunn *v.* Turner, 13 Ont. L. R. 158 (applying the statute to admit a recital in a deed of 1864 that the grantor was administrator of his father's estate).

[12] 1918, Ralph *v.* Cole, 9th C. C. A., 249 Fed. 81, 93 (notice of location of lode claim; recital of discovery of lode or vein "creates the presumption of discovery of mineral"); 1920, Cole *v.* Ralph, 252 U. S. 286, 40 Sup. 321 (recitals of discovery in recorded notice of location of mining claim are not evidence of discovery).

the party whose predecessor or privy in title made the deed. (*b*) The use of recitals of other deeds in the deed of a *sheriff, trustee, or other official* (*post*, § 1664) must also be distinguished; for the latter are admissible under the Exception for Official Statements, and very different conditions of admissibility there apply. (*c*) The use of a *party's self-serving statements as explaining away his admissions* (*ante*, § 1133) may also serve to admit deed-recitals which would not be admissible under the present Exception. (*d*) The use of *copies of ancient deeds* not verified by a witness on the stand (*ante*, § 1281, *post*, § 2143) must also be distinguished. (*e*) The use of *recitals of a power of attorney in an ancient deed*, as sufficient evidence of the power's existence, falls under another head (*post*, § 2144).

(2) From the use under the present Exception of *ancient deed-recitals to prove boundary* (as in Massachusetts) must be distinguished (*a*) the use, under the foregoing branch of the Exception, of *declarations by deceased persons about private boundary*, particularly the Massachusetts form of the rule (*ante*, §§ 1564, 1567); and also (*b*) the use of *reputation to prove boundary*, under the next Exception (*post*, §§ 1587, 1592), by which ancient deeds, leases, maps, and the like, become admissible so far as they can be construed as the vehicle of reputation. (*c*) Moreover, where adverse possession is relied upon, the ancestor's making of a deed, reciting the extent of his claim, may be admissible as a *verbal act coloring possession* (*post*, § 1778). (*d*) Finally, in proving acts of adverse possession, the question may arise whether the mere *making of a deed or lease* is *evidence of possession* (*ante*, § 157).

(3) From the use of *deed-recitals of pedigree*, under the present Exception, must be distinguished the use of *declarations of relationship by a member of the family*, under the Family History Exception (*ante*, §§ 1480, 1497). The difference is that under the present Exception it is not necessary that the reciter should be related to the persons mentioned. Nevertheless, most of the recitals admitted under the present Exception would have been admissible under the former; and it is possible that the present one grew out of passages in earlier writers stating the former in loose language.

C. Statements by Deceased Persons in General

§ 1576. **Statutory Exceptions for all Statements of a Decedent.** There was a time, in the early 1800s, when it came near to being settled that a general exception should exist for all statements of deceased persons who had competent knowledge and no apparent interest to deceive;[1] but this tendency was of short duration and was decisively negatived.[2] Nevertheless, such an exception, uniting as it does the essential requirements of an exception to the Hearsay rule (*ante*, §§ 1420–1424), commends itself as a just addition to the present sharply defined exceptions, and represents undoubtedly the enlightened policy of the future (*ante*, § 1427):

§ 1576. [1] Cases cited *ante*, § 1476.

[2] 1844, Sussex Peerage Case, 11 Cl. & F. 85; 1901, Morell *v.* Morell, 157 Ind. 179, 60 N. E. 1092 (statements by a deceased attesting witness, excluded).

1876, MELLISH, L. J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154: "I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements, made by persons who are dead, respecting matters of which they had a personal knowledge, and made 'ante litem motam', should be admitted. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. . . . [But] it appears to me that it would be better to leave it to the Legislature to make the improvement, which in my opinion ought to be made, in our present rules with regard to the admissibility of evidence of that description."

1879, COCKBURN, L. C. J., in *R.* v. *Bedingfield*, 14 Cox Cr. 342: "I regret that according to the law of England any statement made by the deceased should not be admissible."

1886, HERSCHELL, L. C., in *Woodward* v. *Goulstone*, L. R. 11 App. Cas. 469: "No doubt there are many countries, and indeed Scotland is one of them, where the law permits declarations of persons who are dead to be given in evidence in all cases where they were made under circumstances in which such evidence ought properly to have been admitted if the person had been living; and there is much to be said for that law as compared with our own."[3]

1860, APPLETON, C. J., Evidence, 190: "It is equally desirable that all testimony should have all possible and conceivable securities for trustworthiness; but if from any cause the attainment of one or more of those securities becomes physically impracticable, that will not suffice for the rejection of such evidence thus obtained, if it have any the slightest probative force. . . . The best evidence, the highest securities for testimonial veracity, are required; but the best theoretic evidence, the best theoretic securities, may be unattainable. . . . If, then, these principles be adopted, it would seem to follow that when the witness is dead, his declarations in whatsoever form attainable should be received. . . . The epistles of Paul, the journal of Columbus, the letters of Washington, would not be adjudged competent to establish any fact which being in issue might be determined by their production. . . . Were Paul or Columbus or Washington living, the reasoning by which this testimony would be excluded might be considered unanswerable; dead, their evidence thus delivered, satisfactory to everybody else, to the judge alone seems without force."

Recommendations of such an enlargement had been made more than two generations ago.[4] But no effect was given them until fairly recent times. To-day are found statutes in three jurisdictions; and these experiments have sufficiently shown that the example is safe to follow. The statutory measure is found in two forms, the one being of a limited scope only.

(1) In *Connecticut* a statute admits all *written statements* of a *deceased person in an action by or against his representatives* or those claiming under him.[5]

[3] "[The French lawyers] laughed, not without reason, at our strictness in excluding all hearsay evidence" (Life of L. C. Campbell, I, 364).

[4] A proposal to this effect had been made in England as long ago as 1828, by Lord (then Mr.) Brougham, in his great Speech on the Courts of Common Law, 18 Hans. Parl. Deb. 2d Ser. 218, 227, who proposed that "any deceased person's books or memorandums may be received, provided it appear that they were not prepared with a view of making evidence for his successors but plainly 'alio intuitu.'" This proposal was probably based on Bentham's suggestion, in his Rationale of Judicial Evidence, b. VI, c. II, § 1, b. I, c. XIII, § 5.

The proposal now forms the subject of a Report (1923) by a Committee on Improvement of the Law of Evidence, acting under the Directors of the Commonwealth Fund (Professor E. M. Morgan, Yale University, Chairman of Committee).

[5] Conn. Gen. St. 1918, § 5735 ("In all actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received in evidence"); § 5736 ("In all actions . . . in which the entries and written memoranda of deceased persons would be admissible in favor of the representatives of such deceased persons, such entries and memoranda may be admissible in favor of any person claiming title under or from such deceased person"); § 5737 (party insane or otherwise mentally disqualified; quoted *ante*, § 1519).

The avowed purpose of this statute was merely to place the deceased party's case on an equal footing, in respect to sources of proof, with that of the surviving opponent.[6] Regarded as a substitute for the statutory rule common in other jurisdictions (*ante*, § 578), whereby the survivor is disqualified as a witness, this rule deserves universal imitation. The policy of disqualifying the survivor has already been noticed (*ante*, § 578) as unenlightened and unpractical, and is so thoroughly to be condemned that there is no excuse for not employing the present rule as a more effective and rational expedient to attain the same end. The Connecticut statute has been in operation more than fifty years, and the trifling number of rulings required to interpret and apply it [7] merely puts in a more discreditable light the thousands of quibbling decisions that have been rendered necessary by the arbitrary and complicated wording of the other group of statutes.

In *Massachusetts* and *Oregon*, statutes of more limited scope have followed the Connecticut example.[8] In *Virginia*, a statute, after permitting the survivor of a transaction to testify, but requiring corroboration, provides further

[6] 1893, Baldwin, J., in Rowland *v.* R. Co., 63 Conn. 415, 417, 28 Atl. 102 ("The act of 1848, by removing the common-law disqualification of interest, brought two important witnesses, the plaintiff and defendant, into the trial of almost every suit. Two years of practice under its provisions convinced the Legislature that, when the accident of death had withdrawn one of these witnesses, the testimony of the other gave him as a party an undue advantage. The act of 1850 [now Gen. St. § 5735] was intended to restore, so far as might be, the footing of equality between him and the representatives of the decedent which had existed at common law").

[7] 1865, Bissell *v.* Beckwith, 32 Conn. 509, 517 (the classes of writings named include ordinary letters, and are not confined to documents of purely mercantile or legal purpose); 1893, Barber's Appeal, 63 Conn. 393, 412, 27 Atl. 973 (statute does not admit diaries of a testator in a probate appeal, this not being an "action"; unsound; such a ruling tends to reintroduce technicalities of enumeration); 1893, Rowland *v.* R. Co., 63 Conn. 415, 417, 28 Atl. 102 (where an injured plaintiff's deposition has been taken in action begun before his death, the exception for these extra-judicial statements fails); 1899, Brown *v.* Butler, 71 id. 576, 42 Atl. 654 (statute applied); 1900, St. Regis Lumber Co. *v.* Hotchkiss, — Conn. —, 44 Atl. 11 (statute applied); 1920, McClure *v.* Middletown Trust Co., 95 Conn. 148, 110 Atl. 838 (deceased agent's statements; "the case presents in striking fashion the tendency of the rule excluding the declarations of deceased persons to shut out the truth; most eminent authority . . . have favored the admission of statements of deceased persons", etc.).

[8] *Massachusetts:* St. 1896, c. 445, Gen. L. 1920, c. 233, § 66 ("If a cause of action brought against an executor or administrator is supported by oral testimony of a promise or statement made by the testator or intestate of the defendant, evidence of statements, written or oral, made by the decedent, memoranda and entries written by him, and evidence of his acts and habits of dealing, tending to disprove or to show the improbability of the making of such promise or statement, shall be admissible"); 1901, National Granite Bank *v.* Whicher, 179 Mass. 390, 60 N. E. 927 (statute applied); 1902, Huebener *v.* Childs, 180 Mass. 483, 62 N. E. 729 (statute applied to evidence adduced on re-examination); 1904, Cogswell *v.* Hall, 185 Mass. 455, 70 N. E. 461 (action by a husband's heir against his widow's executor on a promise to pay relating to the dower estate; the deceased widow's declarations and conduct, admitted in disproof of the promise); 1904, Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361 (action on a contract by the testator; testator's declarations admitted);
Oregon: St. 1893, p. 134, Laws 1920, § 732 (amends Code § 732, quoted *ante*, § 488, by adding to par. 2: "provided that when a party to an action or suit by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by the deceased against the interest of the deceased, statements of the deceased concerning the same subject in his own favor may also be proven"); 1894, Grubbe *v.* Grubbe, 26 Or. 368, 38 Pac. 182 (statute applied); 1915, Chance *v.* Graham, 76 Or. 199, 148 Pac. 63 (express or resulting trust; certain declarations of the deceased owner held not to fall within the statute); 1915, Goff *v.* Kelsey, 78 Or. 337, 153 Pac. 103 (oral land contract; statute applied).

that if such *survivor testifies*, the *deceased opponent's* written statements may be admitted.[9]

(2) In *Massachusetts*, a statute has gone the full length of the principle above mentioned as advanced in the early 1800s, by adding a general exception for *statements of deceased persons*.[10] The exception has been found to

[9] *Virginia:* Code 1919, § 6209 (quoted *post*, § 2065); 1921, Robertson's Ex'r *v.* Atlantic C. R. Co., 129 Va. 494, 106 S. E. 521 (agent contracting with person now deceased; the first provision of the statute not being applicable to the agent, held that the deceased's written statements were not admissible).

[10] *Massachusetts:* St. 1898, c. 535, Gen. L. 1920, c. 233, § 65 ("A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the Court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant").

Construed and applied in the following cases: 1900, Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802 (statute does not apply in restriction of any other exceptions to the rule); 1901, Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407 (grantor's declaration as to intent of executing deed, admitted); 1901, Dixon *v.* R. Co., 179 Mass. 242, 60 N. E. 581 (deceased officer's statement admitted); 1902, O'Driscoll *v.* R. Co., 180 Mass. 187, 62 N. E. 3 (written report of deceased physician to the defendant, admitted); 1902, Green *v.* Crapo, 181 Mass. 55, 62 N. E. 956 (deceased's copying of letters in a press, said to "import a declaration that they are in the course of transmission", and *semble* to be within the statute as such); 1902, Boyle *v.* Columbian F. Co., 182 Mass. 93, 64 N. E. 726 (statute applied); 1903, Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249 (statute applied; see citation *post*, § 2099); 1900, Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386 (deceased's declarations as to sending money to his mother, etc., admitted under St. 1898); 1902, Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074 (deceased third person's statement as to tidewater height, admitted under St. 1898); 1905, Nagle *v.* Boston N. St. R. Co., 188 Mass. 38, 73 N. E. 1019 (declarations of a deceased motorman, admitted; that they were made in answer to leading questions, held immaterial); 1905, Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68 (personal injury; a statement made after serving notice of the injury to the city, held admissible; the trial Court's finding of good faith, presumed); 1906, Gray *v.* Kelly, 190 Mass. 184, 76 N. E. 724 (declarations as to boundary, admitted); 1906, Weeks *v.* Boston El. R. Co., 190 Mass. 563, 77 N. E. 654 (more than one statement of the deceased is admissible); 1906, Hall *v.* Reinherz, 192 Mass. 52, 77 N. E. 880 (statute applied to a written statement made before the statute); 1906, Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032 (statute applied to declarations about land); 1906, Putnam *v.* Harris, 193 Mass. 58, 78 N. E. 747 (statute applied, the question here being as to the declarant's personal knowledge); 1907, Chaput *v.* Haverhill G. & D. St. R. Co., 194 Mass. 218, 80 N. E. 597 (decedent in an action for personal injury); 1908, McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405 (pointing out that a deceased's testimony may be admissible under the rule of § 1387, *ante*); 1908, Glidden *v.* U. S. Fidelity & G. Co., 198 Mass. 109, 84 N. E. 143 (statement not made "in good faith", excluded); 1908, Supple *v.* Suffolk S. Bank, 198 Mass. 393, 84 N. E. 432 (statute applied to declarations about money given); 1909, Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755 (revocation of a probate decree of adoption); 1910, Giles *v.* Giles, 204 Mass. 383, 90 N. E. 595 (whether the statute applies to admit testator's declarations of revocation not otherwise admissible; not decided); 1911, Com. *v.* Stuart, 207 Mass. 563, 93 N. E. 825 (whether applicable in criminal cases, not decided); 1912, Randall *v.* Peerless Motor Car Co., 212 Mass. 352, 99 N. E. 221 (statute admits prior declarations of one who has testified at a former trial); 1913, Pigeon's Case, 216 Mass. 51, 102 N. E. 932 (the statutory exception held applicable to cases arising before the Industrial Accident Board under an industrial insurance Act); 1916, Little *v.* Massachusetts N. E. St. R. Co., 223 Mass. 501, 112 N. E. 77 (a declaration by a deceased physician, as to the cause of a patient's injury, that it was being "thrown out of his carriage", held not a statement "upon personal knowledge"); 1917, McSweeney *v.* Edison El. I. Co., 228 Mass. 563, 117 N. E. 846 (death by wrongful act; the admissibility of declarations offered under Rev. L. c. 175, § 66, is for the trial judge, not for the jury); 1918, Keough *v.* Boston Elev. R. Co., 229 Mass. 275, 118 N. E. 524 (personal injury; statement by a deceased doctor, advising plaintiff to go away, excluded as opinion; absurd); 1918, Carr *v.* Dighton, 229 Mass. 304, 118 N. E. 525 (exclusion of children from school; certificate of a deceased physician that he had examined the childrens' heads and found no vermin, admitted); 1918, Com. *v.* Wakelin, 230 Mass. 567, 120 N. E. 209 (homicide; whether the statute applies to criminal cases, not decided; here a statement found not to have been made "in good faith" was excluded); 1919, Eldridge *v.* Barton, 232 Mass. 183, 122 N. E. 272 (death by wrongful

work well; and its general adoption would be an important improvement in the law of Evidence.

act; the decedent's statement, "it is my fault, I am to blame", held not admissible if construable as an opinion; unsound); 1921, Horan *v.* Boston Elev. R. Co., 237 Mass. 245, 129 N. E. 355 (under this statute, the judge must make the preliminary finding required, before admitting the evidence to the jury).

For the doctrine as to the *judge's determination* of facts preliminary to admissibility of the declaration, see *post*, § 2550.

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC VII: REPUTATION

CHAPTER LIII.

§ 1580. **In General.** At the time of the definite emergence of the Hearsay rule (*ante*, § 1364) — that is, by the end of the 1600s —, there remained in existence a practice, more or less loose, of receiving the repute of the community on various matters. At that time, the jury's traditional right to resort to common repute as a source of its knowledge was still a real part of trial-practice. It can be easily understood that the exclusion, when offered in court as evidence, of a repute which the jury could in any case have considered, had they otherwise known of it, would be unnatural and improbable.[1] But with the final shaping of the Hearsay rule's limits, and the conscious statement of specific exceptions, in the first half of the 1700s, and with the progress and final settlement, in the same century, of the doctrine that the jury could consider no information not presented to them as evidence in court (*post*, § 1800), the use of common repute came to be limited to specific excepted cases.

The excepted subjects thus surviving from the older loose practice included at that time (1) land-boundaries and land-customary-rights and verdicts in other litigation, (2) events of general history, (3) personal character, and (4) marriage and other facts of family history. Since that time a few other isolated classes of facts — for example, insolvency — have in various jurisdictions been treated as properly provable by reputation; these instances, however, do not represent historically a continuous survival of earlier practice, but a reasoned application of a general principle.

The precedents for these various groups of facts form for the most part separate and independent series. Nevertheless, they all rest equally on a more or less conscious recognition of a common and rationalized principle, which in a broad way is found to be satisfied alike in all of them and to justify the maintenance of the exceptions. This principle is the twofold one already indicated (*ante*, § 1420) as the basis of all the exceptions to the Hearsay rule, namely, the principle of Necessity and the principle of a Circumstantial Guarantee of Trustworthiness. (*a*) The *necessity* is here to be found in the general dearth of other satisfactory evidence of the desired fact, by reason of which we are thrown back upon reputation as a source of information. In the exceptions for land boundaries and customs this necessity is found to exist where the matter is an ancient one, and thus living witnesses are not to be had. In the exceptions for character and marriage the necessity lies in the usual difficulty of obtaining other evidence than reputation. (*b*) The circumstances creating a fair *trustworthiness* are found when the topic is such that the facts are likely to have been generally inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one. This, under differing con-

§ 1580. [1] "It was natural," says Professor Thayer, "that what the Courts clearly recognized as a proper basis for the jury's action, when they picked up their own information, *i.e.* reputation or traditional declarations in matters of prescription, should be allowed to be offered to them by the statement of witnesses in court" (Cases on Evidence, 1st ed., 420).

ditions, is the common ground of trustworthiness for reputation on land-boundaries and customs, for events of general history, and for character and marriage. There is therefore, on the whole, a certain underlying unity of principle for all the recognized uses of reputation.

In a few jurisdictions, legislative enactments have attempted to adopt and restate the first two branches to the exception;[2] but those statutory attempts usually fail to distinguish the limitations of the different exceptions, and can hardly be said to be successful.

A. LAND-BOUNDARIES AND LAND-CUSTOMS

1. The Necessity Principle

§ 1582. **Matter must be Ancient.** In the effort to put a limit to the use of reputation-evidence, and to phrase the conditions of necessity in which it could be resorted to in default of better evidence, the element of *antiquity* came to be made the fundamental characteristic of this branch of the Exception. When the phrase about "best evidence" began to be invoked (*ante*, § 1173), and its corollary was referred to, that the "best evidence" might be dispensed with if it could not be had, one of the specific rules sometimes associated with it was the present one; that is to say, in ancient matters of certain sorts the "best evidence" obtainable was reputation-evidence. An "ancient" matter would ordinarily be a matter upon which no living witnesses having personal knowledge were attainable; so the reputation is often predicated as coming merely from deceased persons, or deceased old persons.

The phrasing varies loosely; but the common idea is the same, namely, that it is to be the reputation of a past generation, and thus is to deal with a matter of which there can be no witnesses of the present generation having a personal knowledge. The following passages illustrate the general thought:

1811, MANSFIELD, C. J., in the *Berkeley Peerage Case*, 4 Camp. 415: "The declarations of deceased persons, who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead."

1855, Lord CAMPBELL, C. J., in *R.* v. *Bedfordshire*, 4 E. & B. 535: "The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted on only at distant intervals of time; direct proof of their existence therefore ought not to be required."

1810, SWIFT, C. J., Evidence, 121: "The law has therefore wisely rejected all hearsay evidence, excepting where it is impossible in the nature of things to obtain any other. . . . This happens in matters of long standing, where the witnesses who were knowing to them are not in being. Such are . . . the ancient boundaries of land."

1860, SELDON, J., in *McKinnon* v. *Bliss*, 21 N. Y. 218: "The fact sought to be proved being of too ancient a date to be proved by eye-witnesses, and not of a character to be

[2] The statutes are collected *post*, § 1597.

made a matter of public record, unless it could be proved by tradition there would seem to be no mode in which it could be established. It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable."

In the United States the question came up most frequently with reference to *boundaries of land*, and the special necessity of resorting to reputation-evidence in such cases was often noticed:

1797, Per CURIAM, in *Montgomery* v. *Dickey*, 2 Yeates 213: "It must be obvious that when the country becomes cleared and in a state of improvement, it is oftentimes difficult to trace the lines of a survey made in early times. The argument 'ex necessitate rei' will therefore apply."

1837, TUCKER, C. J., in *Harriman* v. *Brown*, 8 Leigh 707: "Questions of boundary, after the lapse of many years, become of necessity questions of hearsay and reputation. For boundaries are artificial, arbitrary, and often perishable; and when a generation or two have passed away, they cannot be established by the testimony of eye-witnesses."

What, then, may to-day be said to be the results of this requirement, so far as specific rules can be laid down? The authorities of modern date are few, owing perhaps in this country to the changes in the conditions of life and the methods of administration of land-records in the past century, and it is not easy to predict the exact form in which Courts may choose to apply the principle. But the following rules may be ventured:

(1) The *matter to be proved* must be *ancient, i.e.* of a *past* generation. The custom, landmark, or boundary, must either be a former one, or, if it is still in existence, its existence in a previous generation must be the subject with which the reputation is concerned:[1]

1855, BALTZELL, C. J., in *Daggett* v. *Willey*, 6 Fla. 511: "Reputation or hearsay, taken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks or other evidence than that of hearsay."

(2) The *reputation* offered must also be ancient, *i.e.* of a past generation.[2]

(3) If the reputation is shown by means of the reported statements of individuals (*post*, § 1584), the *persons* whose statements are reported must be shown to be *deceased*.[3]

2. The Circumstantial Guarantee of Trustworthiness

§ 1583. **General Principle; Reputation as Trustworthy.** The element here

§ 1582. [1] *Accord:* 1886, Clark *v.* Hills, 67 Tex. 152, 2 S. W. 356.

[2] 1872, Shutte *v.* Thompson, 15 Wall. 161; 1905, Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101; 1852, Adams *v.* Stanyan, 24 N. H. 412 (maps); 1862, Dobson *v.* Finley, 8 Jones L. N. Y. 495, 499 (a call in a grant of B. in 1798, admitted; death of B. and his surveyor need not be shown; antiquity is sufficient "without enquiring as to whether the parties . . . are living or dead"); 1906, Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443 (reputation no earlier than 1884, in a suit brought in 1901, excluded); 1914, Sullivan *v.* Blount, 165 N. C. 7, 80 S. E. 892 (reputation of 40 years or more, admitted); 1917, Mechanics' Bank & T. Co. *v.* Whilden, 175; N. C. 52, 94 S. E. 723 (to identify a disputed corner in a grant of 1872, "general reputations as to what tract of land the locust at J. is at the corner of", excluded, not being ancient); 1921, Barnhill *v.* Hardee, 182 N. C. 85, 108 S. E. 348 (reputation of a street's width 30–35 years before, admitted).

[3] 1843, R. *v.* Milton, 1 C. & K. 62. Compare the statutes cited *post*, § 1597.

operating to supply a fair degree of trustworthiness is the third already noticed (*ante*, § 1422), namely, the consideration that the prolonged and constant exposure of a condition of things to observation and discussion by a whole community will in certain cases sift the possible errors and will bring the resulting belief down to us in a residual form of fair trustworthiness. These conditions are usually found where the matter is one which in its nature affects the common interests of a number of persons in the same locality, and thus necessarily becomes the subject of active, general, and intelligent discussion; so that whenever a single and definite consensus has been reached in the shape of common reputation, it may be supposed to have considerable evidential value. This principle underlies the willingness of the Courts to give credit to such a reputation in all the branches of the present Exception, and has often been stated specifically for this branch, though sometimes more or less imperfectly; the passages quoted from Lord Campbell and Mr. Justice Loomis express it in a form which leaves nothing to be desired:

1837, *Wright* v. *Tatham*, 7 A. & E. 358; on appeal, in 5 Cl. & F. 720. COLTMAN, J.: "Where boundary is proved by reputation, what is the guarantee for sincerity?" Mr. *Starkie*, of counsel: "The publicity of the transaction and the general interest in the fact being rightly ascertained." COLTMAN, J.: "The principle on which I conceive the exception [of reputation as to public rights] to rest is this, — that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which in most cases direct proof can no longer be given." ALDERSON, B.: "There are, no doubt, exceptions to this rule, in which hearsay evidence is admissible. One such exception is to be found in the case of public rights. There the general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias and makes the sanction of an oath less necessary."

1855, CAMPBELL, L. C. J., in *R.* v. *Bedfordshire*, 4 E. & B. 535: "The admissibility of the declarations of deceased persons in such cases is sanctioned . . . because in local matters in which the community are interested all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false, and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other who are all interested in investigating the subject."

1881, LOOMIS, J., in *Southwest School District* v. *Williams*, 48 Conn. 507: "The law does not dispense with the sanction of an oath and the test of cross-examination as a prerequisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth. The matters included in the class under consideration are such that many persons are deemed cognizant of them and interested in their truth, so that there is neither the ability nor the temptation to misrepresent that exists in other cases; and the matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination. . . . After passing such an ordeal, it is reasonably safe to accept the result as an established fact."

This being the well-accepted foundation for receiving a common reputation as trustworthy, certain limitations are deducible as a necessary consequence.

§ 1584. **Reputation, but not Individual Assertion.** What is offered must be in effect *a reputation*, not the mere *assertion of an individual*. This follows from the nature of the foregoing principle, and is the thought running through the language of all the judges.

But reputation includes and is often learned through the assertions of individuals; it is therefore constantly necessary to distinguish between (*a*) assertions involving mere individual credit and (*b*) assertions involving a community-reputation. The common form of question put to a reputation-witness was: "What have you heard old men, now deceased, say as to the reputation on this subject?" The judges constantly speak of "reputation from deceased persons."[1] Thus, though in form the information may be merely what deceased persons have been heard to say about a custom, yet in effect it comes or ought to come from them as a statement of the reputation.[2]

This aspect of the rule is frequently found stated in the form "the reputation must be general"; in other words, the hearsay statement "I know the right or custom to be such-and-such" is not receivable; but "I understand the general acceptance of the custom by the community to be such-and-such" is admissible. The deceased individual declarant is merely the mouthpiece of the reputation. Whenever, therefore, individual declarations are offered, they must appear to be, in the words of Baron Wood, "the result of a received reputation":[3]

§ 1584. [1] *E.g.*, 1813, Weeks *v.* Sparke, 1 M. & S. 689 ("Evidence is to be admitted from old persons . . . of what they have heard other persons, of the same neighborhood, who are deceased, say respecting the right"); 1808, Higham *v.* Ridgway, 10 East 120 ("Reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another"); see also the quotations *ante*, § 1582.

[2] As well put by Knox, J., in Bender *v.* Pitzer, 27 Pa. 335, "The declaration did not amount to general reputation; for one man's declaration of the existence of a fact does not prove that the allegation is generally reputed to be well founded."

[3] See also the following instances:

ENGLAND: 1831, Davies *v.* Morgan, 1 C. & J. 590; 1835, Drinkwater *v.* Porter, 2 C. & K. 182; 1844, Earl of Carnarvon *v.* Villebois, 13 M. & W. 332; 1903, Brocklebank *v.* Thompson, 2 Ch. 344, 352 (a certain memorandum, excluded); 1904, Mercer *v.* Denne, 2 Ch. 534 (fishing-rights; depositions taken in 1639, under an information by the Attorney-General, stating the point to which the sea extended, excluded; Farwell, J., holding that "depositions of deceased witnesses" are admissible against strangers "if they relate to a custom where reputation would be evidence; but then those depositions must be depositions of matters of reputation, and not of matters of fact"); 1905, Mercer *v.* Denne, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal, but on the principle of § 1591, *post*, by one of the three judges); 1913, Attorney-General *v.* Horner, 2 Ch. 140, 152 (Cozens-Hardy, M. R., "overborne by the weight of authority", rejected, on the ground that an individual's map must "purport to be a statement of reputation", three maps offered to show the physical condition of an alleged market-place in 1882, viz.: (1) a survey of 1677 by J. O. and W. M., dedicated to the Lord Mayor by W. M., his Majesty's cosmographer; (2) a map of 1681–2 by W. M.; (3) Gascoigne's map of Stepney, 1703); 1914, Fowke *v.* Berington, 2 Ch. 308 (location of ancient church buildings in the 1400s; "Habington's Survey of Worcestershire", a private treatise of repute, existing only in MS. until printed in modern times, containing a description of the premises made from H.'s personal observation in the early 1600s, was rejected, as not involving reputation; following Attorney-General *v.* Horner; but misunderstanding the principle).

CANADA: 1885, Vankoughnet *v.* Denison, 11 Ont. App. 699, 707 (reputation, as indicated by a city map, apparently not admitted to show the location and extent of a public square).

UNITED STATES: 1904, Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610 ("reputation" and "hearsay" distinguished); 1906, Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443 (a reputation sifting down merely to what J. C. said, J. C. being alive, excluded).

1822, WOOD, B., in *Moseley* v. *Davies*, 11 Price 180: "It must be proved that the declarations establishing the reputation, and the acts done [by the community] in consequence, were the result of a received reputation. . . . The principal use of evidence of this sort is to show that the act done or declaration made was not a new thought adapted to serve some particular occasion, but the consequence of a received notion of the existence of a custom requiring the performance of the act, and accounting for or explaining it by such declaration. Such evidence should always be general."

1837, DENMAN, L. C. J., in *R.* v. *Bliss*, 7 A. & E. 550 (rejecting testimony that R., now deceased, had planted a willow in a certain spot to show where the boundary had been of a way alleged to be public): "He does not assert that he has heard old people say what was the public road; but he plants a tree and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by an individual. . . . That is, he knew it to be so from what he had himself observed, and not from reputation."

It follows, conversely, that the form in which the reputation is presented is immaterial; whatever form it takes — individual writings, maps, leases, or the like — suffices if in truth it represents common repute; this application of the principle is later examined (*post*, § 1592).

But this exclusion of individual assertion, whenever it does not serve as the vehicle of reputation, applies of course only where the evidence is offered under the present Exception. Under the Exception for Private Boundaries, already examined (*ante*, § 1563), such declarations are in many American jurisdictions unquestionably admissible, merely as individual statements, and not associated with reputation. That Exception, historically, was mainly derived from the present one; but each now has its separate existence and peculiar limitations.

§ 1585. **Reputation not as to Specific Acts.** Furthermore, where a custom or right is to be shown, the reputation must be as to the custom or right itself, and *not as to particular occasions of its exercise*. It is obvious that as to such particular occasions or acts of its exercise there can be no fair opportunity for a reputation to arise. It can arise only as to the practice or validity of the right or custom in general. There may legitimately be a common reputation as to whether (for example) a general duty existed for the townspeople of Wilton to pay a fee at a certain tollgate; but not whether John Doe paid it on a particular occasion. It is sometimes said, misleadingly, that the reputation cannot be received as to a *particular fact;* [1] but this expression is inconclusive, because the line of a certain boundary is a "particular fact." This phrase, so far as used, has meant that, in proof of local customs, hearsay as to a particular individual act in exercise of the general custom would not be received. The latter form of phrasing is the more accurate (as used by Mr. Peake, *infra*); but, subject to explanation, the loose phrase occasionally found in judicial language need not mislead:

1801, Mr. *Peake*, Evidence, 13: "A witness may be permitted to state what he has heard from dead persons respecting the reputation of the right; but not to state facts of the exercise of it which the dead persons said they had seen."

§ 1585. [1] 1837, Coleridge, J., referring to the evidence excluded in R. *v.* Bliss, quoted *ante*, § 1584 ("It is a rule that evidence of reputation must be confined to general matters and not touch particular facts", *i.e.* the act of planting the willow).

1810, MACDONALD, C. B., in *Harwood* v. *Sims*, Wightw. 112 (admitting evidence of reputation from deceased persons as to a tithe payment): "I take this to be the distinction as to evidence of reputation: if they confine it to the fact of payment, it would not be evidence; unless the tradition that came with it was a reputation that that had always been the case."

1800, MUTER, C. J., in *Cherry* v. *Boyd*, Litt. Sel. Cas. 8: "Such hearsay evidence [of general customs and the common repute about them] is safe, because if not true, it can be disproved by other evidence of the same kind. But even in these cases hearsay is restricted from being evidence of particular facts; because in such instances, although the evidence should be false, yet counter evidence could not be expected." [2]

§ 1586. **Reputation must relate only to Matters of General Interest.** The question next arises, About what sorts of matters may reputation be received as trustworthy?

The principle already examined (*ante*, § 1583) prescribes the answer, — that the matter must be in its nature one about which a trustworthy common reputation could fairly arise, *i.e.* about which an active, constant, and intelligent discussion by the members of a community would result in a residuum of fairly trustworthy conclusions. As a rough-and-ready test, we may thus say that the matter should be one of *public*, or *general*, or *public and general*, *interest;* and this is the common phrasing; though it varies thus loosely. But this is still only a rule of thumb. To decide difficult cases it is necessary still to seek the living principle, and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant, and intelligent discussion a fairly trustworthy reputation is likely to arise. That this is the method actually followed by the Courts in ruling upon doubtful cases, and that the application of the principle is not narrowly to be made merely by defining the set terms "public" or "general", is seen in the following passages:

1835, *R.* v. *Antrobus*, 2 A. & E. 793 (evidence was rejected of reputation as to an exemption of the sheriffs of Chester county from executing criminals). Counsel for defendant: "The proper criterion as to the admissibility of reputation is whether the custom if it existed would be matter of public discourse." DENMAN, L. C. J.: "Reputation is admitted where a public interest is concerned; but I cannot see how the public are interested in the question which sheriff is to perform this duty."

1855, CAMPBELL, L. C. J., in *R.* v. *Bedfordshire*, 4 E. & B. 535 (admitting reputation whether the county or private owners were bound to repair a bridge): "Let us now upon these principles examine whether . . . evidence of reputation ought to be admitted. It does involve matter of private right. . . . But does it not likewise relate to matters of public and general interest within the received meaning of the words? . . . [After showing the community's interest in the question, and using the language quoted *ante*, § 1583], the question therefore is almost sure to be discussed in the neighborhood, and a true reputation upon the subject is likely to prevail."

1881, LOOMIS, J., in *Southwest School District* v. *Williams*, 48 Conn. 507 (after stating the general reason as above, and using the language quoted *ante*, § 1583): "But if the fact to be proved is a particular date, [here, of the existence of a school-house,] though con-

[2] *Accord:* 1805, Nicholls *v.* Parker, 14 East 331 (evidence admitted of what old persons had said concerning the boundaries of the parishes and manors; though not as to particular facts or transactions); 1793, Outram *v.* Morewood, 5 T. R. 122; 1836, Ellicott *v.* Pearl, 10 Pet. 437.

nected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guaranty for its correctness."

In the application of this general principle the typical classes of facts regarded as provable by reputation were *boundaries* of *public land-divisions* and *customs* affecting the rights and liabilities of the community in some governmental subdivision, — roughly speaking, public land boundaries and customs. But these kinds of facts, as the above quotations indicate, were merely typical and representative, not definitive. Sundry other facts of various sorts were also thus provable.[1] In the following passage is a sufficiently full and correct enumeration of the settled practice in England:

1895, SEYMORE, J., in *Robinson* v. *Dewhurst*, 15 C. C. A. 466, 68 Fed. 336: "The exception raises a question regarding that exception to the general rule excluding hearsay evidence which permits such evidence to be given, under certain limitations, in cases of ancient boundaries. The exception, as it originated in the English courts, was confined to such boundaries as were matters of public concern, and was part of a larger exception to the rule. On questions respecting the existence of manors; manorial customs; customs of mining in particular districts; a parochial modus; a boundary between counties, parishes, or manors; the limits of a town; a right of common; a prescriptive liability to repair bridges; the jurisdiction of certain courts, — matters in which the public is concerned, as having a community of interest, from residing in one neighborhood, or being entitled to the same privileges, or subject to the same liabilities, — common reputation and the declarations of deceased persons are received, if made, 'ante litem motam', by persons in a position to be properly cognizant of the facts."

§ 1587. **Same: Private Boundaries, Title, or Possession.** In the application of the foregoing principle, the subject of special controversy has been the ownership — in particular, the boundaries — of private property. May reputation be admitted of the *boundary-locations* of *private* property?

In *England* the answer was in the negative:

1811, KENYON, L. C. J., in *Morewood* v. *Wood*, 14 East 329: "Evidence of reputation upon general points is receivable because, all mankind being interested, it is natural to

§ 1586. [1] In the following cases reputation-evidence was *admitted: Eng.* 1899, Evans *v.* Merthyr Tydfil, 1 Ch. 241 (whether a piece of land was subject to commonable rights); 1905, Heath *v.* Deane, 2 Ch. 86, 91 (court rolls of a manor, admitted as to right of common for tenants to take stone; but not plainly on this ground); *U. S.* 1901, Klinkner *v.* Schmidt, 114 Ia. 695, 87 N. W. 661 (street boundary); 1883, State *v.* Vale Mills, 63 N. H. 4 (the former line of the road which the plaintiff was charged with obstructing); 1874, Cox *v.* State, 41 Tex. 4 (county lines); 1824, Ralston *v.* Miller, 3 Rand. Va. 49 (street lines); 1914, State *v.* Alderson, 74 W. Va. 732, 82 S. E. 1021 (county boundary).

In the following cases reputation-evidence was *rejected: Eng.* 1795, Withnell *v.* Gartham, 1 Esp. 325 (right of nomination to the place of schoolmaster); *U. S.* 1904, Hartford *v.* Maslen, 76 Conn. 599, 57 Atl. 740 (whether land was tendered by the city to the State in lieu of another site; the understanding of citizens at a mass-meeting in 1872, excluded; the precise point is obscure); 1867, Hall *v.* Mayo, 97 Mass. 417 (possession or habitancy of a house); 1875, Adams *v.* Swansea, 116 Mass. 596 (same); 1882, Boston Water Power Co. *v.* Hanlon, 132 Mass. 483 (same). The applicability of an Indian name to a given white person in a grant in a treaty was held not provable by hearsay, because the fact of identity would not "be likely to excite public interest", in Stockton *v.* Williams, 1 Dougl. Mich. 568 (1845).

The following ruling is anomalous: 1900, Shepard *v.* Turner, 129 Cal. 530, 62 Pac. 106 (reputation not admitted to show a road a public way).

suppose that they may be conversant with the subjects and that they should discourse together about them, having all the same means of information. But how can this apply to private titles? . . . How is it possible for strangers to know anything of what concerns only these private titles?" [1]

This conclusion was reached by a reasoned consideration of the principle on which reputation-evidence rests. But the correctness of the application may be questioned; for if such evidence may be offered to show customs and boundaries of a private manor, boundaries of a parish, and tithe-duties,[2] the principle may well cover any other property-rights in which a number are interested in general inquiry and discussion, whether the right is in substantive law called a public or a private one. Thus, in Weeks *v.* Sparke, decided shortly after Morewood *v.* Wood, *supra*, the argument was accepted that any fixed and (for this purpose) arbitrary distinction between "public" and "private" rights should be repudiated, and a flexible test be applied in each case, — this test being whether the matter affected the interests of a large number of persons:

1813, *Weeks* v. *Sparke*, 1 M. & S. 690 (a right of common being in issue); BAYLEY, J.: "I take it that where the term 'public right' is used, it does not mean 'public' in the literal sense, but is synonymous with 'general', — that is, what concerns a multitude of persons." DAMPIER, J.: "[Reputation-evidence] has been extended to other rights which strictly cannot be called public, such as manors, parishes, and a modus, which comes the nearest to this case. That, strictly speaking, is a private right, but has been considered as public, as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district."

This reasoning might have led ultimately in England to the admission of reputation-evidence for private-property matters; but the case was practically repudiated by Baron Parke, in 1850,[3] and subsequent English practice has checked all further advances. The rule may there be said to be determined by the distinction (for this purpose more or less arbitrary) between "public" and "private" property-rights; *i.e.* the "public interest" which is required to exist is taken as meaning the legal liability or right which is vested in each member of the community as such, — not as meaning merely a motive of any sort stimulating the mass of the community to a concern in the matter.

In the *United States* the result has been otherwise. The earliest English practice had clearly been to admit reputation as to private titles,[4] and it is

§ 1587. [1] *Accord:* 1811, Doe *v.* Thomas, 14 East 323.

[2] 1819, Stell *v.* Prickett, 2 Stark. 466, Abbott, C. J.; and cases *infra*, n. 3, and *post*, § 1592.

[3] *Eng.* 1850, Dunraven *v.* Llewellyn, 13 Q. B. 809 (a right of common for individuals, not for the community, was involved: Parke, B.: "Reputation is not admissible in the case of such separate rights, each being private, . . . unless the proposition can be supported that, because there are *many* such rights, the rights have a public character. We think this position cannot be maintained. It is impossible to say in such a case where the dividing point is. What is the number of rights which is to cause their nature to be changed and to give them a public character? . . . The number of these private rights does not make them to be of a public nature"); 1855, R. *v.* Bedfordshire, 4 E. & B. 535; *Can.* 1905, Barlett *v.* Nova Scotia S. Co., 37 N. Sc. 259, 264.

[4] Thayer, Cases on Evidence, 1st ed., 421, note.

therefore natural to find, on questions of private boundary, that reputation was regularly admitted without question in the early American cases.[5] Then, when the English cases of the early 1800s became known to our judges, and the question was argued on its merits as a matter of principle, the decision was reached — entirely in harmony with the conditions of life at the time — that the rule ought to admit reputation-evidence of the landmarks of private title:

1837, TUCKER, P., in *Harriman* v. *Brown*, 8 Leigh 708: "Because we have not manors, shall we therefore lose the benefit of the rule which considers boundary as matter of reputation and permits hearsay evidence of its locality? If a like state of things exists among us, if the principle will be found to apply in its utmost strictness, shall we reject the evidence because the case is not identical? By no means. . . . [After quoting Lord Kenyon's language, *supra*,] If reputation is admissible to establish the boundaries of a manor because all the tenants of a manor are interested therein and naturally conversant about the boundary, and may be presumed to discourse together about it, what shall we say in the case of our wild lands, which were covered with early adventurers whose chief concern was to make themselves acquainted with the lines and corners of all around them? . . . Every one knows that such subjects were not only the familiar topics of conversation, but that they were the all-absorbing topics. I will venture to conjecture that for one discussion in private conversation about the boundaries of an English manor, there have been a hundred animated and interested debates about the situation of a corner tree in our western counties. I take it therefore that every motive for the admission of hearsay testimony as to boundary in case of a manor applies with equal force to its admission in questions of boundary with us."

1860, FIELD, C. J., in *Morton* v. *Folger*, 15 Cal. 279: "In this country the admissibility of this kind of evidence . . . has been uniformly maintained when the tract originally surveyed was lar· , and was subsequently subdivided into numerous farms, the boundary of the original tract serving as a boundary of the several farms. In cases of this kind, the principle upon which the evidence is received has been regarded as similar to that which relates to boundaries of a manor or parish."

1860, SELDEN, J., in *McKinnon* v. *Bliss*, 21 N. Y. 218: "That hearsay or reputation is admissible as evidence . . . upon questions respecting the boundaries of lands, is a familiar doctrine. But there are no doubt other cases in which the same kind of evidence may be received for the purpose of establishing a mere private right, when the fact to be proved is one of a quasi-public nature, that is, one which interests a multitude of people, or an entire community. . . . The Royal Grant, as it is called, is an extensive tract, embracing an entire township and parts of several others; and everything relating to the original document upon which the title depended would necessarily affect the interests of every occupant of the tract"; and common report as to the disposition of the patent would be admissible.

The result has been that, except in Maine and Massachusetts,[6] it is now everywhere accepted in the United States as a legitimate application of the general principle, that reputation, so far as it definitely exists, may be admissible to prove the location of private boundaries.[7]

[5] 1823, Dane's Abr. III, 397 (citing some cases before 1800).

[6] 1853, Chapman *v.* Twitchell, 37 Me. 62; 1867, Hall *v.* Mayo, 97 Mass. 417; 1875, Long *v.* Colton, 116 Mass. 416 (abandoning the early Massachusetts practice). In an early case in Kentucky, no longer law, it was excluded for the unique reason that the matter did not lie in parol and could not be proved by parol: 1800, Cherry *v.* Boyd, Litt. Sel. Cas. 8.

[7] To the following, add the statutes cited *post*, § 1597: *Federal:* 1818, Conn *v.* Penn, 1 Pet. C. C. 511; 1887, Clement *v.* Packer, 125 U. S. 321, 8 Sup. 907. The reason of Mr. J. Story in Ellicot *v.* Pearl, 10 Pet. 435 (1836), given for a contrary view, that in re-

But this application of the principle is confined to reputation of boundaries. That *title* cannot be so evidenced is generally conceded.[8] There may however be cases in which *possession* should be thus provable, where adverse possession is to be shown.[9] At this point the present Exception shades off into an historically separate variant, whereby reputation may (by statute) be used to evidence *title*, *incorporation*, and other facts, in certain issues (*post*, § 1626); there the reputation may be modern and contemporary.

gard to private rights the acts of possession and assertion are capable of direct proof, but in public rights the acts of people not in privity with each other "cannot be explained to be in furtherance of a common public right", is vague, and, so far as intelligible, is without support; *Alabama:* 1873, Shook *v.* Pate, 50 Ala. 92; 1897, Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910; *Connecticut:* 1833, Higley *v.* Bidwell, 9 Conn. 451; 1839, Wooster *v.* Butler, 13 Conn. 315; 1845, Kinney *v.* Farnsworth, 17 Conn. 363; *Florida:* 1855, Daggett *v.* Wiley, 6 Fla. 511; *Georgia:* Rev. C. 1910, § 3821 ("General reputation in the neighborhood shall be evidence as to ancient landmarks of more than 30 years' standing"); *Illinois:* 1881, Holbrook *v.* Debo, 99 Ill. 385; *Kentucky:* 1819, Smith *v.* Prewit, 2 A. K. Marsh. 158; 1822, Smith *v.* Nowells, 2 Lit. 160; 1909, Thurman *v.* Leach, — Ky. —, 116 S. W. 300; *Maryland:* 1770, Redding's Lessee *v.* McCubbin, 1 Harr. & McH. 368; 1735, Howell's Lessee *v.* Tilden, ib. 84; 1854, Tyson *v.* Shucey, 5 Md. 540; 1909, Peters *v.* Tilghman, 111 Md. 227, 73 Atl. 726; *Minnesota:* 1894, Thoen *v.* Roche, 57 Minn. 135, 139, 58 N. W. 686 (allowable for U. S. survey lines; acceptance of U. S. doctrine undecided); *New Hampshire:* 1827, Shepherd *v.* Thompson, 4 N. H. 215; *New Jersey:* 1886, Curtis *v.* Aaronson, 49 N. J. L. 78; *North Carolina:* 1795, Standen *v.* Bains, 1 Hayw. 238; 1820, Tate *v.* Southard, 1 Hawks 47; 1825, Taylor *v.* Shufford, 4 Hawks 132; 1838, Mendenhall *v.* Cassells, 3 Dev. & B. 49, 51 (rejecting it here as too indefinite); 1896, Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154 (but where it relates not merely to landmarks or lines, but to a location being within a certain grant, evidence of "muniments of title" must accompany it); 1904, Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610 (Shaffer *v.* Gaynor followed); 1905, Hemphill *v.* Hemphill, 138 N. C. 504, 51 S. E. 42 (the reputation must be ancient and 'ante litem motam', and must refer to some monument or natural object or be corroborated by possession, etc.); 1906, Bland *v.* Beasley, 140 N. C. 628, 53 S. E. 443 (approving the foregoing cases, but here rejecting reputation because "no deed covering this tract of land is introduced, no monument or natural object is shown . . . and no occupation or possession of any such tract by H. or any of his descendants", etc.); *South Carolina:* 1886, Sexton *v.* Hollis, 26 S. C. 231, 236, 1 S. E. 893; *Texas:* 1866, Stroud *v.* Springfield, 28 Tex. 666; 1886, Clark *v.* Hills, 67 Tex. 152, 2 S. W. 356, *semble*.

[8] *Ala.* 1848, Moore *v.* Jones, 13 Ala. 303 (that an occupier was a lessee only); 1889, Ross *v.* Goodwin, 88 Ala. 390, 393, 396, 6 So. 682 (title by prescription); 1896, Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443 (ejectment); 1905, Henry *v.* Brown, 143 Ala. 446, 39 So. 325 (land); 1906, Doe *v.* Edmondson, 145 Ala. 557, 40 So. 505 (land); *Conn.* 1839, South School District *v.* Blakeslee, 13 Conn. 227, 235 (reputation of a house as "J. A.'s school-house", excluded; "a man's general character may be proved by reputation, but not his title to real estate"); *Mass.* 1836, Green *v.* Chelsea, 24 Pick. 71, 75, 80; 1863 Howland *v.* Crocker, 7 All. 153 (title by adverse possession; that a piece of land was known as "the Barney Crocker lot", not admitted to show title in him); *N. M.* 1911, Perkins *v.* Roswell, 16 N. M. 185, 113 Pac. 609 (ordinance forbidding to "keep, maintain, or operate" a sanatorium for certain diseases; common repute that the defendant "runs" it, excluded; unsound); *S. Car.* 1886, Sexton *v.* Hollis, 26 S. C. 231, 235, 1 S. E. 893; 1899, Hiers *v.* Risher, 54 S. C. 405, 32 S. E. 509; *Tex.* 1904, Crippin *v.* State, 46 Tex. Cr. 455, 80 S. W. 372 (permitting gambling in a house under control; ownership not provable by reputation; compare the cases cited *post*, § 1626, n. 7).

[9] *Admitted:* 1895, Vernon Irrig. Co. *v.* Los Angeles, 106 Cal. 237, 39 Pac. 762 (reputation admitted to show an ancient claim of ownership and actual control by the city); 1830, Jackson *v.* Miller, 6 Wend. 228 (that a lot of land was commonly known by the name of an individual, — as "Smith's Lot", or "The Duke's Farm", or "The Queen's Farm", was admitted to show that the person in question was at the time in occupation, personally or by agent, of the property); 1847, Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 732 (same).

Excluded: 1852, Benje *v.* Creagh, 21 Ala. 151, 156; 1888, Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 442, 6 So. 349; 1898, Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

But reputation may be otherwise admissible, in an issue of title by adverse possession, under the principle of § 254, *ante*, as evidence of the probable *knowledge* by the other party of the *existence of the adverse claim*, and therefore of acquiescence

It must be noted that, even in those jurisdictions where public boundaries alone are thus provable, the fact that the *private boundary* is alleged to be *identical with the public one* does not prevent the use of reputation to prove the latter, the identity being then otherwise shown.[10]

§ 1588. **Reputation as (1) 'Post Litem Motam', or (2) from Interested Persons, or (3) Favoring a Right.** Certain additional limitations have been suggested, as affecting the trustworthiness of the reputation; but only one of them has received any sanction.

(1) The limitation, already noticed as obtaining in other Hearsay exceptions, that the reputation, to be admissible, must have arisen 'ante litem motam', is well established; and its propriety cannot be doubted.[1]

(2) It was once argued that one's *interest as a member of the community* would involve bias, and hence statements of reputation as to a customary right in a community, coming from a deceased member of the community, could not be received. But such a declarant speaks merely of the current and undisputed reputation, and moreover is usually not personally interested in any important degree; and the argument against admission has not prevailed.[2]

(3) For the same reason, it is immaterial whether the reputation *favors or disparages* the existence of the custom or boundary;[3] because, although members of the community may be interested and biassed in favor of a public right, nevertheless there is almost invariably an equal opposite interest in

[10] 1837, Thomas *v.* Jenkins, 6 A. & E. 525 (the boundary of a farm being in issue, and its identity with the hamlet-boundary being testified to, reputation as to the hamlet-boundary was admitted; Coleridge, J.: "The objection comes to this, that evidence shall not be given as to the boundary of a hamlet in the same mode as on other occasions because the proof is in the particular case only subsidiary. But I never heard that a fact was not to be proved in the same manner, when subsidiary, as when it is the very matter in issue"); 1893, Mullaney *v.* Duffy, 145 Ill. 559, 564, 33 N. E. 750 (where a private depends on a public boundary, the latter may be shown by reputation); 1839, Abington *v.* N. Bridgewater, 23 Pick. Mass. 174 (admitting declarations as to a boundary line with reference to proving, not a public right, but the situation of a house where a pauper lived); 1879, Drury *v.* Midland R. Co., 127 Mass. 581 (allowing reputation as evidence of the location of a creek "notorious and public in its nature", which in one view of the case was a dividing line between counties, and in another was in issue as a private boundary); 1921, Barnhill *v.* Hardee, 182 N. C. 85, 108 S. E. 348 (boundary line on a public street; reputation 30–35 years ago of width of the street, admitted).

Contra, semble: 1894, R. *v.* Berger, 1 Q. B. 823, 827 (obstructing a highway; dispute as to boundary; old map held admissible to show that land was a highway, but not to show the boundaries; unsound). *Not decided:* 1918, Virginia & W. Va. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83, 116.

§ 1588. [1] *Accord: Eng.* 1805, Nicholls *v.* Parker, 14 East 331, note; 1811, Mansfield, C. J., and Lord Redesdale, in Berkeley Peerage Case, 4 Camp. 416, 421; 1813, R. *v.* Colton, 3 Camp. 44, Dampier, J.; 1830, Richards *v.* Bassett, 10 B. & C. 661; 1832, Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 279; (but in Mercer *v.* Denne, 1904, 2 Ch. 534, 1905, 2 Ch. 535, 560, an ancient deposition was said to be admissible, ignoring the present principle); *U. S.* 1852, Adams *v.* Stanyan, 24 N. H. 412; 1917, Mechanic's Bank T. Co. *v.* Whilden, 175 N. C. 52, 94 S. E. 723; 1902, Westfelt *v.* Adams, 131 N. C. 379, 42 S. E. 823 (reputation after 1886, not admitted in the trial of an action begun in 1891); 1886, Clark *v.* Hills, 67 Tex. 152, 2 S. W. 356.

Contra, for a verdict as reputation (*post*, § 1593): 1816, Freeman *v.* Phillipps, 4 M. & S. 491; 1877, Duke of Devonshire *v.* Neill, L. R. Ire. 2 Exch. 156.

Compare the more fully developed definition of 'lis mota' under the Family History (Pedigree) exception (*ante*, § 1483).

[2] 1810, Harwood *v.* Sims, Wightw. 112; 1822, Moseley *v.* Davies, 11 Price 175.

[3] 1835, Drinkwater *v.* Porter, 2 C. & K. 182; 1830, Russell *v.* Stocking, 8 Conn. 240.

many as individuals in favor of a private claim, excluding the public one; so that the reputation, as it finally settles down in a definite form, represents the result of conflicting claims, and not merely a one-sided opinion.

2. Testimonial Qualifications, and Other Independent Rules of Evidence

§ 1591. **Reputation must come from a Competent Source; Reputation in Another District.** The principle that the witness must appear to have been in a position to obtain adequate knowledge (*ante*, § 653) finds an application to the present Exception. The reputation, to be admissible, must obviously have been formed among a class of persons who were in a position to have sound sources of information and to contribute intelligently to the formation of the reputation:

1813, LeBlanc, J., in *Weeks* v. *Sparke*, 1 M. & S. 698: "The only evidence of reputation which was received was that from persons connected with the district, . . . such evidence being confined to what old persons who were in a situation to know what these rights are have been heard to say concerning them." [1]

In particular, the reputation must be offered from *the particular district* or the particular class of persons affected: [2]

1835, Parke, B., in *Crease* v. *Barrett*, 1 C. M. & R. 928: "In cases of rights or customs which are not, properly speaking, public but of a general nature and concern a multitude of persons . . . it seems that hearsay evidence is not admissible unless it is derived from persons conversant with the neighborhood. . . . But where the right is really public — a claim of highway, for instance — in which all the King's subjects are interested, it seems difficult to say that there ought to be any such limitation. In a matter in which *all* are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighborhood or frequently using the road in dispute."

§ 1592. **Vehicle of Reputation; Old Deeds, Leases, Maps, Surveys, etc.** It is of course immaterial what form the reputation takes. That it may come in the shape of an individual's assertions, provided they genuinely purport to represent reputation, has already been noticed (*ante*, § 1584); and many other forms are to be recognized in the precedents. For example, the official

§ 1591. [1] In the following cases the rulings were too strict; the knowledge might have been presumed: 1854, Hammond *v.* Bradstreet, 10 Ex. 396 (a map of county boundaries from an old survey by J. and W. K. was rejected); 1904, Mercer *v.* Denne, 2 Ch. 535, 544 (a map of the sea-shore, made by an engineer, etc., in 1837, and found both in the British Museum and in the Admiralty, excluded, per Farwell, J., apparently on the present ground in part; but the opinion is a strange one); 1905, Mercer *v.* Denne, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal; Vaughan Williams, J.: "The second question is: Were the deponents persons to whom we ought to impute such knowledge of the subject-matter as would render their statements evidence of reputation?"; but this part of the opinion was applied to certain ancient depositions, not to the map ruled upon by Farwell, J., *supra*); 1914, Fowke *v.* Berington, 2 Ch. 308 (Habington's Survey of Worcestershire, dating in the early 1600s, not admitted to show the location of parish church premises; the opinion misunderstands the principle; cited more fully *ante*, § 1584).

[2] 1849, Duke of Beaufort *v.* Smith, 4 Exch. 467, 469 (to prove a custom, an alleged survey of 1650 by a jury of the manor was excluded; Parke, B: "The question is whether a jury of the manor are not presumed to be acquainted with its customs, so as to bring the case within the rule laid down in Crease *v.* Barrett"; answering in the negative); 1852, Daniel *v.* Wilkin, 7 Exch. 437; 1860, McKinnon *v.* Bliss, 21 N. Y. 218, per Selden, J.

return of an assembly of the homage (or tenants of a manor), rehearsing customs, fees, and the like, was always regarded as equivalent to a reputation among the tenants, and therefore as receivable.[1] In the same way, old *maps*[2] and old *surveys*,[3] so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after this test of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey. So also, muniments of private title, such as old *deeds* and *leases*,[4] may, in a given case, just as effectually be the vehicle of reputation.[5] The use of history-books in this way is elsewhere considered (*post*, § 1598).

§ 1593. **Same: Jury's Verdict as Reputation.** That the verdict of a jury may amount to a statement of reputation has often been maintained, and the original practice, where the matter was of a public nature, was to admit verdicts upon this theory:

> 1801, LAWRENCE, J., in *Reed v. Jackson*, 1 East 357: "Reputation would have been evidence as to the right of way in this case; 'a fortiori', therefore, the finding of twelve men upon their oaths."

But the practice may be said not to have obtained in the United States, and has now in effect been discredited in England.

The truth is that it has to-day no possible justification under the present Exception. Its allowance up to the early part of the 1800s was merely "a relic of the time when a jury's verdict was a conclusion upon their own knowledge."[1] The jury's verdict did once represent the reputation of the neighborhood.[2] But in the modern practice neither a jury's verdict nor a judge's

§ 1592. [1] 1786, Goodwin *v.* Spray, 1 T. R. 473, per Ashhurst, J.; 1793, Beebee *v.* Parker, 5 T. R. 14.

[2] 1843, R. *v.* Milton, 1 C. & K. 62 (a map of parish boundaries made from information of one old man); 1898, Taylor *v.* McGonigle, 120 Cal. 123, 52 Pac. 159; 1852, Adams *v.* Stanyan, 24 N. H. 411; 1879, Drury *v.* Midland R. Co., 127 Mass. 581; and cases cited *passim* in the foregoing sections.

[3] 1816, Bullen *v.* Michel, 4 Dow 297; 1870, Smith *v.* Earl Brownlow, L. R. 2 Eq. 252; 1914, Fowke *v.* Berington, 2 Ch. 308 (cited more fully *ante*, § 1584, n. 3, § 1591, n. 1); 1852, Adams, *v.* Stanyan, 24 N. H. 411.

For maps and surveys, see also the exception for *deceased surveyors* (*ante*, § 1570), and the exception for *official surveyors* (*post*, § 1665). Most rulings about maps involve merely the question whether a *deed* has *by reference* incorporated a map, — not a question of evidence; compare §§ 1777, 1778, *post* (verbal acts), §§ 2464–2466, *post* (interpretation by usage).

[4] 1832, Henderson, C. J., in Sasser *v.* Herring, 3 Dev. L. 342: "We have also received private deeds and mesne conveyances . . . under the idea that they are common reputation. 'A fortiori' should grants from the State be admitted, for they are something more than the declaration of private individuals." *Accord:* 1819, White *v.* Lisle, 4 Madd. 223; 1829, Coombs *v.* Coether, 1 M. & M. 399; 1829, Plaxton *v.* Dare, 10 B. & C. 19 (it was argued for admission that "the fact recited in the leases . . . was equivalent to declarations made by the deceased landlords and the tenants"); 1829, Brett *v.* Beales, 1 M. & M. 418 (a deed under the seals of the University and Corporation of Cambridge); 1890, Weld *v.* Brooks, 152 Mass. 297, 305, 25 N. E. 719 (deed of 1860, between parties now deceased, admitted as reputation to evidence "the existence and location of a public way").

Compare the use of old deeds as *circumstantial evidence of possession* (*ante*, § 157).

[5] For *perambulations* as reputation-evidence, see *ante*, § 1563.

§ 1593. [1] Thayer, Cases on Evidence, 1st ed., 422; Preliminary Treatise, 90 ff., 168 ff.; *post*, § 1800.

[2] 1840, Alderson, B., in Pim *v.* Curell, 6 M. & W. 254 (answering the citation of earlier cases): "That was when the jury was summoned 'de vicineto', and their functions were less limited than at present."

decree can well be regarded as a vehicle of reputation in any true sense. In the first place, if the judge or the jury were to be brought into court and asked, "What appeared to you to be the reputation among the witnesses?", the answer might in some cases involve reputation. But even here the difficulty is that neither judge nor jury do come into court as sworn witnesses to reputation. Next, the statement involved in a verdict or a decree does not necessarily or probably involve an answer to the above question. The verdict or the decree may have gone merely upon the preponderance of testimony; or it may have taken an old deed or other document as of superior and controlling value; or there may have been no evidence at all that could amount to a reputation. No doubt a previous verdict or decree should properly have an evidential value which the present form of the Hearsay rule does not concede it; but it is certainly not to be forced into evidence under the present exception.

That its acceptance was anomalous in modern practice came to be perceived in England in the middle of the century; it was admitted on precedent and half-heartedly, as "a sort of reputation."[3] Finally, when in 1882 such evidence was again received, and by the House of Lords, it was not under the Reputation exception, or as hearsay at all under any exception, but as a "verbal act" (*post*, § 1778), — *i.e.* not as testimonial assertion, but as an act of possession in the course of the exercise of a public right by the people of the neighborhood.[4] This seems to dispose of its use under the present exception.

§ 1594. **Same: Judicial Order or Decree, or Arbitrator's Award, as Reputation.** In connection with the earlier doctrine, just examined, that a jury's verdict might be used as involving reputation, the attempt was sometimes made to treat a judge's or arbitrator's order or award as also admissible in the same way. But for the reasons just stated, as well as upon the principle

[3] 1838, Brisco *v.* Lomax, 8 A. & E. 211 (Littledale, J.: "It is not reputation; but it is as good evidence as reputation"; Patterson, J.: "Now it is certainly difficult to say that a verdict can be received merely as evidence of reputation; for a jury are summoned from the body of the county at large, and are not themselves likely to know the matter. . . . Yet where a matter has been before a jury, the verdict is generally given in evidence as a sort of reputation, if I may so term it"; Coleridge, J.: "It is not precisely evidence of reputation"); 1840, Pim *v.* Curell, 6 M. & W. 266, per Abinger, C. B.

[4] 1882, Neill *v.* Duke of Devonshire, L. R. 8 App. Cas. 147 (Selborne, L. C.: "Such evidence, admissible in cases in which evidence of reputation is received, is not itself in any proper sense evidence of reputation. It really stands upon a higher and a larger principle, especially in cases, like the present, of prescription; . . . it comes within the category of 'res gestæ' and of declarations accompanying acts. . . . The effect of this evidence . . . is extremely strong to establish a state of possession and enjoyment of the fisheries"; Lord O'Hagan: "I think the proceedings were admissible, not as evidence of reputation, which I agree they are not, but of something higher and better than reputation, . . . of the possession in fact at the time of the bills being filed of the several fishery. . . . Evidence of acts and proceedings with reference to the river generally — the leases, the covenants and reservations, the actions, the judgments, the licenses, and the successful assertions of right under the patents — was properly admitted"; Lord Blackburn agreed that the Court decree "is perhaps not properly evidence of reputation", but is "as strong or stronger than reputation"); 1869, Holiister *v.* Young, 42 Vt. 403, 407 (verdict in trespass or ejectment as indicating a claim of title).

of lack of Knowledge (*ante*, § 1591), such a use of orders or decrees has generally been repudiated.[1]

§ 1595. **Negative Reputation.** It would seem, on the analogy of other instances (*ante*, §§ 1071, 1497, 1531, 1556, *post*, 1614), that an assertion may be made by silence, and that therefore the absence of a reputation (*i.e.*, the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged) should be admissible as a negative reputation.[1]

B. EVENTS OF GENERAL HISTORY

The general principles of this branch of the exception do not differ materially from those of the preceding one; but the line of precedents is a separate one, and the scope of application is in some respects broader; so that it seems more profitable to regard it as a distinct branch of the exception.

§ 1597. **Matter must be Ancient; Statutory Regulation.** The principle of Necessity, allowing the use of this class of evidence, is the same as that already examined (*ante*, § 1582), namely, the matter as to which the history or other treatise is offered must be an *ancient* one, or one as to which it would be unlikely that living witnesses could be obtained. In other words, it must be a matter concerning a former generation.[1] Statutory declaration of the rule, however, has sometimes ignored this,[2] partly through a failure to dis-

§ 1594. [1] 1831, Rogers *v.* Wood, 2 B. & Ad. 256 (excluding a decree of court by certain judges, offered as reputation; "here the persons acting as judges had no knowledge of the fact [*i.e.* the customary rights of a city] except what they derived in the course of that proceeding); 1832, Duke of Newcastle *v.* Braxtowe, 4 id. 279 (orders of sessions made by the justices of the peace assembled in sessions were admitted as evidence of reputation as to a local custom, because, per Parke, J., "though they were not proved to be resiants in the county or hundred, they must, from the nature and character of their offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate"); 1839, Evans *v.* Rees, 10 A. & E. 155 (Denman, L. C. J.: "[The opinion of an arbitrator as to a boundary is] formed not upon his own knowledge, as declarations used by way of reputation commonly are").

In the following cases a chancellor's decree was thus admitted: 1838, Laybourn *v.* Crisp, 4 M. & W. 326, per Parke, B.; 1877, Duke of Devonshire *v.* Neill, L. R. Ire. 2 Exch. 153.

§ 1595. [1] 1835, Drinkwater *v.* Porter, 2 C. & K. 182; 1842, Anglesey *v.* Hatherton, 10 M. & W. 239, 244, *semble*.

§ 1597. [1] 1833, Morris *v.* Lessee, 7 Pet. 558; 1871, Whiton *v.* Insurance Cos., 109 Mass. 31 (Appleton's American Cyclopedia, offered to prove that a certain island was reputed to be a guano island, was rejected because the facts were of recent occurrence). The same result is reached in construing Code provisions: 1885, Gallagher *v.* R. Co., 67 Cal. 15, 6 Pac. 869 (McKee, J., construing C. C. P. § 1936: "What are 'facts of general notoriety and interest'? We think the term stands [1] for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from [2] facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses").

[2] The Code provisions are as follows: *Alabama:* Code 1907, § 3961 ("Hearsay evidence as to declarations of deceased persons as to ancient rights, and made before the litigation arose, are admissible to prove matters of public interest in which the whole community are supposed to take interest and have knowledge"); *California:* C. C. P. 1872, § 1870, par. 11 ("common reputation existing previous to the controversy, respecting facts of a public or general interest more than 30 years old, and in cases of pedigree or boundary", is admissible); par. 13 ("monuments and inscriptions in public places, as evidence of common reputation", are admissible); § 1936 ("Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are 'prima facie' evidence of facts of general notoriety and interest"); *Georgia:* Rev. C. 1910, § 5770 ("declarations of deceased persons as to ancient rights, made before litigation arose", admissible to prove "matters of public interest in which the whole community are supposed to take interest and to

criminate properly between the present exception, in this and the foregoing branch, and the exception created for Learned Treatises in general (*post*, § 1693).

§ 1598. **Matter must be of General Interest.** When a treatise on history is offered as embodying a reputation of the community upon the fact in question, the treatise, in the first place, cannot be regarded as more than the statement of the individual author, unless it is a work so widely known, so long used, and so highly respected, that it can be said to represent the assenting belief of the community. In the next place, the facts for which such an opinion or reputation can be taken as trustworthy must (on the principle of § 1583, *ante*) be such facts as have been of interest to all members of the community as such, and therefore have been so likely to receive general and intelligent discussion and examination, by competent persons, that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality.

This much of a general principle can be said to be beyond dispute. But for the application of the principle, it seems impossible to say that any more definite limitations have been accepted as law:

1696, *Steyner* v. *Droitwich*, Skinner 623, 1 Salk. 281: "Camden's Britannia was offered in Evidence to prove a Reputation Ninety-two years ago that Salt ought to be made only at the three Pits of the Burgesses [of Droitwich] and that all others were excluded. And it was said that the Sayings of antient Persons who are dead is always allowed, and this amounts to as much as the saying of an old Man at least, and that Camden was a publick Person, being Historiographer Royal, etc., and that a Gravestone had been allowed as Evidence. 'Sed non allocatur'; for if one part of Camden be allowed, another part ought to be, and if Camden, then another Historian as well as him, and there would not be any certainty. . . . And the Court said that an History may be evidence of the general history of the Realm, but not of a particular Custom; and therefore 'secundum subjectam materiam' it may be good Evidence or not."

1833, STORY, J., in *Morris* v. *Lessees*, 7 Pet. 558: "Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined . . . to cases where from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence."

1847, SANDFORD, V. C., in *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 724: "The statements of historians of established merit . . . are from necessity received as evidence of facts to which they relate, . . . restricted to facts of a public and general nature."

have knowledge"); § 5772 ("traditionary evidence as to ancient boundaries and landmarks", admissible); § 3821 ("acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line"); *Idaho:* Comp. St. 1919, § 7961 (like Cal. C. C. P. § 1936); *Iowa:* Code 1897, § 4618. Comp. C. § 7325 (like Cal. C. C. P. § 1936); *Montana:* Rev. C. 1921, § 10531, par. 11 (like Cal. C. C. P. § 1870); § 10584 (like Cal. C. C. P. § 1936); *Nebraska:* Rev. St. 1922, § 8852 (like Cal. C. C. P. § 1936, substituting "or" for "and" in the last clause, and "presumptive" for "'prima facie'"); *Oregon:* Laws 1920, § 727, par. 12, 13 (like Cal. C. C. P. § 1870); § 781 (like Cal. C. C. P. § 1936); *Philippine Islands:* C. C. P. 1901, § 298, par. 11, 12 (like Cal. C. C. P. § 1870); § 320 (like Cal. C. C. P. § 1936); *Porto Rico:* Rev. St. & C. 1911, § 1403, par. 9 (like Cal. C. C. P. § 1870, par. 4); par. 11 (like ib. § 1870, par. 13); § 1451 (like ib. § 1936); *Utah:* Comp. L. 1917, § 7107 (like Cal. C. C. P. § 1936).

1860, SELDEN, J., in *McKinnon* v. *Bliss*, 21 N. Y. 216: "Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals and mere local communities. . . . History is admissible only to prove history, that is, such facts as being of interest to a whole people are usually incorporated in a general history of the state or nation." [1]

In some instances the principle has been applied too narrowly, for example, in excluding *county-histories;* [2] for on certain matters there may be a general and settled county-reputation which will be quite as trustworthy as a national reputation upon national matters. There should therefore be no arbitrary line excluding local histories.

§ 1599. **Discriminations; (1) Judicial Notice; (2) Scientific Treatises.** (1) The paucity of rulings upon this class of evidence is probably due to the consideration that when a fact — for example, the date of Washington's birth or of Lincoln's assassination — is one of such general interst as to render an accepted historical treatise admissible upon the present principle, the fact is also of such notoriety that it will be assumed as true by the Court, upon the principles of *Judicial Notice* (*post*, § 2565). In such a case, if the judge is actually not certain of the precise truth as to the fact alleged, but it is of a class capable of being judicially noticed, he may consult an accepted treatise

§ 1598. [1] Other examples are as follows: *England:* 1672, St. Katherine's Hospital, 1 Vent. 151 ("It was shewn out of Speed's Chronicles, produced in Court, that at that Time Queen Isabel was under great Calamity and Oppression, and what was then determined against her was not so much from the Right of the Thing as the Iniquity of the Times"); 1682, Bronuker *v.* Atkyns, Skinner 14 ("Speed's Chronicle was given in Evidence to prove the Death of Isabel, Queen Dowager to E. II; and though Maynard seemed to oppose it, and Dobbins said it was done by Consent; yet the Chief Justice said he knew not what better Proof could be made. And Wallop said that in the Lords' House it was admitted by them as good evidence in the Lord Bridgewater's Case"); 1684, L. C. J. Jeffreys, in Lady Ivy's Trial, 10 How. St. Tr. 555, 625 (rejecting a history offered to show the date of Charles V's abdication and Philip and Mary becoming king and queen of Spain, over a century before: "Instead of records, the upshot is a little lousy history . . . Is a printed history, written by I know not who, an evidence in a court of law?"); 1718, Proceedings respecting the Education, etc., of the Royal Family, 15 How. St. Tr. 1202, 1203, 1206, 1209 (the Judges drew up an opinion upon the King's prerogative in the matter, and cited precedents on the exercise of the prerogative from Rymer's Fœdera, Lord Clarendon's History, Cotton's Record, Kennett's History of England, Burnet's History of the Reformation).

United States: 1834, Marguerite *v.* Chouteau, 3 Mo. 540, 555 (DuPratz, Barbé Marbois and others' works, consulted as to the existence of slavery of Indians in America in the 1700s); 1836, Com. *v.* Alburger, 1 Whart. Pa. 469, 473 (a letter of William Penn confirming a certain grant; its mention "in Proud and various other historical works" treated as sufficient, the matter being ancient); 1869, Baird *v.* Rice, 63 Pa. 489, 496 (in determining the ancient plan of London's streets, etc., so as to interpret Penn's plan of Philadelphia, the following works were consulted: Maitland's History of London, 1754; Bohn's Pictorial Handbook of London, 1854; Great London Directory, 1855); 1811, Hadfield *v.* Jameson, 2 Munf. Va. 53, 71, per Tucker, J. (Edwards' History of the West Indies, used to show the government of Hispaniola).

[2] 1834, Evans *v.* Getting, 6 C. & P. 586 (to show the boundary between two counties, Brecon and Glamorgan, Nicholl's History of Brecknockshire was offered; Alderson, B.: "This is a history of Brecknockshire. The writer of that history probably had the same interest in enlarging the boundaries of the county as an other inhabitant of it. It is not like a general history of Wales. I shall not receive it"; the fault of this decision is that it seems to proceed upon the principle that local interest excludes reputation, — a principle seen *ante*, § 1589, to have been repudiated; the above ruling largely influenced the two ensuing); 1860, McKinnon *v.* Bliss, 21 N. Y. 216 (rejecting Benton's History of Herkimer Co.); 1887, Roe *v.* Strong, 107 id. 356, 14 N. E. 294 (rejecting Thompson's History of Long Island).

as the basis of his ruling (*post*, § 2569); and thus the treatise is in fact used and trusted without being offered formally in evidence to the jury. An equivalent result is by indirection attained; and it can hardly be doubted that, while in practice little inconvenience is felt, yet in theory there is a lurking inconsistency.

(2) In a few jurisdictions, by way of a special Exception, the use of *scientific treatises* in evidence has, with certain limitations, been sanctioned (*post*, § 1690); so that an historical treatise not admissible under this exception might be receivable under that one. Nevertheless, the modern judicial tendency has been to construe the statutes in question as intended merely to re-state the present exception and not to create a new one (*post*, §§ 1693, 1697–1699).

C. Marriage, and other Facts of Family History

§ 1602. **Reputation of Marriage; General Principle.** The use of reputation, by exception to the Hearsay rule, to evidence marriage, fulfils both of the ordinary prerequisites already noted, the necessity principle (*ante*, § 1421) and the principle of trustworthiness (*ante*, § 1422).

The *necessity*, however, here lies not, as for land-boundaries (*ante*, § 1582), in the antiquity of the matter to be proved and the consequent dearth of living testimony, but in the absence of satisfactory direct testimony to the act of exchanging marriage consent. At common law the persons said to have been married, being usually parties or otherwise interested in the cause, would consequently have been disqualified as witnesses; and, when they were only third persons not interested (as in a contest over the inheritance of their property) would usually have been deceased and therefore unavailable. Furthermore, the procurement of the celebrant of their marriage, as a living witness, would usually not be feasible; and the use of a written record, in the shape of a certificate or a register-entry, was to a great extent not permissible by law, owing chiefly to the defective regulations of such records in English and American communities (*post*, §§ 1642–1645). Finally, the latter source of evidence was in the United States likely to be even more scanty, first, because of the constant migration of families over wide regions, and, next, because a marriage was here almost universally treated as valid without a ceremonial celebration, and therefore no record of it would exist for all such informal marriages. Practically, therefore the chief available sources of evidence were two only. One of these was the conduct of the persons themselves as husband and wife; this was used as circumstantial evidence indicating a prior exchange of consent, and has already been examined (*ante*, § 268); it was commonly spoken of as "habit." The other was the present kind of evidence, namely, reputation in the community as married persons.

As to its *trustworthiness*, for ordinary practical purposes, there could equally be no doubt. The relation of husband and wife has important consequences, social and legal, for those who deal with persons purporting to be such. The

community has decidedly an interest to ascertain the fact; and this interest in ascertaining the truth has been already seen to be the ground for exceptionally admitting other kinds of hearsay statements (*ante*, §§ 1482, 1486, 1586) as from persons sufficiently qualified. The adequacy of this ground in the present instance has been expounded in the following passages:

1867, Lord CRANWORTH, in the *Breadalbane Case*, L. R. 1 H. L. Sc. 199: "The great facility which the law of Scotland affords for contracting marriage has given rise to rules and principles which have been sometimes considered peculiar to that law. By the law of England, and, I presume, of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbors, there is a 'prima facie' presumption that they really are and have been what they profess to be. If after their deaths a succession should open to their children any one claiming a share in such succession as a child would establish a good 'prima facie' case by showing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as their child to establish its validity, and, inasmuch as in England all marriages are solemnized in public and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so. The principle is the same in Scotland; but as marriage there is not necessarily celebrated in public or recorded, it is much more probable than it would be in England that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide, after the death of parents, on the legitimacy of children must much oftener than in England have to rely solely on the 'prima facie' evidence afforded by the conduct of the parties towards one another and of their friends and neighbors towards them. This sort of evidence is spoken of in Scotland as *habite* and *repute*. Persons are sometimes said to be married persons by 'habite and repute.' I agree, however, with the argument of the Appellant (speaking with deference to those who think otherwise), that this is an inaccurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties and of their friends and neighbors, in other words, 'habite' and 'repute', may afford strong, and, in Scotland, attending to the laws of marriage there existing, unanswerable evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that 'habite' and 'repute' in any case make the marriage. Repute can obviously have no such effect. It is, perhaps, less inaccurate to speak of 'habite' creating marriage, if by the word 'habite' we are to understand the daily acts of persons living together which imply that they consider each other as husband and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It seems to me, however, even here to be an improper use of the word to say that it makes marriage. The distinction is perhaps one rather of words than of substance; but I prefer to say that 'habite' and 'repute' afford by the law of Scotland, as indeed of all countries, evidence of marriage, — always strong, and, in Scotland, unless met by counter evidence, generally conclusive."

1844, Mr. *J. Hubback*, Succession, 244: "Reputation of marriage, unlike that of other matters of pedigree, may proceed from persons who are not members of the family. The reason of the distinction is to be found in the public interest which is taken in the question of the existence of a marriage between two parties; the propriety of visiting or otherwise treating them in society as husband and wife, the liability of the man for the debts of the woman, the power of the latter to act 'suo jure', and their competency to enter into new matrimonial engagements, being matters which interest not their relations alone, but every one who by coming into contact with them may have occasion to regulate his conduct according as he understands them to be married or not."

1882, FINCH, J., in *Badger* v. *Badger*, 88 N. Y. 546, 552: "The reputation attending this cohabitation in the neighborhood where it existed and was known among those brought into its presence by relationship, business, or society, was that which ordinarily attends the dwelling together of husband and wife. It has been well described as the shadow cast by their daily lives. In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect, we are enabled to see the character of the cohabitation and discern its distinctive features. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing a conclusion." [1]

Accordingly, it has been universally conceded that reputation in the community is always admissible to evidence the fact of marriage;[2] there does not seem to have been any time when this was disputed.

§ 1603. **What constitutes Reputation; Divided Reputation; Negative Reputation.** (1) The reputation need not be such as exists in the *neighborhood; i.e.* the limitation generally laid down (*post*, § 1615) for the use of reputation to moral character is not here applied. The fact of marriage may be of interest to many others than mere neighbors. To them chiefly it may be of social interest; but to others it may be of legal interest and equally important. There seems to be no settled formula of inquiry; in general, it may be assumed that the reputation may be one existing among any persons who *know the parties* said to be married:

1832, *Evans* v. *Morgan*, 2 Cr. & J. 453, 456: assumpsit on a note made by a woman before coverture; the only evidence of the marriage "was that of a person who did not appear to be related to them, or to live near them, or know them intimately; and proved only that he knew the defendant J. M. when she was J. R. and that he had heard that she had since married M."; this witness was not cross-examined. Counsel argued that "it has never been held that such loose evidence as this amounts to evidence of reputation." BAYLEY, B.: "It goes to show the reputation of the neighborhood." LYNDHURST, L. C. B.: "If you do not cross-examine on such point, you must take those expressions in the ordinary sense." VAUGHAN, B.: "I think that there was 'prima facie' evidence of reputation of a marriage." [1]

(2) The reputation must be a consensus of opinion; it must not be a (so-called) *divided* reputation:

1814, Lord REDESDALE, in *Cunningham* v. *Cunningham*, 2 Dow 482, 511: "The parties must be reputed and holden to be married. It must not be an opinion of A in contradiction to an opinion of B, and of C in opposition to D; it must be founded not on singular,

§ 1602. [1] Compare the following cases: 1874, Lyle *v.* Ellwood, L. R. 19 Eq. 107; 1876, De Thoren *v.* Attorney-General, L. R. 1 App. Cas. 686.

[2] The singular rule is laid down in Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (1905) that where a ceremonial marriage is relied on reputation is inadmissible; this law would disturb thousands of lawful couples; the opinion of the majority in this case is an extraordinary one, full of loose law.

§ 1603. [1] 1791, Standen *v.* Standen, Peake N. P. 33 (that the deceased clerk of the parish had said the banns were published, admitted by Lord Kenyon "as evidence of the general reputation"); 1847, Jones *v.* Hunter, 2 La. An. 254, 256, *semble* (reputation in a place where the parties had only "lately arrived", insufficient).

but on general opinion. That species of repute which consists in A, B, and C, thinking one way, D, E, F, another way, is no evidence on such a subject. . . . The conduct of the parties must be such as to make almost every one infer that they were married."

This much, in theory, may be conceded; it is analogous to the rule laid down for reputation to moral character (*post*, § 1612).[2] But the difficulty comes in applying it. If the witnesses all agree that some of the community thought the persons married while others thought them not married, there is in truth no reputation, no consensus of opinion, and the individual opinions would be inadmissible as a reputation. But if, as will usually happen, the witnesses *pro* and *con* assert each that the general opinion in the community, as observed by them, was respectively affirmative and negative of marriage, this is not a case of divided reputation; there is or is not a genuine and universal reputation according as one or the other set of witnesses is believed; and the evidence should therefore go to the jury to determine the witnesses' credibility.[3] The attempt to apply any technical restriction of admissibility based on division of reputation seems therefore to be futile and unwise.[4]

(3) The reputation, assuming it to exist in definite form, may equally be a *negative* one, *i.e.* a reputation that certain persons living together are not married.[5]

§ 1604. **Sufficiency of Reputation-Evidence, distinguished.** Whether reputation is admissible at all, is the only question with which the Hearsay rule is concerned. But there are other rules which concern the sufficiency of admissible evidence, — rules of Quantity; and one of these declares reputation, or reputation together with habit, is insufficient at common law in prosecutions for *bigamy* and actions for *criminal conversation*. The testimony

[2] 1915, Peery *v.* Peery, 27 Colo. App. 533, 150 Pac. 329; 1875, Barnum *v.* Barnum, 42 Md. 251, 297 ("where reputation in such case is divided, it amounts to no evidence at all"); 1877, Jones *v.* Jones, 48 Md. 391, 403 (Barnum *v.* Barnum affirmed); 1921, O'Leary *v.* Lawrence, 138 Md. 147, 113 Atl. 638 (preceding cases approved); 1899, Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036 (must be general and uniform); 1908, Weidenhoft *v.* Primm, 16 Wyo. 340, 94 Pac. 453 (Barnum *v.* Barnum, Md., approved).

[3] This seems to have been the view taken in the following cases: 1883, Powers *v.* Charmsbury, 35 La. An. 630, 634; 1894, Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

[4] The rule should rather be that a divided reputation, though admissible, is insufficient for proof: 1902, Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428; 1916, Svendsen's Estate, 37 S. D. 353, 158 N. W. 410.

[5] 1874, Lyle *v.* Ellwood, L. R. 19 Eq. 98, 106; 1918, Gorden *v.* Gorden, 283 Ill. 182, 119 N. E. 312 (legitimacy and inheritance); 1868, Boone *v.* Purnell, 28 Md. 607, 629; 1842, Re Taylor, 9 Paige N. Y. 611, (reputation of non-marriage was admitted; but the Chancellor declared that reputation after certain "stories were set afloat" was "not legal evidence to rebut the presumption", "as it was not a part of the 'res gestæ'"; this is a confusion of thought, but at any rate does not declare the reputation inadmissible).

Contra: 1885, Northrop *v.* Knowles, 52 Conn. 522 (title depending on legitimacy; after proof by certificate of marriage, reputation of the relation as adulterous was excluded; perhaps allowable, in proof by reputation, to show divided reputation in disproof); 1882, Badger *v.* Badger, 88 N. Y. 546, 554, *semble* (reputation of non-marriage of the man among persons with whom he lived as a bachelor, concealing his connection with the woman, held inadmissible; to be admissible "it does not and cannot go beyond the range of knowledge of the cohabitation").

Undecided: 1859, Hill *v.* Hill's Adm'r, 32 Pa. 511 (dower; reputation that claimant had been "called in her neighborhood" Mrs. W., not Mrs. H., excluded, as here being only individual declarations; general question reserved).

of an eye-witness is indispensable, *i.e.* the oral testimony of a bystander or the celebrant or a party to the marriage or the hearsay testimony of a certificate or register entry. These rules, which form a special class by themselves, are elsewhere dealt with (*post*, §§ 2082–2086).

§ 1605. **Reputation of Other Facts of Family History (Race-Ancestry, Legitimacy, Relationship, Birth, Death, etc.).** May not neighborhood-reputation be often sufficiently trustworthy to be received in evidence of certain *other facts of family history* likely to be notoriously canvassed and hence to become known with a sufficient degree of accuracy? [1]

In communities of more primitive conditions where social life continues stable amid constant and fixed surroundings, the neighborhood-reputation is unquestionably of some value. Such was formerly the almost universal state of things in England, on the Continent, and in the United States. Such is still the state of things in rural communities almost everywhere (except in newly-settled regions), notably in the small towns. That it has ceased to exist in the metropolitan communities does not indicate that neighborhood-reputation, where it arises, is less trustworthy; it merely indicates that amid the gregarious individualism and domiciliary mutations of the metropolitan horde no neighborhood-reputation is likely to exist. Moreover, the frequent migrations in American domestic life have in one respect made reputation-evidence even more necessary than in stable communities as a source of knowledge; for in countless families the only means of knowledge for them of the career of their migrated members is the reports brought back, at times, of the fate or fortune reputed to have overtaken them in the distant community where they took up a new home. In the typical cases coming before the courts, where, for example, one who was in California with John Doe, who emigrated from New England in 1850, testifies that Doe was commonly reputed in Sandy Gulch to have been killed in a brawl and to have been then and there buried, does not this serve to support belief? If it is the fear of imposition that stands in the way, would it not be equally possible to procure some perjurer to come from California and tell upon the stand a concocted story about the death of Doe as witnessed by him? It is not a question of absolute proof; it is a question of the admissibility of a single piece of evidence, which may or may not prove to be sufficient. It seems finical to exclude from all consideration whatever, in a legal investigation, a class of evidence which is not only much relied upon in practical affairs, but is also sufficiently within the general principle of two exceptions (Reputation and Family History) to the Hearsay rule.

Such evidence was once in England considered orthodox enough; [2] and its

§ 1605. [1] Distinguish the use of declarations by *individuals* (friends and intimates) *not being family-relations*, under the Family History Exception (*ante*, § 1487).

[2] It was always admitted to show *place of birth*, as fixing nationality: 1696, Vaughan's Trial, 13 How. St. Tr. 485, 509, 512, 515; 1704, Lindsay's Trial, 14 How. St. Tr. 987, 996; 1717, Francia's Trial, 15 How. St. Tr. 897, 962.

So also for *time of birth:* 1649, Duke of Hamilton's Trial, 4 How. St. Tr. 1155, 1170 ("common report" admitted that defendant was a 'postnatus', *i.e.* born after the accession of James I of England). The practice prob-

use has been vindicated, on grounds of policy and of principle, by many American Courts, as admissible in certain classes of cases:

1821, MILLS, J., in *Birney* v. *Hann*, 3 A. K. Marsh. 326: "From the sayings of the parents or members of the family, Courts progressed at last to the admission of the general recognition or reputation of the heirship by others. It is admitted that it is difficult to lay down any precise rule on this subject. The kinds of evidence which are calculated to prove the consanguinity or affinity of one person to another are various, and all may be proper after a lapse of time. . . . Lapse of time, or distance of place, may furnish grounds for greater latitude and admit tradition, reputation, and recognition of a neighborhood, or the use of documents, records, and inscriptions, which may disclose the connexion by blood or marriage to him from whom a right is claimed."

1834, CATRON, C. J., in *Flowers* v. *Haralson*, 6 Yerg. 496: "Reputation of pedigree is the result of the public mind, founded upon actual knowledge of the whole community; and experience and knowledge in the nature and habits of man teach the unerring certainty of the public knowledge and conclusion in relation to family history. Individuals may fail in their investigations of particular facts; but where marriages, births, and deaths are the facts to be learned, human curiosity saves us the trouble and expense of proving the occurrences by witnesses present or by the hearsay of those who were, or of the family connexion. No individual investigations or testimony can generally be equal in certainty to the curious' scrutiny; and if secrecy be attempted, public curiosity sets on foot an anxious search for the truth. General reputation of such facts is not only competent, but highly credible."

1869, LAWRENCE, J., in *Ringhouse* v. *Keener*, 49 Ill. 471 (admitting testimony of friends that "his death was announced in the newspapers and he was spoken of by his acquaintances as dead"): "In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice."

1875, COOPER, C., in *Carter* v. *Montgomery*, 2 Tenn. Ch. 227: "In England it is now well settled that hearsay evidence is resorted to in matters of pedigree . . . upon the ground of the interest of the declarants in knowing the connections of the family. The rule is consequently restricted to the declarations of deceased persons who were related by blood or marriage to the person from whom the descent is claimed, and general repute in the family proved by a surviving member. . . . It is obvious that while the English rule may be most consonant to sound principle, and may answer the ends of justice in a dense population and settled community, yet it scarcely suffices in a sparsely inhabited country with a migratory and rapidly changing population. It would be utterly inadequate in matters relating to a slave population, where the family is not legally recognized, and, for the same reason, to the settlement of the rights of illegitimates. Where would the negro have been in suits for freedom, after a few years, on a change of domicile by the master, with the presumption of slavery against them by reason of color, if the English rule had been rigidly adhered to? . . . Under our decisions so much of the testimony in this case, based upon hearsay or reputation, as relates to the pedigree of James M. Garrett is admissible, whether it comes from members of the family or third persons, to be weighed according to the sources of information, the opportunities of witnesses, and the surrounding circumstances."

ably continued till the 1800s: 1792, Grose, J., in Morewood *v.* Wood, 14 East 330, note: "I remember the case of a pedigree tried at Winchester, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it."

This sanction of neighborhood-reputation has not been universal. It is illustrated in many rulings; but there is still in many other Courts an entire refusal to accept it. There are certain classes of facts for which it is entirely appropriate; there are others for which it may not be. The matter is one in which it should be left to the discretion of the trial Court to admit such a reputation wherever the meagreness of other evidence, or the difficulty of obtaining it, renders it desirable to accept that which is offered.

On no one point is there a general agreement in the rulings. They may be grouped according as they deal with the admissibility of reputation as evidence of *legitimacy* or the opposite;[3] of *relationship*, to a family or to an individual;[4] or of *birth*[5] or of *death* or its place or time;[6] or of *race-ancestry* (*i.e.*

[3] ENGLAND: 1743, Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1174, 1439, 'et passim' (admitted); 1744, Heath's Trial, 18 How. St. Tr. 1, 77 (same controversy; excluded); 1810, Banbury Peerage Case, in App. to LeMarchant's Gardner Peerage Case, 447, 470, 481 (Lord Redesdale: "General reputation of legitimacy would have been evidence in favor of the legitimacy of Nicholas; so general reputation that there existed no issue of Lord Banbury was evidence against such legitimacy. . . . The reputation at home and abroad, the belief of relations, friends, and neighbors, was the evidence which ought to have been resorted to").

CANADA: 1853, Doe *v.* Marr, 3 U. C. C. P. 36, 49 (inheritance and legitimacy; repute as to the mother having had illicit intercourse with S., excluded).

UNITED STATES: *Fed.* 1825, Stegall *v.* Stegall's Adm'r, 2 Brockenb. 256, 263, Marshall, C. J. (it "cannot be entirely disregarded", but its weight "depends on the circumstances of the case"; said of reputation to legitimacy); 1826, Stokes *v.* Dawes, 4 Mason 268, 270, Story, J. (admitted without question); 1896, Flora *v.* Anderson, 75 Fed. 217, 233 (neighbors' reputation as to illegitimate child, excluded); *Cal.* C. C. P. 1872, § 1870, par. 11 (quoted *ante*, § 1597); 1901, Heaton's Estate, 135 Cal. 385, 67 Pac. 321 (reputation in the community, excluded; C. C. P. § 1870, par. 11, "never was intended to broaden the common-law rule upon this subject"); *Ga.* 1857, Richardson *v.* Roberts, 23 Ga. 220 (reputation that the plaintiff's child was a bastard, etc., as alleged in an utterance charged as defamatory, excluded); *Ind.* 1881, DeHaven *v.* DeHaven, 77 Ind. 236, 239 (reputation as to paternity, excluded); *Ia.* 1899, Watson *v.* Richardson, 110 Ia. 673, 80 N. W. 407 (current reports in the community of deceased that the claimant was his illegitimate son, excluded; except so far as by statute the putative father's recognition in substantive law must be "notorious"); 1914, Hays *v.* Claypool, 164 Ia. 297, 145 N. W. 874 (inheritance by a recognized illigitimate child); *Mass.* 1862, Haddock *v.* R. Co., 3 All. 298 (reputation of child's illegitimacy, excluded); *N. J. L.* 1843, Fuller *v.* Saxton, 20 N. J. L. 61, 66 (that G. K. was the daughter of D. C.; reputation admitted, though not "traced to the family"); *N. C.* 1898, Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844 (reputation to show legitimacy, excluded); *Or.* 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 (excluded); *P. I. C. C. P.* 1901, § 298, par. 11 (like Cal. C. C. P. § 1870); *P. R.* Rev. St. & C. 1911, § 1403, par. 9 (like Cal. C. C. P. § 1870, par. 11); *Tenn.* 1846, Ford *v.* Ford, 7 Humph. 98 (admitted); 1875, Carter *v.* Montgomery, 2 Tenn. Ch. 227 (admitted; see quotation *supra*).

[4] 1899, Elder *v.* State, 123 Ala. 35, 26 So. 213 (reputation in the neighborhood to show relationship, excluded); 1899, Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958 (reputation of neighborhood to show relationship, excluded); Me. Pub. St. 1883, c. 27, § 49 (in actions against liquor-seller for damage to family, general reputation is admissible to show plaintiff's relationship to the intoxicated person); Mich. Comp. L. 1915, § 7050 (damage to family by liquor; like the Maine statute); N. Y. 1811, Jackson *v.* Cooley, 8 Johns. 130 (cited *ante*, § 1487); 1919, Ashe *v.* Pettiford, 177 N. C. 132, 98 S. E. 304 (claim by Joe A. by collateral descent from Martha P. as being the claimant's sister; "general reputation in the community" as to the relation between J. A. and M. P., excluded); S. Dak. Rev. C. 1919, § 10309 (in actions for injury to family by sale of intoxicating liquor, "the general reputation of the relation of husband or wife or parent and child" shall be 'prima facie' evidence); Tenn. 1834, Ewell *v.* State, 6 Yerg. Tenn. 364, 372 (admitted).

[5] Citations *supra*, note 2.

[6] *Federal:* 1831, Scott *v.* Ratliffe, 5 Pet. 81, 86, *semble* (reputation admitted); *Ill.* 1869, Ringhouse *v.* Keener, 49 Ill. 471 (admissible; see quotation *supra*); *Ind. T.* 1907, Driggers *v.* U. S., 7 Ind. Terr. 752, 104 S. W. 1166 (death of a former witness; not decided); *Ia.* 1860, Carnes *v.* Crandall, 10 Ia. 377 (reputation among C.'s friends and

whether slave or free, whether white, negro, or Indian),[7] or of sundry facts of family history.[8]

§ 1606. **Same: "Notorious" Recognition of Illegitimate Child by Parent.** The Anglo-Norman traditions, which harshly fixed forever as unchangeable the illegitimate status of a child not born in wedlock, have been gradually abandoned in modern times.[1] But the transition has been incomplete and unsystematic, and several novel and unrelated expedients have found a place in our law. One of these is the statutory rule of several States which gives a lawful status (of some sort) to the "natural" child if there has been a "recognition" of him by the father, but for this purpose requires that this recognition be "general and *notorious*"; sometimes a writing is required in the alternative. Here the act of recognition, whether by conduct or by writing, is not merely evidential conduct (as in § 269, *ante*), or declarations (*ante*, § 1492), but is an act of substantive law, provable as a 'factum probandum.' The notoriousness is thus a part of the act; and reputation in the commun-

neighbors in California that he had died there in 1851, excluded; no authority cited); *Mass.* 1885, Blaisdell *v.* Bickum, 139 Mass. 250, 1 N. E. 281 (reputation of death of Q. before marriage with E. Q., excluded; no authority cited); 1902, Welch *v.* R. Co., 182 Mass. 84, 64 N. E. 695 (general repute, brought home to the family, held admissible to prove death); *N. J.* 1917, Schaffer *v.* Krestovnikov, 88 N. J. Eq. 192, 102 Atl. 246 (neighborhood reputation that he died in the service of Russia in 1904–5, admitted); 1918, Schaffer *v.* Krestovnikow, 89 N. J. Eq. 549, 105 Atl. 239 (reputation admitted, affirming the above ruling on appeal); *N. Y.* 1826, Jackson *v.* Etz, 5 Cow. 319 (time of death; admissible); 1898, Arents *v.* R. Co., 156 N. Y. 1, 50 N. E. 422 (whether M. was the only surviving child of C. in 1849; reputation of the neighborhood received to show the death of certain other children); *Tenn.* 1834, Flowers *v.* Haralson, 6 Yerg. 496 (admissible; see quotation *supra*); Tex. 1851, Primm *v.* Stewart, 7 Tex. 178 (reputation that W. had died some years before, admitted); 1911, Wiess *v.* Hall,— Tex. Civ. App. —, 135 S. W. 384 (repute twenty years ago that a married woman had had a child born dead, admitted; sensible opinion by Reese, J.); *Vt.* 1890, Hurlburt *v.* Hurlburt, 63 Vt. 667, 22 Atl. 850, *semble* (reputation in Dakota as to death of an emigrant, excluded); 1896, Hurlburt's Estate, 68 Vt. 366, 35 Atl. 77 (reputation among friends and acquaintances, in the place of residence, as to death, excluded).

[7] *Ala.* 1904, Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008 (inheritance of an alleged negro); *Ga.* 1856, Bryan *v.* Walton, 20 Ga. 480 (freedom of a person of color); *Ind.* 1864, Nave *v.* Williams, 22 Ind. 368 (mixed blood; admissible); *Ky.* 1839, Chancellor *v.* Milly, 9 Dana 24 (colored slave ancestry; admissible); *N. C.* 1906, Gilliland *v.* Board, 141 N. C. 482, 54 S. E. 413 (reputation as to the white race of an ancestor, admitted; here the reputation was shown by the fact that he had always been allowed to vote at public elections without objection); *Okl.* 1912, Cole *v.* District Board, 32 Okl. 692, 123 Pac. 426 (reputation of negro race, admissible, on an issue of school rights); *Tenn.* 1827, Vaughan *v.* Phebe, Mart. & Y. 19 (admissible, to show free or slave ancestry; leading opinion, by Crabb, J.); *Va.* 1806, Hudgins *v.* Wrights, 1 Hen. & M. 134, 137, 142 (Indian ancestry; admissible); 1808, Pegram *v.* Isabell, 2 id. 205 (similar).

[8] 1851, State *v.* Seawell, 18 Ala. 616 (reputation to prove a party out of the State, excluded); 1858, Griffin *v.* Wall, 32 Ala. 149, 160 (reputation to prove a voter's residence, inadmissible); 1897, Mitchell *v.* State, 114 Ala. 1, 22 So. 71 (the absence of a witness from the jurisdiction, excluded); La. Rev. Civ. C. 1920, §§ 193–195 (reputation admissible; quoted *post*, § 1606); 1898, Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282 (reputation as to the residence of a pauper, excluded).

§ 1606. [1] See the Report of the Committee on Uniform Illegitimacy Act (Ernst Freund, Chairman), in the Proceedings of the National Conference of Commissioners on Uniform State Laws, 1920 and 1921.

On the Continent the law has arrived at a state of systematic provision for the situation. For the Continental law and the various traditional controversies arising in it, see: Bonnier, Traité des preuves, ed. Larnaude, 5th ed., 1883, §§ 203–223, 547–571; Brissaud, Hist. of French Private Law (1912; Continental Legal History Series, vol. III), §§ 169–176, 573; Baudry-Lacantinerie et al., Traité théorique et pratique de droit civil, 2d ed., 1902, vol. III, "Des personnes", § 671, "Recherche de la paternité."

ity would therefore seem here to be a substantive fact, not merely (as in §§ 1492, 1605, *ante*) an evidential one. The reputation is of course admissible under such statutes.[2]

In *Quebec* and *Louisiana*, inheriting the French Civil Code (which itself inherited a long history on the subject of filiation of illegitimate and natural children), and in the *Philippines* and *Porto Rico*, which follow the Spanish Code, the act of "recognition" by the father, and its relation to other methods of filiation and the allowable ways of evidencing them, involve a special history and group of principles; and the precedents in those jurisdictions can hardly be of service elsewhere.[3]

[2] *California:* 1896, Blythe *v.* Ayres, 96 Cal. 584 (authorities reviewed); *Iowa:* 1899, Watson *v.* Richardson, 110 Ia. 673, 80 N. W. 407 (cited more fully *ante*, § 1605); 1901, Alston *v.* Alston, 114 Ia. 29, 86 N. W. 55; 1914, Robertson *v.* Campbell, 168 Ia. 47, 147 N. W. 301 (illegitimate child's claim to an inheritance; the neighborhood repute as to paternity, admitted); 1916, Luce *v.* Tompkins, 177 Ia. 168, 158 N. W. 535 (partition; on the issue of plaintiff's being a legitimate son, "general and notorious" recognition by the putative father suffices); 1918, McKellar *v.* Harkins, 183 Ia. 1030, 166 N. W. 1061 (descent of lands; under Code § 3385, providing that illegitimates inherit if the father's recognition has been "general and notorious, or else in writing", a judgment entry of bastardy, followed by the defendant's signature of assent to an adoption by third persons, was held on the facts to be a recognition in writing); *Kansas:* 1916, Record *v.* Ellis, 97 Kan. 762, 156 Pac. 711 (inheritance; Gen. St. 1905, § 2956, requiring "general and notorious" recognition, applied); 1921, Muir *v.* Campbell, 110 Kan. 110, 202 Pac. 844 (inheritance; under Gen. St. 1915, § 3845, providing that the recognition of a natural child must be either general and notorious or in writing, an entry on the docket of a justice of the peace in a bastardy proceeding is sufficient); 1922, Weber *v.* Gardner, 110 Kan. 295, 203 Pac. 705 (paternal recognition of an illegitimate son, held general and notorious under G. S. 1915, § 3845); *Michigan:* 1919, Kotzke *v.* Kotzke's Estate, 205 Mich. 184, 171 N. W. 442 (the father's "recognition" must be "general", under Comp. L. 1871, § 4312, in effect at the time here in issue; though by St. 1881, Comp. L. 1915, § 11798, his written acknowledgment is necessary); *Nebraska:* Rev. St. 1922, § 1228 (illegitimate child may be an heir if a person has in writing "acknowledged himself to be the father of such child").

Compare the citations *ante*, § 269 (parents' conduct as evidence of legitimacy), *ante*, § 1492 (family repute as evidence of legitimacy), and *post*, § 2527 (filiation of illegitimates).

[3] For the *proceeding to compel recognition* of an illegitimate child, see *post*, § 2527; for the admissibility of the *record of civil status* (marriage, birth, death), see *ante*, § 1336, *post*, § 1644); *Quebec:* 1917, Canada Cement Co. *v.* Hanchuk, 37 D. L. L. 422, Que. (death of employee; whether certain natural children had been recognized by him, held to depend on the same rules for recognition by writing, etc., as in the case of alimony, viz. Civ. C. §§ 240, 241; elaborate examination of the authorities on proof of filiation, per Archambeault, C. J.);
Louisiana: Rev. Civ. C. 1920, §§ 193, 194 (filiation of legitimate children, provable by the register; if the register is lost or none existed, "it suffices for the child to show that he has been constantly considered as a child born during marriage"); § 195 (this "being considered" includes, "that the individual has always been called by the surname of the father from whom he pretends to be born", that the father treated him as his child, "that he has been constantly acknowledged as such in the world; that he has been acknowledged as such within the family"); §§ 203, 922 (rules for filiation of illegitimates); 1921, Minor *v.* Young, 148 La. 610, 87 So. 472, 89 So. 757 (inheritance; parental acknowledgment of an illegitimate or natural child, under Civ. C. §§ 203, 922, held the exclusive method, per Dawkins, J., for the majority; Provosty, J., diss.; the opinions elaborately examine the theory); 1917, Pizzicati's Succession, 141 La. 645, 75 So. 498 (whether adoption by notorial act is valid; theories of adoption discussed). 1918, Lacosst's Succession, 142 La. 673, 77 So. 497 (paternal acknowledgment, and other modes of proof, considered); 1922, Taylor *v.* Allen, 151 La. —, 91 So. 635.
Philippine Islands: Civ. C. §§ 129–136 (rules for giving effect to parental recognition); 1904, Mijares *v.* Nery, 3 P. I. 195 (Civ. C. §§ 129, 131 applied); 1904, Llorente *v.* Rodriguez, 3 P. I. 697 (Civ. C. §§ 129, 131, held not applicable to a prior recognition); 1905, Mendosa *v.* Ibañez, 4 P. I. 666 (letters held insufficient as recognition); 1905, Benedicto *v.* De La Rama, 4 P. I. 746 (similar); 1905, Buenaventura *v.* Urbano, 5 P. I. 1; 1907,

D. MORAL CHARACTER (PARTY OR WITNESS)

§ 1608. **Reputation and Actual Character, distinguished.** That actual character is distinct from reputation of it, and the latter is merely evidence to prove the former, ought to be a truism. But the common use of the word "character" in the senses both of actual disposition and of reputation has led to occasional obscurity of language in judicial opinions, and has thus tended to remove the emphasis from the distinction. When we argue that a defendant probably did not commit a forgery because his disposition was honest (*ante*, § 55), or that a witness probably is speaking falsely because he is mendacious in disposition (*ante*, § 922), we are arguing from his actual moral constitution, which in its turn becomes a fact to be proved; and when we then resort to reputation or individual opinion or particular conduct, we are resorting to it as evidence from which we may make some inference to the nature of the actual trait. The distinction has already been referred to elsewhere (*ante*, §§ 52, 920); but the following passages remind us of its importance:

Siguiong *v.* Siguiong, 8 P. I. 5 (subsequent marriage is not a recognition); 1907, Capistrano *v.* Fabella, 8 P. I. 135 (certificate of baptism, etc., is not a recognition); 1908, Cosio *v.* Pili, 10 P. I. 72 (recognition need not be in express terms); 1909, Dizon *v.* Ullman, 13 P. I. 88; 1909, Conde *v.* Abayor, 13 P. I. 249; 1912, Adriano *v.* De Jesus, 23 P. I. 350 (baptismal certificate); 1915, Enriquez' and Reyes' Estate, 29 P. I. 167 (Civ. C. §§ 129–136, applied); 1915, Dalistan *v.* Armas, 32 P. I. 648 (Civ. C. § 135 applied); 1916, Requejo *v.* Rabalo, 33 P. I. 14 (Civ. C. §§ 119–131 applied);

Porto Rico: Rev. St. & C. 1911, §§ 3263–3267 (rules for giving effect to parental recognition of paternity or of maternity); 1909, Gual *v.* Bonafoux, 15 P. R. 545, 551 (applying old Civ. C. § 137, and Rev. Civ. C. §§ 198, 199); 1916, Charres *v.* Arroyo, 16 P. R. 777; 1911, Diaz' Estate *v.* Diaz' Estate, 17 P. R. 53 ("The way to prove the filiation of children is by proof of the marriage of the parents and the birth of their children"; here a will's recitals were held inadequate); 1911, Fajardo *v.* Tio, 17 P. R. 230; 1911, Lucero *v.* Vilá's Heirs, 17 P. R. 141, 153; 1911, Calaf *v.* Calaf, 17 P. R. 185, 193 (when acknowledgment is denied, the only evidence is "a public and authentic document showing such acknowledgment, or a final judgment ordering that such acknowledgment be made"); 1912, García *v.* Garzot, 18 P. R. 835, 845 (effect of an acknowledgment made in ecclesiastical proceedings under the former Spanish system); 1913, Figueroa *v.* Diaz, 19 P. R. 683, 691 (Calaf *v.* Calaf followed); 1913, Villamil *v.* Romano, 19 P. R. 832 (effect of a certain written acknowledgment, considered); 1913, Jesús *v.* Villamil's Succession, 19 P. R. 850; 1913, González *v.* López, 19 P. R. 1056 (acknowledgment in a baptismal certificate, not sufficient, on a collateral issue of heirship; note that in a case under old Civ. C. § 137, Rev. Civ. C. § 189, the nature of an acknowledgment sufficient in itself to fix status for the purposes of any issue of litigation is more exacting than the evidential conduct sufficient to lead to a judicial decree of status in an action brought expressly to establish filiation; see the cases on the latter action, *post*, § 2527); 1916, Iturrino *v.* Iturrino, 24 P. R. 439 (like García *v.* Garzot, *supra*); 1914, Méndez *v.* Martínez, 21 P. R. 238, 252; 1915, Servera *v.* Otero, 22 P. R. 341 (an acknowledgment made in a will is effective since St. 1911, amending Rev. Civ. C. § 193); 1916, López *v.* López, 23 P. R. 766 (Calaf *v.* Calaf followed); 1917, Dupont *v.* Aybar, 25 P. R. 290; 1919, Román *v.* Agosto, 27 P. R. 529 (mandamus for a copy of a will acknowledging a natural child; held that such an acknowledgment is effective under Civ. C. §§ 727, 731, even before the testator's death; Wolf, J., dissenting in an able opinion).

Canal Zone: 1921, Panama R. Co. *v.* Castilla, 5th C. C. A., 272 Fed. 656 (death of a minor natural son of the plaintiff woman, who had never acknowledged the child in a public instrument or testamentary act; the Panama Civil Code, in force in the Canal Zone, contained provisions in Arts. 54–57 similar to those of P. I. Civ. C. §§ 129–136; but Panama St. 1890 also provided that acknowledgment by a mother who is a single woman is presumed, "as if they had been recognized by a public instrument"; held that this law of 1890 was not in force in the Canal Zone).

1851, CALDWELL, J., in *Bucklin* v. *State*, 20 Oh. 23: "The term 'character', when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be formed or expressed of him by others; the term 'reputation' applies to the opinion which others may have formed and expressed of his character; so that, as has been remarked in some of the books, when treating on this subject, a man's character may really be good when his reputation is bad, and, on the other hand, his reputation may be good when his character is bad. But, as we have before intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction, — the term 'general character' being used in legal signification, as it is frequently used in common parlance, to express the opinion that has generally obtained of a person's character, the estimate the community generally has formed of it. When you ask a witness, then, in this sense of the term, what a man's general character is for truth and veracity, he is called on to answer as to what opinion is generally entertained and expressed of him by those acquainted with him."

1885, DURFEE, C. J., in *State* v. *Wilson*, 15 R. I. 180, 1 Atl. 415: "Doubtless there is a distinction observed by careful writers between 'character' and 'reputation'; 'character' (where the distinction is observed) signifying the reality, and 'reputation' merely what is reported, or understood from report, to be the reality, about a person or thing."

1895, JORDAN, J., in *Wright* v. *Crawfordsville*, 142 Ind. 636, 642, 42 N. E. 227 (admitting specific acts to prove character); "Counsel seemingly confuse real character — that which is actually impressed by nature, traits, or habits upon a person — with what is generally termed reputed character. Reputation may be evidence of character, but it is not character itself. That which a person really is must be distinguished from that which he is reputed to be."

1885, Mr. *Richard Grant White*, Words and their Uses, 9th ed., p. 99: "Character, Reputation. These words are not synonymes; but they are too generally used as such. . . . We know very little of each other's characters; but reputations are well known to us (except our own). Character, meaning first a figure or letter engraved, means secondarily those traits which are peculiar to any person or thing. Reputation is, or should be, the result of character. Character is the sum of individual qualities; reputation, what is generally thought of character, so far as it is known. Character is like an inward and spiritual grace, of which reputation is, or should be, the outward and visible sign. . . . Sheridan errs in making Sir Peter Teazle say, as he leaves Lady Sneerwell's scandalous coterie, 'I leave my character behind me.' His reputation he left; but his character was always in his own keeping."

§ 1609. **Reputation not a "Fact", but Hearsay Testimony.** It follows, since reputation is looked to merely as evidence of the character reputed, that the reputation is *hearsay testimony;* for it is the expression of an opinion on the part of the community, used testimonially, but uttered out of Court and not under cross-examination (*ante,* §§ 1361, 1362). It is therefore receivable, if at all, as an exception to the Hearsay rule.

It has been said, in an opinion often quoted,[1] that reputation is admissible as a "fact", *i.e.* as circumstantial evidence; but this is the merest error.

§ 1609. [1] 1877, Lord, J., in Walker *v.* Moors, 122 Mass. 504 (dealing with a witness to reputation for mercantile credit; "Was his testimony the statement of a fact, or was it simply what is ordinarily designated as hearsay evidence? The distinction between reputation and hearsay evidence is sometimes a difficult practical question. . . . General reputation is a fact. The mere declaration of one or many is hearsay. . . . The question is a simple one of fact, Is there a general reputation?"). So also Pollock, C. B., in R. *v.* Rowton, 1865, Leigh & C. 526 ("What you pick up of a man's reputation in the neighborhood in twenty years is not hearsay").

Reputation is testimonial evidence, *i.e.* the assertion of a number of persons used as the basis of an inference to the truth of the fact asserted (*ante*, § 25); and the true nature of this use cannot be obscured by calling it a "fact":

1815, TILGHMAN, C. J., in *Com.* v. *Stewart*, 1 S. & R. 344 (rejecting neighborhood-reputation-evidence as to the character of an alleged disorderly house): "It is agreed on all hands that this is not one of those cases in which hearsay evidence can be admitted. But it is contended that the complaint of the neighborhood is a matter of fact, and therefore, when the witness proves the complaint, she only proves a fact within her own knowledge. I am not satisfied with this ingenious distinction, which gets round and avoids an important rule of evidence; in the same way all hearsay evidence may be introduced, for it is always a fact that the witness hears the other person speak, and it is a fact that the words spoken by that person were heard by the witness."

It is true that reputation is not always and necessarily used as hearsay, *i.e.* as a testimonial assertion. It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action for defamation, or where the reputation of a house of ill-fame is in issue; in these and similar cases (*ante*, § 70–79), the reputation is *the* fact to be proved, irrespective of the actual character reputed. Moreover, reputation may be evidential circumstantially, as where it is offered to show probable knowledge by a creditor of a debtor's insolvency or to show probable belief by a defendant in the violent character of the deceased on a trial for homicide; in these and similar cases (*ante*, §§ 245–261), the reputation is used merely as a circumstance from which it may be inferred that some other person obtained a knowledge or a belief. But when reputation is offered as a ground for inferring that the character affirmed by the reputation to exist does actually exist, then what we are asked to receive is testimonial evidence, precisely as it would be (by general concession) if the offer was to prove the extra-judicial belief and utterance of John Doe to the same character. Whenever the offer is to prove what Doe, or Doe and Roe, or Doe and Roe and five hundred others, think and say of J. S.'s character, as a mode of proving J. S.'s actual character, the evidence is hearsay, and must come in, if at all under a hearsay exception.

§ 1610. **General Theory of Use of Reputation as Evidence of Character.** There was perhaps a time when reputation alone was not regarded as admissible to prove character. There certainly was a time when the personal knowledge and opinion of acquaintances was regarded as a superior source of evidence.[1] But at any rate, for more than two centuries, it has been settled that reputation in the community is a proper source of evidence.

(1) That there is a *necessity* for this kind of evidence, according to a fundamental principle of Hearsay exceptions (*ante*, § 1421), appears not merely from the fortuitous circumstance that the personal opinion of intimates is by the present law of most jurisdictions improperly held to be inadmissible (*post*, §§ 1983, 1985); but also from the settled rule that particular acts, as

§ 1610. [1] *Post*, § 1981.

evidence of character, are not to be resorted to at all against a defendant in a criminal case (*ante*, § 194) nor against a party in most civil issues (*ante*, §§ 199–212), and not against a witness except by cross-examination or by judgment of conviction for crime (*ante*, §§ 977–981); and furthermore from the probable scantiness and indefiniteness of evidence of the latter sort as compared with the fulness and solidity of material represented in a reputation based on a person's constant and repeated exhibition of his character in conduct as daily observed by the community. The last reason has been well set forth in the following passage:

1823, GIBSON, J., in *Brindle* v. *M'Ilvaine*, 10 S. & R. 282, 285 (excluding reputation to prove intemperance): "That kind of depravity which renders a man unworthy of belief, and which is proved, not by particular instances, but by general reputation, is of a *moral* kind, and is evinced by a variety of acts and a long course of general bad conduct, the particular instances of which (if they were not inadmissible for other reasons) could not in the nature of things be expected to be treasured up in the recollection of witnesses and spoken of in detail to enable a jury to draw their own conclusions; and therefore an inference of moral destitution drawn from this source by the public at large, which is nothing else than general reputation, is not secondary but the best evidence of the fact of which the nature of the case is susceptible. But the causes of physical depravity of the mental faculties are susceptible of a particular description by those who have witnessed them, and are to be proved by the ordinary evidence of any other fact."

(2) That there is, in the community's reputation, a *circumstantial guarantee of trustworthiness*, fulfilling another fundamental requisite for Hearsay exceptions (*ante*, § 1422), is found in the same considerations already mentioned as justifying the use of reputation on matters of general interest (*ante*, § 1583). Those considerations are that, where the subject matter is one in which all or many of the members of the community have an opportunity of acquiring information and have also an interest or motive to obtain such knowledge, there is likely to be such a constant, active, and intelligent discussion and comparison that the resulting opinion, if a definite opinion does result, is likely to be fairly trustworthy. That these considerations apply to a reputation of personal character cannot be doubted. No fact is more open to general observation, no fact is of more legitimate interest to the community as an object of knowledge, and consequently no fact is more the theme of general discussion, criticism, and comparison of views, than moral character as exhibited in conduct. The community relies upon this reputation as evidence in social, commercial, and professional relations, and the law of Evidence relies upon it. Erskine's description of reputation is celebrated:

1794, Mr. *Thomas Erskine*, arguing, in *Thomas Hardy's Trial*, 24 How. St. Tr. 1079: "You cannot, when asking to character, ask, What has A. B. C. told you about this man's character? No; but, what is the general opinion concerning him? Character is the slow-spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence."

No doubt reputation is often misleading; but so are all sources of evidence. No doubt actual character is not ascertainable by reputation beyond a few broad traits grossly marked, clearly exhibited, and easily observed; but the law does not attempt to use it beyond this point. No doubt actual character does not always merit the estimation which reputation puts upon it; but, nevertheless, there is a certain inevitableness in the revelation of character by conduct, and a certain sureness of apprehension even in the rough popular judgment. Confucius said[2] in a warning to his disciples: "How *can* a man conceal his character! How *can* a man conceal his character!" Emerson expounded it as a cardinal truth of life:[3] "A man passes for what he is worth. Very idle is all curiosity concerning other people's estimate of us; and all fear of remaining unknown is not less so. The world is full of judgment-days, and into every assembly that a man enters, in every action he attempts, he is gauged and stamped. 'What has he done?' is a divine question which searches men, and transpierces every false reputation. A fop may sit in any chair of the world, nor be distinguished for his hour from Homer and Washington; but there need never be any doubt concerning the respective ability of human beings. Human character evermore publishes itself." That was a keen answer of Murray, Lord Mansfield, when Mr. Cowper remarked, arguing about reputation-evidence:[4] "I have heard it said, as a common profligate observation of Colonel Charteris, that he would give twenty thousand pounds to be thought an honest man, — though he would not give twenty farthings to *be* one"; upon which the great judge commented: "His money could not have been worse laid out; for he would have lost his good character in half an hour afterwards."

(3) A third element, to be regarded in all Hearsay exceptions because required of all testimonial evidence (*ante*, § 1424), is that principle which excludes testimony not founded on adequate sources of knowledge. This requirement, though an independent one, is satisfied whenever the foregoing one is satisfied; but its bearing here is particularly seen in the rule limiting reputation to that community in which the person resides (*post*, § 1615).

§ 1611. **Reputation, distinguished from Rumors.** Reputation, being the community's opinion, is distinguished from mere rumor in two respects. On the one hand, reputation implies the definite and final formation of opinion by the community; while rumor implies merely a report that is not yet finally credited. On the other hand, a rumor is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character; a man's reputation, for example, may declare him honest, and yet to-day a rumor may have circulated that this reputed honest man has defaulted yesterday in his accounts.

The distinction in the latter aspect has already been sufficiently illustrated (in the passages quoted *ante*, § 74). The distinction in the former aspect is the more important one to be emphasized in the present connection:

[2] Analects, book II. [3] Essay on Spiritual Laws. [4] 1783, Bembridge's Trial, 22 How. St. Tr. 135.

1852, BELL, J., in *Dame* v. *Kenney*, 25 N. H. 320: "People usually form their opinions of the characters of men from what they know of them personally and from what is said of them by those who have the means of knowledge and whose opinions are entitled to confidence. . . . [Mere rumors and reports], if numerous and repeated, too often gain credit, and the general character may, in consequence of that credit, be seriously affected. The reports themselves prove nothing as to general character. They may be entirely discredited and disbelieved where the party assailed is known. The point of inquiry in relation to general character is not whether a man has been attacked; but, how does he stand now, when rumor has spent its force upon him?"[1]

§ 1612. **Reputation must be General; Divided Reputation.** It is commonly said that the reputation must be "general"; that is, the community as a whole must be agreed in their opinion, in order that it may be regarded as a reputation. If the estimates vary, and public opinion has not reached the stage of definite harmony, the opinion cannot yet be treated as sufficiently trustworthy. On the other hand, it must be impossible to exact unanimity; for there are always dissenters. To define precisely that quality of public opinion thus commonly described as "general" is therefore a difficult thing.

The requirements of modern Courts are apparently more strict than in the earlier practice; and there is something to be said for the liberality of the latter:

1780, *Maskall's Trial*, 21 How. St. Tr. 684: "Do you know anything more of him [the witness Richard Ingram]?" "I have been in several companies where he has been mentioned, and wherever his name was mentioned, he was generally known by the appellation of Lying Dick." To another witness: "What character does he bear?" "There is a diversity of opinions respecting him; some give him a good character, and some a very indifferent one." "Which is the most prevalent of the two?" "I hear that he is a most notorious liar." "Is the opinion more general of his being a liar than otherwise?" "I have heard them that know him a good deal say so."

1884, CAMPBELL, C. J., in *Pickens* v. *State*, 61 Miss. 566: "General reputation consists in what is generally thought of one by those among whom he resides and with whom he is chiefly conversant. 'Common opinion'; 'that in which there is general concurrence'; 'the prevailing opinion in that circle where one's character is best known'; 'what is generally said by those among whom he associates and by whom he is known'; 'common report among those who have the best opportunity of judging of his habits and integrity'; 'common reputation among his neighbors and acquaintances', — are so many forms of expression by which an effort has been made to define wherein consists general reputation."

1895, MCSHERRY, J., in *Jackson* v. *Jackson*, 82 Md. 17, 33 Atl. 317: "A reputation, to be a provable reputation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad. It cannot be intermediate, — that is, partly one, and partly the other; for that would not be general, and there would then be no general reputation either way. If it is generally good or generally bad, or, as applicable to the case at bar, if a man and woman are generally reputed to be married, or if the converse is generally asserted, a general reputation, one way or the other, exists; and of a general reputation, and none other, the law allows evidence to be given. But, if it be not general, then, obviously, it does not exist as a fact, and evidence cannot be received to show

§ **1611.** [1] *Accord:* 1879, Haley *v.* State, 63 Ala. 86; 1855, Pleasant *v.* State, 15 Ark. 624, 653 ("rumor and belief", excluded); 1877, State *v.* Laxton, 76 N. C. 216 (excluded; here offered by the prosecution in rebuttal of a defendant's good character); 1903, Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594; 1846, Ford *v.* Ford, 7 Humph. 101.

a partial, limited, or qualified repute. The existence of a diversity of opinion is one of the means by which a witness may know there is a general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, and as a totally independent circumstance, is not the thing to be proved."

In applying this principle, a great variety of forms of question are to be found, sanctioned or disapproved, all of them involving efforts, more or less successful, to carry out more definitely the fundamental and unquestioned notion that the reputation must be "general."[1] There is on this subject often an attempt at nicety of phrase which amounts in effect to mere quibbling, because the witness ordinarily will not appreciate the discriminations; such requirements of definition should be avoided as unprofitable.[2]

§ 1612. [1] *Federal:* 1851, Wayne, J., in Gaines *v.* Relf, 12 How. 555 (not merely what some say, but the general saying); *Alabama:* 1846, Sorrelle *v.* Craig, 9 Ala. 539 ("what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant"); 1848, Hadjo *v.* Gooden, 13 Ala. 720, 722 ("it is not necessary to know all his neighbors"); 1885, Jackson *v.* State, 78 Ala. 473 (reputation "in the upper portion of the neighborhood", admitted); 1913, Watson *v.* State, 181 Ala. 53, 61 So. 334 ("how he stood with the law-abiding people", excluded); *Colorado:* 1903, Vickers *v.* People, 31 Colo. 491, 73 Pac. 845 (testimony excluded, where the witness, a non-resident, had talked with only three persons); *Illinois:* 1845, Regnier *v.* Cabot, 7 Ill. 40 (the witness knew of the opinion of three persons only; excluded); 1859, Crabtree *v.* Kile, 21 Ill. 183 (what is "generally said"); 1861, Crabtree *v.* Hagenbaugh, 25 Ill. 233, 238 (what "a majority of his neighbors said"); *Indiana:* 1864, Fahnestock *v.* State, 23 Ind. 231, 238 (character founded on "report of his neighbors", excluded, as not involving the "general opinion of the neighborhood"); 1879, Meyncke *v.* State, 68 Ind. 404 ("the word 'general' is an essential requisite in an impeaching question of this kind"); *Kansas:* 1891, Coates *v.* Sulan, 46 Kan. 341, 26 Pac. 720 (a question as to the "reputation in this community", not inadmissible if properly understood by the witness as involving generalness, though the word "general" was not used); *Maryland:* 1869, Vernon *v.* Tucker, 30 Md. 456, 462 (what "several" of the neighbors said, excluded); *Michigan:* 1856, Webber *v.* Hanke, 4 Mich. 198 ("what people acquainted with him say", held improper; "what is generally said" is proper); 1878, Lenox *v.* Fuller, 39 Mich. 271 (apparently approving the preceding case); 1892, Sanford *v.* Rowley, 93 Mich. 119, 122, 52 N. W. 1119 (numerously signed indorsement of petition for office, excluded); *Mississippi:* 1859, Powers *v.* Presgroves, 38 Miss. 227, 241 ("what is generally said"); 1885, French *v.* Sale, 63 Miss. 386, 392, 394 (the testimony is "usually and necessarily indefinite" as to the number of persons; the witness must be able "as a matter of conscience" to give the "common or general opinion"); *Nebraska:* 1877, Matthewson *v.* Burr, 6 Nebr. 312, 316 (not "what two or three persons only may think or say", but "the general estimation in which he is held by his neighbors and acquaintances"); *New Hampshire:* 1851, Hersom *v.* Henderson, 23 N. H. 498, 506 ("Do the neighbors call him Lying Josh?", excluded); *North Carolina:* 1843, State *v.* O'Neale, 3 Ired. 88 (inquiries as to "what a majority of neighbors said", and "in what estimation E. was held", excluded; the estimation must be general); 1843, State *v.* Parks, 3 Ired. 296 (the witness "had heard a great deal said about his character"; "did not know whether a majority of those he heard speak of it spoke well or ill of it"; "had heard a great many respectable men speak well of L's character, and a great many, equally respectable, speak ill of it"; excluded, as not amounting to a general reputation); *Ohio:* 1853, French *v.* Millard, 2 Oh. St. 44 ("reputation" means "general reputation"); *South Carolina:* 1892, State *v.* Turner, 36 S. C. 534, 539, 15 S. E. 602 (the reputation must be "general", the number of persons included depending largely on circumstances, in the trial Court's discretion); *Utah:* 1898, State *v.* Marks, 16 Utah 204, 51 Pac. 1089 ("the word 'general' should always be used", and directed to the reputation in the community of residence).

It follows that, on direct examination, the witness cannot be asked to *name individuals* who have spoken: 1872, State *v.* Perkins, 66 N. C. 127. For allowing this on cross-examination, see *ante*, §§ 988, 1111.

[2] 1859, Bell, J., in Boon *v.* Wethered, 23 Tex. 675, 681; 1880, Stone, J., in Sullivan *v.* State, 66 Ala. 50 ("The question of general character or reputation is one of difficult solution to a majority of witnesses. Counsel should be allowed to vary the phraseology, or sever the constituent parts or members of the sentence, so as to place the subject within the comprehension of the witness").

§ 1613. **Same: Majority need not have Spoken.** The reputation, as just indicated, must involve the general opinion, not a partial or fragmentary one. Nevertheless that opinion may exist as a general one, entertained by the community as a whole, although no utterance by that general mass of its members, or even by a majority of them, has been made. In other words, a general reputation may by inference be believed to exist, although the utterances actually heard by the witness, and used as the basis of his inference, may be and usually are those of a representative minority only:[1]

1884, CAMPBELL, C. J., in *Pickens* v. *State*, 61 Miss. 567: "It was not necessary for him [the witness] to have heard a majority, or any given proportion, of that undefined and undefinable circle, designated as the 'neighborhood' or 'community', *say* what they thought of G. . . . While a witness should be cautious on this subject, and not be encouraged to testify that he is acquainted with the general reputation of another unless he knows the generally prevalent sentiment of those most conversant with him, he is not to be repressed by telling him he must know what a majority *say* of him about whom he is called to testify. . . . He may have heard a sufficient number express themselves to be willing to say he knows the general concurrence in one view of a number great enough to be regarded as a fair index to the community. One may know the general reputation of Sargent S. Prentiss as a matchless orator, although he has heard a small proportion of those who felt the thrill of his unrivalled eloquence say what they thought of him."

§ 1614. **Same: Never Hearing anything against the Person.** Upon the same principle, the absence of utterances unfavorable to a person is a sufficient basis for predicating that the general opinion of him is favorable. A witness to *good reputation* may therefore testify by saying that he has *never heard anything said against* the person:[1]

§ 1613. [1] *Accord:* 1878, Robinson *v.* State, 16 Fla. 835 (not necessary that a majority of the neighbors should have spoken on the subject); 1920, Girch *v.* State, 104 Nebr. 503, 177 N. W. 798; 1902, Cunningham *v.* Underwood, 53 C. C. A. 99, 116 Fed. 803, 810.

Yet the number of occasions *may* indicate in a given case that the witness has not sufficient knowledge (*ante*, § 692) of the community's opinion: 1883, Com. *v.* Rogers, 136 Mass. 158 (hearing the character spoken of on two occasions; excluded).

§ 1614. [1] *Accord:* ENGLAND: 1796, Leary's Trial, 26 How. St. Tr. 337, 338; UNITED STATES: *Federal:* 1902, Foerster *v.* U. S., 54 C. C. A. 210, 116 Fed. 860; *Alabama:* 1848, Hadjo *v.* Gooden, 13 Ala. 720, 722; 1853, Dave *v.* State, 22 Ala. 23, 37 (disapproving an instruction asking for a knowledge of what "the majority of the neighbors" said or thought; because a majority may not have expressed themselves); 1876, Childs *v.* State, 53 Ala. 28, 29; 1888, Hussey *v.* State, 87 Ala. 129, 6 So. 420 (admitting the question whether he had ever heard of the defendant having any other "difficulty" than the one in question); 1888, Moulton *v.* State, 88 Ala. 121, 6 So. 758; 1917, Glover *v.* State, 200 Ala. 384, 76 So. 300; 1921, Massey *v.* Pentecost, 206 Ala. 411, 90 So. 866; *Arizona:* 1915, Leonard *v.* State, 17 Ariz. 293, 151 Pac. 947; *California:* 1902, People *v.* Adams, 137 Cal. 580, 70 Pac. 662; *Columbia (Dist.):* 1914, Fletcher *v.* U. S., 42 D. C. App. 53; *Florida:* 1910, Hinson *v.* State, 59 Fla. 20, 52 So. 194; *Georgia:* 1854, Taylor *v.* Smith, 16 Ga. 7; 1888, Flemister *v.* State, 81 Ga. 768, 771, 7 S. E. 642; 1892, Hodgkins *v.* State, 89 Ga. 761, 15 S. E. 695; 1897, Powell *v.* State, 101 Ga. 9, 29 S. E. 309; *Illinois:* 1893, Gifford *v.* People, 148 Ill. 173, 35 N. E. 754; *Iowa:* 1882, State *v.* Nelson, 58 Ia. 208, 12 N. W. 253; 1895, State *v.* Case, 96 Ia. 264, 65 N. W. 149; 1900, State *v.* Keenan, 111 Ia. 286, 82 N. W. 792; *Kansas:* 1908, State *v.* McClellan, 79 Kan. 11, 98 Pac. 209; *Louisiana:* 1922, State *v.* Emory, 151 La. —, 91 So. 659; *Maine:* 1908, State *v.* Lambert, 104 Me. 394, 71 Atl. 1092; *Massachusetts:* 1891, Day *v.* Ross, 154 Mass. 14, 27 N. E. 676 (compare the citations *infra*); *Michigan:* 1878, Lenox *v.* Fuller, 39 Mich. 271; 1895, Conkey *v.* Carpenter, 106 Mich. 1, 63 N. W. 990; 1907, Smitley *v.* Pinch, 148 Mich. 670, 112 N. W. 686; 1919, People *v.* Woods, 206 Mich. 11, 172 N. W. 384 (here the witness on cross-examination stated that he had "never heard anything said about his reputation one way or another"; held error to strike

1865, *R.* v. *Rowton*, Leigh & C. 520, 535, 536; ERLE, C. J.: "The best character is that which is the least talked of." COCKBURN, C. J.: "Negative evidence, such as 'I never heard anything against the character of the man', is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is some fault to be found with it. It is the best evidence of his character that he is not talked about at all."

1854, BENNING, J., in *Taylor* v. *Smith*, 16 Ga. 10: "Certainly the sort of silent respect and consideration by which one is treated and received by those who know him is some index of what they think of him as a man of veracity; and indeed, if he is a person whom they think very highly of, this is about the only index. The character for truth of such a person is never discussed, questioned, 'spoken of.' To discuss, question, or even perhaps to speak of one's reputation for truth, is to admit that two opinions are possible on that point. Suppose the question were, What was the character of Washington among his neighbors for truth? Could the answer be anything but this: 'I never heard it questioned, discussed, spoken of; and yet I know it to have been the most exalted'?"

But it is obvious that this form is no sufficient indication for a reputation of *bad* character.[2] Moreover, so far as the answer "I never heard his character discussed" implies that the witness has not had opportunities for learning what the reputation was, he is not a qualified witness to reputation (on the principle of § 692, *ante*).[3]

out the testimony); *Minnesota:* 1876, State *v.* Lee, 22 Minn. 407, 409 (admissible, if the witness has been "acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him"); 1886, Bingham *v.* Bernard, 36 Minn. 114, 116, 30 N. W. 404 (an instruction referring to this as the "very best evidence", held not improper); 1921, State *v.* Morris, 149 Minn. 41, 182 N. W. 721; *Mississippi:* 1885, French *v.* Sale, 63 Miss. 386, 393; 1905, Sinclair *v.* State, 87 Miss. 330, 39 So. 522; 1906, Johnson *v.* State, — Miss. —, 40 So. 324; *Missouri:* 1878, State *v.* Grate, 68 Mo. 26; 1893, State *v.* Brandenburg, 118 Mo. 181, 185, 23 S. W. 1080; *Montana:* 1898, State *v.* Shafer, 22 Mont. 17, 55 Pac. 526; 1902, Matusevitz *v.* Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467; *Nebraska:* 1877, Matthewson *v.* Burr, 6 Nebr. 312, 317; *Nevada:* 1880, State *v.* Pearce, 15 Nev. 188, 190; *New Hampshire:* 1900, State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083; *New Mexico:* 1921, State *v.* Douthitt, 26 N. M. 532, 195 Pac. 879; *New York:* 1839, People *v.* Davis, 21 Wend. 315; 1907, People *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (following R. *v.* Rowton, *supra*); *North Carolina:* 1873, State *v.* Speight, 69 N. C. 72, 75, *semble; Ohio:* 1860, Gandolfo *v.* State, 11 Oh. St. 114, 117; *Oklahoma:* 1922, Phillips *v.* State, — Okl. Cr. —, 203 Pac. 902 (murder; witness could only recall one person who had spoken; allowed); *Pennsylvania:* 1850, Morss *v.* Palmer, 15 Pa. 51, 57; 1898, Milliken *v.* Long, 188 Pa. 411, 41 Atl. 540; *Texas:* 1859, Boon *v.* Weathered, 23 Tex. 675, 681; *Utah:* 1916, State *v.* Barretta, 47 Utah 479, 155 Pac. 343; *Virginia:* 1880, Davis *v.* Franke, 33 Gratt. 425; *West Virginia:* 1870, Lemons *v.* State, 4 W. Va. 755, 760; 1907, State *v.* Cremeans, 62 W. Va. 134, 57 S. E. 405; *Wisconsin:* 1907, Spencer *v.* State, 132 Wis. 509, 112 N. W. 462.

Contra: 1909, Brinsfield *v.* Howeth, 110 Me. 520, 73 Atl. 289 (whether the reputation was "questioned or doubted" until now, held improper, except to rebut testimony to bad reputation); 1877, Walker *v.* Moors, 122 Mass. 502 (a confused opinion, but apparently excluding such a form of answer); 1878, Lenox *v.* Fuller, 39 Mich. 268; 1915, Thayer *v.* Thayer, 188 Mich. 261, 154 N. W. 32; 1867, Lyman *v.* Philadelphia, 56 Pa. 488, 502, *semble.*

[2] 1884, Pickens *v.* State, 61 Miss. 563, 567, *semble:* 1885, French *v.* Sale, 63 id. 386, 393; 1921, State *v.* Hulbert, — Mo. —, 228 S. W. 499 (murder; police officer's testimony to defendant's repute, based not on hearing any one talk but on observing defendant as frequenting dives, held inadmissible; this illustrates again the childish absurdity of the rule of § 1983, *post*, excluding personal opinion based on observation).

[3] In Com. *v.* Lawler, 12 All. Mass. 585 (1866), the question, "Have you heard his character called in question?" was excluded merely because the witness seemed to know nothing of the reputation.

The following case erroneously applies here the rule of § 692 *ante:* 1921, Prevatt *v.* State, 82 Fla. 284, 89 So. 807 (murder; "Have you ever heard anything said against his reputation in the community?" excluded, because the witness was not asked first if he knew the reputation; though the witness had known the defendant).

§ 1615. **Reputation must be in Neighborhood of Residence.** That discussion and comparison which contribute to the complete estimate and lead to the general consensus (*ante*, § 1610) must in the beginning obtain its data from the experience of those who have had direct contact with the person in question; and it is these data of personal observation which are indispensable as a foundation of the final reputation. Such experience of observed instances is to be found only among those with whom the person ordinarily associates, — that is, among the members of the community in which he lives and acts:

1887, BRACE, J., in *Waddingham* v. *Hulett*, 92 Mo. 533, 5. S. W. 27: "[The witness to reputation] must be able to state what is generally said of the person by those among whom he dwells, or with whom he is chiefly conversant, — not by those among or with whom he may have sojourned for a brief period, and who have had neither time nor opportunity to test his conduct, acts, or declarations, or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his life, and not by a mere episode in it."

Accordingly, it is commonly said that the place or community of which the reputation is predicated must be the "neighborhood" where he has "resided."[1] The phrasings and definitions of this community and of the time of

§ **1615**. [1] *Alabama:* 1921, Charley *v.* State, 204 Ala. 687, 87 So. 177; *Florida:* 1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (reputation in different places, admitted); *Georgia:* 1852, Boswell *v.* Blackman, 12 Ga. 593 (reputation in a county, *i.e.* a district larger than the mere neighborhood, admitted); *Indiana:* 1863, Aurora *v.* Cobb, 21 Ind. 510 ("friends and neighbors"); 1877, Rawles *v.* State, 56 Ind. 441 (limiting it definitely to the neighborhood of residence; not accepting it from "the neighborhood where she is best known"); 1879, Smock *v.* Pierson, 68 Ind. 405 ("neighborhood where he resides"); *Iowa:* 1887, Hanners *v.* McClelland, 74 Ia. 322, 37 N. W. 389 (in a town near by, admitted); 1904, Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550 (reputation in places of brief residence, admitted on the facts); *Kansas:* 1895, State *v.* Brown, 55 Kan. 766, 42 Pac. 363 (a twenty-four hours' stay in a place, held sufficient to found a reputation for unchastity; "there is no fixed time within which a reputation may be gained; . . . she may have gained considerable notoriety in twenty-four hours"); *Kentucky:* 1859, Henderson *v.* Haynes, 2 Metc. Ky. 342, 348 ("those among whom he dwells *or* with whom he is conversant"); 1895, Combs *v.* Com., 97 Ky. 24, 29 S. W. 734 (in a county where he did not reside, excluded); *Louisiana:* 1889, State *v.* Johnson, 41 La. An. 574, 7 So. 670 ("general reputation", held improper, without the addition "in the neighborhood in which he lived"); *Massachusetts:* 1921, Com. *v.* Porter, 237 Mass. 1, 129 N. E. 298 (defendant's reputation only in the town of the witness' father-in-law, the employer of defendant, held inadmissible); 1859, Powers *v.* Presgroves, 38 Miss. 227, 241 (the reputation must be "where he is best known", "by those among whom he dwells or with whom he is chiefly conversant", but no definite limits to that neighborhood can be set); 1885, French *v.* Sale, 63 Miss. 386, 392, 394 (the testimony is "usually and necessarily indefinite" as to the dimensions of the neighborhood; the witness must be able to say "as a matter of conscience that he knows the common or general opinion of the community or neighborhood on the subject"); *Missouri:* 1874, Warlick *v.* Peterson, 58 Mo. 408, 416 (must be at place of residence); 1887, Waddingham *v.* Hulett, 92 Mo. 533, 5 S. W. 27 (reputation at a place where the person visited 3 months, etc., excluded); 1893, State *v.* Petit, 119 Mo. 410, 414, 24 S. W. 1014 (reputation where the deceased had lived only 8 or 9 months, held receivable in trial Court's discretion); 1899, State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315 (residence for 6 or 8 months, sufficient); 1900, State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737 (reputation where he resided only a few weeks, allowed on the facts); *New Hampshire:* 1860, Kelley *v.* Proctor, 41 N. H. 140, 146 (the question "Are you acquainted with F.'s reputation for truth in the vicinity or neighborhood where he resides?" was urged by counsel as the proper form; Sargent, J.: "No doubt the form of the question as insisted on by the defendant is substantially correct; . . . but a man's neighborhood extends for these purposes as far as he is well known, — as far as people are acquainted with him and his character"; and the question, "Are you acquainted with F.'s reputation for truth?" was held sufficient);

sojourn vary considerably; but nothing should turn upon precise words; and the general idea may be with sufficient correctness phrased in various forms.

§ 1616. **Same: Reputation in a Commercial or other Group, not the Place of Residence.** In a community where the ordinary person's home is under the same roof as his store or workshop, or where the stores, workshops, offices, and homes are all collected within a small village or town group, and one's working associates are equally the neighbors of one's home, there is but one community for the purpose of forming public opinion, and there is but a single capacity in which the ordinary person can exhibit his character to the community. In other words, he can there have but one reputation. But in the conditions of life to-day, especially in large cities, a man may have one reputation in the suburb of his residence and another in the commercial or industrial circles of his place of work; or he may have one reputation in his place of technical domicile in New York and another in the region of the mines of Michigan or the steel-mills of Ohio where his investments call him for supervision for portions of time. There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man.

There is no reason why the law should not recognize this. The traditional phrase about "neighborhood" reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. 'Alia tempora, alii mores.' What the law, then as now, desired was a trustworthy reputation; if that is to be found among a circle of persons other than the circle of dwellers about a sleeping-place, it should be received. This modern application of the traditional principle was foreshadowed in the following exposition of one of the greatest American judges:

1855, LUMPKIN, J., in *Keener* v. *State*, 18 Ga. 221 (murder in a brothel, by a railway-conductor): "We distinctly repudiate the doctrine that a man may not have different general characters, adapted to different circumstances and localities, — that is, a character for rail-cars and a character for the brothel, a character for the church and one for the street, a character when drunk and a character when sober. . . . A schoolmaster is indicted for an assault and battery upon one of his pupils; he defends himself under his acknowledged right to inflict moderate correction; the charge puts in issue the character of the teacher for violence; and where, pray, would you go to ascertain that character, — among his fellow-men, or in the school-room? There can be but one response to this question. An officer in the army or navy is tried for cruelty to a soldier or sailor; what

Ohio: 1862, Griffin *v.* State, 14 Oh. St. 63 (excluding a reputation in a town 26 miles from the defendant's home, in a community "not having the means of forming from personal acquaintance an intelligent judgment on the subject"); *South Dakota:* 1905, State *v.* Cambron, 20 S. D. 282, 105 N. W. 241 (rule applied to a house of ill-fame); *Texas:* 1859, Boon *v.* Weathered, 23 Tex. 675, 686 ("in the community where he lives or is best known"); *Vermont:* 1915, State *v.* Gomez, 89 Vt. 490, 96 Atl. 190 (assault to kill; accused's reputation at M., where he lived prior to going to W., the near-by place of the assault, where he had been for a few weeks only, admitted); *Washington:* 1896, State *v.* Cushing, 14 Wash. 527, 45 Pac. 145 (reputation in a town a few miles from the witness' home, admitted).

has his reputation in the community generally to do with the trait of character involved in the issue? It is in the barracks and on board the man-of-war that we look for what we wish to learn."

1903, FISH, J., in *Atlantic & B. R. Co.* v. *Reynolds*, 117 Ga. 47, 43 S. E. 456: "As the general reputation of a man is usually formed in the neighborhood where he spends most of his time, and most frequently comes in social and business contact with his fellow-men, it is usual to limit the inquiry as to a witness' general character to his general reputation in the neighborhood where he lives; that is, where he has his home. We do not think, however, there is any hard and fast rule which requires this to be done in every possible case. The very reason for so limiting the inquiry generally may be a good reason for allowing more latitude in an exceptional case. The reason for so limiting the inquiry generally, as already indicated, is that the place in which to ascertain a man's true reputation is the place where people generally have had the best opportunities of forming a correct estimate of his character. It is obvious that this may not, in every instance, be the neighborhood where a man's home is situated. . . . We apprehend that there may be cases in which a person has established no general reputation in the immediate neighborhood of his home, but has established such a reputation elsewhere. This may arise from the fact that his home is located in one place and his daily business or work is carried on in another, in which latter place he spends nearly all of his time, and hence is well known to people generally, while he rarely comes in social or business contact with people, outside of his family circle, in the neighborhood of his home."

The judicial rulings on this class of questions show frequently a defiance of common sense. "The rules of evidence," said Lord Ellenborough,[1] "must expand according to the exigencies of society." It is to be hoped that the due expansion will here be found.[2]

§ 1616. [1] 1812, Pritt *v.* Fairclough, 3 Camp. 305.

[2] The cases on both sides are as follows; hardly a one of the exclusionary rulings can be defended:

ENGLAND: 1664, Turner's Trial, 6 How. St. Tr. 565, 607 (robbery; defendant's reputation "upon the Exchange" asked for).

UNITED STATES: *Federal:* 1897, Williams *v.* U. S., 168, U. S. 382, 18 Sup. 92 (extortion by a custom-house officer; the defendant's bad reputation "in the Custom House", excluded, because it prevailed only "among the limited number of people employed in a particular public building"; this is not an enlightened ruling; the place where a reputation would be best founded is the place of daily employment); 1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 285, 68 C. C. A. 26 (reputation of a fellow-servant engineer, among conductors and brakemen, and not including "engineers and others acquainted with him", excluded); 1909, Pittsburgh R. Co. *v.* Thomas, 3d C. C. A., 174 Fed. 591 (repute of a motorman among fellow-employees, admitted; "reputation in a special employment or calling is competently proved — indeed, is best proved — as it exists among those of the same calling"); *Alabama:* 1860, Mose *v.* State, 36 Ala. 211, 229 (a family of eight or ten whites and about fifty blacks; the reputation of a slave therein, admitted, because in such cases "it is a general character and often the only character which the slave has"); *California:* 1883, People *v.* Markham, 64 Cal. 157, 163, 30 Pac. 620 ("general reputation" among the police-officers of a certain town, excluded; reputation must be "amongst his neighbors" or "amongst those who have had opportunities of ascertaining his reputation as generally estimated"); 1906, People *v.* Lamar, 148 Cal. 564, 83 Pac. 993 ("A man may possess different characters, or different reputations, adapted to different localities"; here, in saloons); *Columbia (Dist.)*: 1916, Gerber *v.* Probey, 44 D. C. App. 392, 407 (sale of automobiles; both parties were in the trade, the plaintiff living in Detroit, Mich.; a witness living in Martinsburg, Va., who knew plaintiff's reputation among manufacturers, excluded; unsound); *Delaware:* 1901, Giordano *v.* Brandywine Granite Co., 3 Pennewill Del. 423, 52 Atl. 332 (reputation among fellow-workmen, allowed to be shown by their expressed refusal to work with him because incompetent; sensible opinion; Lore, C. J., diss.); *Georgia:* 1903, Atlantic & B. R. Co. *v.* Reynolds, 117 Ga. 47, 43 S. E. 456 (reputation "up and down the W. A. L. Railroad, where he worked," admitted; quoted *supra*): *Indiana:* 1890, Sage *v.* State, 127 Ind. 15, 27, 26 N. E. 667 (reputation in H. at a time when the witness had been seven years confined in jail at I., excluded); *Louisiana:* 1878,

§ 1617. **Time of Reputation; (1) Reputation before the Time in Issue.** A reputation to character must ordinarily be thought of as contemporary with the character, *i.e.* as predicating the person, then existing in the community, to possess a certain trait. There is thus no objection, so far as concerns the reputation-element, to using a *prior reputation*, — for example, of Doe, in 1895, for peaceableness as evidential in a charge of murder in 1900; for the reputation in 1895 predicates the trait as then existing, and does not pretend to predicate anything as to 1900; and the real question to be met is a question of relevancy, namely, whether the existence of the trait in 1895 is evidence of its existence in 1900. That it is evidential for that purpose is unquestionable (*ante*, §§ 60, 191, 927). The judicial views thereon have already been considered in dealing with Witness' Character in Impeachment (*ante*, § 928).

§ 1618. **Same: (2) Reputation after the Time in Issue.** Where the reputation offered is of a *time subsequent* to the time of the act in issue, the objection is of a different sort, and involves directly the trustworthiness of the reputation-evidence.

There is here no difficulty from the point of view of the relevancy of character; a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward (*ante*, §§ 60, 921). Assuming, then, that we could ascertain the actual disposition (for example) of Doe one year after the time of a murder charged, there is no objection to using it as a basis for inferring his disposition a year before. But can we

State *v.* Clifton, 30 La. An. 951 (reputation for honesty in the defendant's boarding-house, excluded); *Maine:* 1908, State *v.* Lambert, 104 Me. 394, 71 Atl. 1092 (reputation in a town where "numerous business dealings" had been had, admitted, approving the above text); *Maryland:* 1902, Bonaparte *v.* Thayer, 95 Md. 548, 52 Atl. 496 (reputation for veracity "among his business associates", excluded); *Minnesota:* 1920, State *v.* Rogers, 145 Minn. 303, 177 N. W. 358 (keeping a house of ill-fame; repute as heard from persons who "had places of business in that locality and were there every day, but lived elsewhere", admitted); *New Jersey:* 1904, State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6 (rape; the accused's repute for chastity and morality "among his fellow-workmen", excluded); *New York:* 1876, Thomas *v.* People, 67 N. Y. 224 (reputation in prison, admitted; "there was a large community there, and a man can have a general character there as well as elsewhere"); 1897, Youngs *v.* R. Co., 154 N. Y. 764, 49 N. E. 1106, 77 Hun. 612 (reputation among fellow-employees, not received to show the fact of incompetency); 1898, Park *v.* R. Co., 155 N. Y. 215, 49 N. E. 674 (same); *North Carolina:* 1903, Lamb *v.* Littman, 132 N. C. 978, 44 S. E. 646 (reputation of a boss, for incompetence, among mill hands, admitted; but this was a fellow-servant case); *Pennsylvania:* 1877, Snyder *v.* Com., 85 Pa. 519, 522 (the complaints of the defendant's children about his cruelty to them, held not equivalent to a reputation); *Utah:* 1900, State *v.* Hilberg, 22 Utah 27, 61 Pac. 215 (reputation "in that precinct", excluded; unsound); *Wisconsin:* 1910, Moering *v.* Falk Co., 141 Wis. 294, 124 N. W. 402 (reputation of a fellow-servant for recklessness among those acquainted with his work, admitted).

In the following two cases, trial instructions too long to be quoted, dealing with a reputation among criminals, gamblers, etc., were passed upon: 1896, Smith *v.* U. S., 161 U. S. 85, 16 Sup. 483; Brown *v.* U. S., 164 U. S. 221, 17 Sup. 33; the rulings of the majority opinion are possibly correct in theory; but in so far as they disapproved the well-worded instructions of Mr. J. Parker, one of our greatest American trial judges, they are lamentable quibbles; compare § 21, *ante*.

Distinguish the use of an *employee's reputation* to show the employer's *knowledge of incompetence* (*ante*, § 249).

assume that it is his real disposition or trait, one year later, which is before us? Is his reputation, as obtaining one year later, then a trustworthy index to his actual character? This question may be answered differently for a party and for a witness.

(*a*) Where the desired character is that of a *party* — for example, the defendant in a criminal charge, the prosecutrix in a rape charge, or the plaintiff in a statutory action for seduction — it is obvious that after the charge has become a matter of public discussion, and partisan feeling on either side has had an opportunity to produce an effect, a false reputation is likely to be created, — a reputation based perhaps in part upon rumors about the very act charged or upon interested utterances of either party. The safeguards of trustworthiness are here lacking:

1863, BATTLE, J., in *State* v. *Johnson*, Winston 151: "Upon principle, it ought to be confined to the time when the charge was first made. A different rule will expose the defendant to the greater danger of having his character ruined or badly damaged by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay; and the general rule in relation to that kind of testimony is that it shall not be received if the hearsay be 'post litem motam.'"

1882, HINES, J., in *White* v. *Com.*, 80 Ky. 486: "The only reason for stopping the inquiry at either point [time of discovery or time of arrest] is that the probabilities of innocence derived from previous good character may not be destroyed or embarrassed by the fact that the offence under consideration has been committed. . . . After the discovery that an offence has been committed, a previous good character may be destroyed and a bad one created by discussion of the circumstances connected with the offence, as well before as after the formal charge by legal proceeding is had."

Accordingly, it is generally agreed that a reputation at any time *after a charge published*, or other controversy begun, is not admissible.[1] But, since the above reasoning is directed against the risk of an unduly hostile reputa-

§ **1618.** [1] *Federal:* 1898, Spurr *v.* U. S., 31 C. C. A. 202, 87 Fed. 701 (defendant's reputation since the time of the act charged, excluded); *Alabama:* 1871, Brown *v.* State, 46 Ala. 175, 184 (of defendant, after the time of the alleged crime, excluded); 1896, White *v.* State, 111 Ala. 92, 21 So. 330 (defendant's character while in jail, excluded; the time must be at or before the crime charged); 1904, Gordon *v.* State, 140 Ala. 29, 36 So. 1009 (reputation of the deceased after the killing, excluded); *Indiana:* 1910, In re Darrow, 175 Ind. 44, 92 N. E. 369 (disbarment; offer of good character, not limited to the time before the alleged offence, excluded); *Iowa:* 1915, State *v.* Rowell, 172 Ia. 208, 154 N. W. 488 (reputation after the time of the alleged crime, excluded); *Kentucky:* 1882, White *v.* Com., 80 Ky. 485 (bad reputation of a defendant, limited to the time before discovery of the offence charged); 1909, Allen *v.* Com., 134 Ky. 110, 119 S. W. 795 (defendant's reputation after the act charged, excluded); 1914, Combs *v.* Com., 160 Ky. 386, 169 S. W. 879 (murder; "general moral reputation" of the accused, at the time of trial admitted, thus not confining it to the time prior to the killing, when it is offered to impeach him as a witness, on the principle of § 923, *ante;* White *v.* Com. and Allen *v.* Com. distinguished as still in force for the case of a defendant not taking the stand; the witness distinction said to have been "first announced by this Court" in Hourigan *v.* Com., 89 Ky. 305, 12 S. W. 550; the distinction is sound enough in theory but it leads obviously to a quibble); *Michigan:* 1873, People *v.* Brewer, 27 Mich. 133, 135 (seduction; the woman's reputation 'post litem', excluded); 1913, People *v.* Huff, 137 Mich. 620, 139 N. W. 1033 (larceny; cross-examination of a good-character witness to matters after the date of the act charged, excluded); *Missouri:* 1905, State *v.* Day, 188 Mo. 359, 87 S. W. 465 (prosecutrix in rape under age; reputation prior to the trial but after birth of the child, excluded); *New Hampshire:* 1861, State *v.* Forschner, 43 N. H. 89, 90 (rape; bad reputation of the prosecutrix for

tion, it would seem that a party might properly be allowed to invoke in his favor a good reputation 'post litem motam'.

(*b*) In the case of a *witness*, the conditions above pointed out do not usually affect his reputation, because his conduct is not the subject of the controversy. Moreover, although a witness may sometimes be so related to the controversy or to the parties as to have suffered in consequence from partisan feeling, yet the situation hardly requires as a general rule a limitation to reputation 'ante litem motam'. Accordingly, the reputation of a witness even up to the *time of testifying*, is generally regarded as admissible.[2]

chastity, as formed since the time of the alleged rape, excluded, as "inducing attempts to destroy the character of a prosecutrix in order to defeat the prosecution"); *New Jersey:* 1900, State *v.* Sprague, 64 N. J. L. 419, 45 Atl. 788 (rape-assault; defendant's bad reputation for violence after the time of arrest, or of commission of the offence — the opinion not clearly distinguishing —, inadmissible; the rule not to apply to the reputation of a witness or of a defendant as witness); *North Carolina:* 1877, State *v.* Laxton, 76 N. C. 216, 218 (of defendant, after charge made, excluded); *Ohio:* 1851, Cincinnati F. & M. Ins. Co. *v.* May, 20 Oh. 224 (of a pilot, confined to the time before the accident in issue); 1870, Wroe *v.* State, 20 Oh. St. 472 (of defendant, after the time of the offence, excluded); *Rhode Island:* 1893, State *v.* Kenyon, 18 R. I. 217, 223, 26 Atl. 199 (reputation of deceased for quarrelsomeness, since his death, excluded); *South Carolina:* 1900, State *v.* Taylor, 57 S. C. 483, 35 S. E. 729 (prosecutrix in rape; reputation after the date charged, excluded); *South Dakota:* 1897, State *v.* King, 9 S. D. 628, 70 S. W. 1046 (seduction; reputation after accusation made, excluded); *Tennessee:* 1895, Lea *v.* State, 94 Tenn. 495, 29 S. W. 900 (of defendant, after charge made, excluded); 1906, Powers *v.* State, 117 Tenn. 363, 97 S. W. 815 (defendant's repute after the homicide, excluded; but here the rule was erroneously applied to forbid cross-examination of a good-character witness as to reports of violent conduct; this was admissible on the principle of § 988, *ante*); *Texas:* 1922, Polk *v.* State, — Tex. Cr. —, 238 S. W. 934 (seduction; complainant's reputation for unchastity after date of seduction, excluded); *Vermont:* 1906, State *v.* Biscome, 78 Vt. 485, 63 Atl. 877 (assault; excluded, but no authority is cited and the reasoning is confused); *Virginia:* 1819, Carter *v.* Com., 2 Va. Cas. 169 (of defendant, after charge made, excluded); *West Virginia:* 1906, State *v.* Barrick, 60 W. Va. 576, 55 S. E. 652 (prosecutrix in rape; reputation after the alleged offence, inadmissible).

Contra, but missing the point: 1839, Com. *v.* Sacket, 22 Pick. Mass. 369 ("it may be of little weight, but still it will have some bearing, as commonly the descent from virtue to crime is gradual").

For the exclusion of reputation *after publication of a defamatory charge*, offered to mitigate damages in an action for defamation, see *ante*, § 74.

[2] 1899, Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95 (bad reputation of defendant's wife at time of trial, admissible, even though affected by the charge against defendant); 1878, Fisher *v.* Conway, 21 Kan. 18, 25 (holding that the basing of the reputation upon rumors circulated by enemies, etc., goes merely to the weight of the evidence); 1858, Mask *v.* State, 36 Miss. 77, 89 (testimony to bad reputation admitted, though the witness had never heard it called in question till after the present dispute); 1838, State *v.* Howard, 9 N. H. 486 (although a concerted attempt to injure the witness' reputation was alleged to have been made by the opponent); 1881, Dollner *v.* Lintz, 84 N. Y. 669 (reputation at the time of trial, admissible to show reputation at the time the deposition was taken); 1897, Smith *v.* Hine, 179 Pa. 203, 36 Atl. 222 (that the reputation is founded on partisan opinions goes to weight only); 1900, Fossett *v.* State, 41 Tex. Cr. 400, 55 S. W. 497; 1868, Stirling *v.* Sterling, 41 Vt. 80, 96 (bastardy; complainant's reputation since controversy begun, admitted); 1882, Amidon *v.* Hosley, 54 Vt. 25 (holding, conversely, that a person offering his witness' good character may confine his inquiry to the time before suit begun).

Contra: 1908, State *v.* Blackburn, 136 Ia. 743, 114 N. W. 531 (rape under age; the prosecutrix' repute at time of trial, admitted; unsound); 1864, Reid *v.* Reid, 17 N. J. Eq. 101 (opinions obtained by an agent sent to the neighborhood to make inquiries); 1879, Johnson *v.* Brown, 51 Tex. 65, 76 (reputation arising from the very will-contest before the court, excluded). Compare the cases *ante*, § 692, excluding testimony by one sent to a neighborhood to investigate reputation; in part they proceed upon this ground.

In general, a reputation may be stated to have been good up to a certain time, and then bad thereafter: 1858, Quinsigamond Bank *v.* Hobbs, 11 Gray 252, 257.

(*c*) Where the witness is also the party, it would seem that the rule applicable to parties should be applied usually to his case.[3]

§ 1619. **Other Principles affecting Reputation, discriminated (Character in Issue, Witness' Knowledge of Reputation, Belief on Oath).** (1) That reputation is distinct from character has already been noted (*ante*, § 1608). Hence, where "character" is *in issue upon the pleadings*, it is important to observe whether by the nature of the case it is the actual character or the reputation that is in issue. If the latter, then reputation is provable as a fact in issue; if the former, then reputation, though not in issue, is admissible under the present exception as evidence of the actual character. The classes of cases involving such questions have already been examined (*ante*, §§ 70–80, 202–212).

(2) The *witness* who testifies *to reputation* must, like other witnesses, have had opportunities to acquire *personal knowledge* of the fact to which he testifies. Hence it is commonly said that he must be a resident of the neighborhood or otherwise so placed as to be acquainted with the reputation; this principle has already been examined (*ante*, § 692).

(3) A witness to reputation may *on cross-examination be tested*, like other witnesses, as to the sources of his knowledge; whether he may be asked what persons he has heard speak unfavorably, or be otherwise so tested, rests on principles already examined (*ante*, §§ 988, 1111).

(4) Whether a witness testifying that he would not *believe another upon oath* may base the belief upon the other's reputation, is dealt with elsewhere, under the Opinion rule (*post*, § 1980), in treating of personal opinion to character.

§ 1620. **Kind of Character; (1) Chastity; (2) House of Ill-fame; (3) Common Offender; Illegal Sale of Liquor or Drugs.** That species of character of which reputation is strictly and properly a trustworthy evidence is *moral character*, *i.e.* traits of permanent moral constitution, such as peaceableness, honesty, veracity, and the like, or their opposites. But obviously the line between those personal qualities which are properly provable by reputation

[3] 1898, State *v.* Marks, 16 Utah 204, 15 Pac. 1089 (not after time of offence, "or at least", time of arrest; here applied to a defendant as witness); 1922, Mohler *v.* Com., — Va. —, 111 S. E. 454 (murder; accused's reputation for veracity at the time of trial admissible against him as a witness, even though affected by gossip since the date of the crime; otherwise, for his reputation for general peaceable character).

Contra: 1916, Smith *v.* State, 197 Ala. 193, 72 So. 316 (murder; defendant's good character since confinement in jail, and her appointment as a jail trusty, excluded); 1917, Parker *v.* Newman, 200 Ala. 103, 75 So. 479 (alienation of affections; to rebut defendant's good character evidence, plaintiff was allowed to introduce defendant's bad general repute "up to the time of the occurrence". but thereafter only her bad veracity character; this subtle and perhaps correct quiddity had presumably not the least appreciable effect on the jury's state of persuasion; why should Supreme Courts spend their mental vigor and the State's time doing something which they like the Roman augurs must in private candor regard as a vain thing?); 1889, Com. *v.* Hourigan, 89 Ky. 313, 12 S. W. 550; 1916, State *v.* Murray, 139 La. 280, 71 So. 510 (assault; accused's good reputation after the event, excluded; distinguishing State *v.* Anderson, 135 La. 326); 1921, State *v.* Dolliver, 150 Minn. 155, 184 N. W. 848 (carnal knowledge of a female under age; defendant's good reputation to include the period following arrest, held inadmissible); 1900, State *v.* Sprague, N. J., *supra*, note 1; 1896, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046; 1900, Renfro *v.* State, 42 Tex. Cr. 393, 56 S. W. 1013. Compare the cases cited *supra*, n. 1.

and those which are not is a difficult one to draw; it cannot be definitely fixed by way of deduction from principle. The considerations of principle (noted *ante*, § 1610) still leave it arguable in some classes of cases whether reputation is a proper source of proof within the general scope of the principle.

(1) As to *chastity* or its opposite, no doubt has ever arisen, except in a single and peculiar action. In the statutory action or prosecution for seduction of a woman of "previously chaste character", the question first arises whether this "character" is actual character or reputation. Assuming the former view to be taken, then, although actual character is the fact in issue, there is no reason why reputation should not be admissible, as in all other issues, to prove the chaste or unchaste character.[1] But in some jurisdictions the Court's adoption of the view that actual character is the fact in issue has led it erroneously to exclude reputation as evidence of that character.[2] It may be added that reputation is of course not admissible to prove a specific *act of fornication*,[3] or a condition of *pregnancy*.[4]

(2) On a charge of *keeping a house of ill-fame* or a *disorderly house*, the same distinction between actual character and reputation serves to solve the difficulty. (*a*) So far as the offence involves in the issue the *kind of persons resorting to it*, it is possible to maintain that either their reputation or their actual character is the fact in issue; if the former, then those persons' reputation is of course admissible as being in issue;[5] if the latter, then their reputation is admissible under the present exception as evidence of their personal moral character, and upon this point, naturally, no doubt has ever

§ 1620. [1] 1906, Ex parte Vandiveer, 4 Cal. App. 650, 88 Pac. 993; 1893, State v. Lenihan, 88 Ia. 670, 673, 56 N. W. 292 (good repute, admitted in rebuttal); 1905, State v. Hummer, 128 Ia. 505, 104 N. W. 722 (reputation, admissible in rebuttal, but only for chastity and not for general moral character); 1892, State v. Lockerby, 50 Minn. 363, 52 N. W. 958 (admissible "in corroboration" of the complaining witness); 1897, Carroll v. State, 74 Miss. 688, 22 So. 295 (where chastity is essential, in a charge of seduction, reputation is evidence of actual chastity); 1906, State v. Taylor, 207 Mo. 41, 183 S. W. 299 (citing with approval the text above); 1918, State v. Cook, — Mo. —, 207 S. W. 831 (carnal knowledge of a chaste female under age; good reputation admitted; careful opinion by Faris, J., citing with approval the text above); 1906, State v. Connor, 142 N. C. 700, 55 S. E. 787 (criminal elopement with a married woman of virtuous character; the woman's virtuous character admitted); 1910, State v. Mallonee, 154 N. C. 200, 69 S. E. 786; 1912, State v. Meister 60 Or. 469, 120 Pac. 406 (reputation admissible after evidence by specific unchaste acts).

[2] *Ala.* 1888, Hussey v. State, 86 Ala. 34, 36, 5 So. 484; *Ia.* 1871, State v. Shean, 32 Ia. 88, 92 (because actual chastity is required, reputation is excluded, either of unchastity or chastity, its use as hearsay to prove the actual character being ignored; but then, to disprove the commission of acts of lewdness charged, the actual character is declared relevant, and reputation is received to prove it; a paradoxical ruling); 1899, State v. Reinheimer, 109 Ia. 624, 80 N. W. 669 (unchaste repute, excluded); *Mo.* 1898, State v. Summar, 143 Mo. 220, 45 S. W. 254 (bad repute excluded, because by statute chastity was immaterial); *Nebr.* 1904, Woodruff v. State, 72 Nebr. 815, 101 N. W. 1114; *N. Y.* 1863, Kenyon v. State, 26 N. Y. 203, 208 ("It could not have been intended to substitute reputation for character in this its primary and true sense"; but Balcom, J., diss.); *Okl.* 1911, Hast v. Terr., 5 Okl. Cr. 162, 114 Pac. 261; *Wash.* 1911, State Workman, 66 Wash. 292, 119 Pac. 751 (statutory rape; but the reputation should be confined to the purpose of discrediting the witness, Chadwick, J., diss.).

For this difference of statutes and their interpretation, see more fully *ante*, § 205.

[3] 1822, Treat v. Browning, 4 Conn. 408, 414 (fornication and the having a bastard child); 1839, Overstreet v. State, 3 How. Miss. 328 (charge of fornication).

[4] 1835, Boies v. McAllister, 12 Me. 308.

[5] The cases are collected *ante*, §§ 78, 204; some of the statutes cited *infra*, n. 7, make this provision also.

arisen. (*b*) So far as the habitual use or "character" of the *house itself* is concerned, the same question again arises, whether the fact in issue is the "fame", *i.e.* reputation of it, or the actual habit and character of it. If we accept the former view (and here much depends on the statutory wording), then reputation is of course admissible as being in issue.[6] But if we take the latter view, then, the actual use and character of the house becoming the issue, the question arises whether reputation is admissible under the present exception to prove it. The subject of the reputation is not an individual's moral trait, and therefore is without the ordinary scope of the present exception. Nevertheless, having regard to the circumstances from which such a reputation arises, and the difficulty of obtaining other evidence in the ordinary way from unimpeachable witnesses, it seems unquestionable that reputation should be admitted as trustworthy and necessary evidence.[7]

[6] The cases are collected *ante*, § 78.

[7] *Admitted:* CANADA: 1916, R. *v.* Sands, 28 D. L. R. 375, Alta. (keeping a common bawdy-house: reputation not sufficient without other evidence); 1901, Re Fong Yuk, 8 Br. C. 118, 120 (deportation of a prostitute: reputation of the house in which the woman formerly lived, admissible);

UNITED STATES: *Federal:* 1919, Anzine *v.* U. S., 9th C. C. A., 260 Fed. 827 (keeping a house of ill-fame, under U. S. St. 1917, May 18, § 13: general reputation of the house, admitted); 1921, Hunter *v.* U. S., 4th C. C. A., 272 Fed. 235, 241 (keeping a bawdy-house within 5 miles of a military post, under St. 1917, May 18, § 13; reputation of the house, admissible); *Alaska:* Comp. L. 1913, § 2008 (keeping a house of ill-fame; "common fame shall be competent evidence"); St. 1919, c. 20, § 4 (enjoining a house of prostitution: "common fame shall be competent evidence in support of the complaint"); *Arizona:* Rev. St. 1913, Civ. C. § 4342 (maintaining house of prostitution; "general reputation of the place", admissible); P. C. § 308 (keeping a house of prostitution, etc.; "the general reputation of the house and of the persons frequenting the same", to be admissible); *Arkansas:* 1919, Batesville *v.* Smythe, 138 Ark. 276, 211 S. W. 140 (keeping a house of prostitution; repute of the house, admitted); *California:* 1899, Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207 (lease for a house of prostitution; reputation of the house, admitted); 1920, People *v.* Bay Side Land Co., — Cal. App. —, 191 Pac. 994 (St. 1913, p. 20, Redlight Abatement Act, admitting "general reputation of the place", applied); *Colorado:* Comp. L. 1921, § 6234 (abatement of a house of prostitution; "general reputation of the place or of its habitués", admissible); *Columbia (Dist.):* Code 1919, p. 412, U. S. St. 1914, Feb. 7 (abatement of house of prostitution; "general reputation of the place," admissible); *Connecticut:* Gen. St. 1918, § 2707 (house of ill-fame: on injunction proceedings, "general reputation of the place" is admissible); *Georgia:* 1885, Hogan *v.* State, 76 Ga. 82; 1919, Wilkes *v.* State, 23 Ga. App. 727, 99 S. E. 390 (but reputation alone is not enough); *Idaho:* Comp. St. 1919, § 7046 (in actions to abate a "moral nuisance", "general reputation of the building or place" or its inmates and "those resorting thereto", is admissible); *Illinois:* St. 1915, June 22, p. 371, § 2 (abatement of prostitution nuisance: "general reputation of such building or apartment, or of such place, of the inmates thereof, and of those resorting thereto" is admissible); *Iowa:* Comp. Code § 8795, Code 1897, § 4944 (on a charge of keeping a house of ill-fame, the prosecution may introduce "general reputation of such house as so kept" to show its character); Code 1919, § 1030 (nuisance by prostitution: "general reputation of the place", admissible); 1904, State *v.* Steen, 125 Ia. 307, 101 N. W. 96 (statute applied); 1910, State *v.* Burns, 145 Ia. 588, 124 N. W. 600 (living as a prostitute in a house of ill-fame: repute of the house, admitted, on the analogy of Code § 4944); 1916, State *v.* Gardner, 174 Ia. 748, 156 N. W. 747 (resorting to a house of ill-fame for purposes of prostitution: general reputation of the house, admitted; nothing said about any statute); *Kansas:* 1918, State *v.* Fleeman, 102 Kan. 670, 171 Pac. 618 (maintaining a place of prostitution; reputation admitted); *Kentucky:* 1913, King *v.* Com., 154 Ky. 829, 159 S. W. 593 (maintaining a common public nuisance, viz. a bawdy-house; repute admitted, but not sufficient as the sole evidence: the opinion does not notice the statutory distinctions on which the rule depends); *Louisiana:* St. 1918, June 27, No. 47, § 7 (abatement of prostitution nuisance; "general reputation of the building, structure, land, or other place, or of the defendant, or of the occupants thereof or habitual visitors" is admissible, "and judgment may be based on the general reputation so proven"); *Maine:* Rev.

(3) The offence of being a common thief, or a common gambler, or other *common offender*, or of keeping a common nuisance, *e.g.* a place for *illegal*

St. 1916, c. 126, § 20 (pandering and pimping; "general reputation or common fame" admissible to prove a house one of prostitution, etc.); St. 1919, c. 112 (prostitution; pandering, etc.; "reputation of any place, structure, or building, and of the person or persons who frequent the same", admissible); *Maryland:* Ann. Code 1914, Art. 27, § 19 (keeping a bawdy house; "general reputation of the house", admissible); *Michigan:* Comp. L. 1915, § 7783 (nuisance of house of assignation, etc.; "general reputation of the place", admissible); *Minnesota:* 1896, Egan *v.* Gordon, 65 Minn. 505, 68 M. W. 103 (in an action to recover rent); *Montana:* 1895, State *v.* Hendricks, 15 Mont. 194, 39 Pac. 94 (provided there is corroboration by facts of such use); *Nebraska:* Rev. St. 1922, § 9769 (enjoining a nuisance of house of prostitution; "general reputation of the place", admissible); *Nevada:* Rev. L. 1912, § 6513 (keeping house of ill-fame; "general reputation", admissible as to the house and the woman); *New Hampshire:* St. 1919, Mar. 28, c. 95, § 5 (abatement of prosecution nuisance; "general reputation of the place, or an admission or finding of guilt of any person under the criminal laws against prostitution", admissible to prove the nuisance); *New Mexico:* St. 1921, c. 69, § 3 (prostitution; "reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same [and] of the defendant shall be admissible in support of the charge"); St. 1921, c. 90, § 4 (injunction against keeping a house of prostitution; "evidence of general reputation of the place", admissible); *New York:* St. 1914, c. 365 (injunction to suppress house of ill-fame as a nuisance; amending St. 1909, c. 49; inserting a new § 343*d*; "evidence of the common fame and general reputation of the place, of the inmates thereof, or of those resorting thereto, shall be competent evidence to prove the existence of the nuisance"); C. Cr. P. 1881, § 889 *a*, as added by St. 1919, c. 502 (pandering and prostitution; "reputation of the place wherein the offense occurred or of persons who frequent or reside therein" is admissible); *North Carolina:* Con. St. 1919, § 4347 (on trials for keeping a bawdy-house, etc., "evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute, and boisterous conversation of the inmates and frequenters, while in and around the house, shall be 'prima facie' evidence of the bad character of the inmates and frequenters and of the disorderly character of the house"); § 4360 (pandering, pimping, etc.; reputation of "any place, structure, or building", and of "the person or persons who reside in or frequent the same, and of the defendant", is admissible); 1918, State *v.* Price, 175 N. C. 804, 95 S. E. 478 (keeping a bawdy-house; reputation of the house, admitted, under Pell's Revisal § 3353A); *North Dakota:* St. 1919, Mar. 7, c. 190, § 3 (prostitution offences; "testimony of a prior conviction or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant shall be admissible); *Ohio:* St. 1913, p. 180, Gen. Code Ann. 1921, § 13031–11 (in pandering cases, "general reputation of a house as a house of prostitution or assignation" is competent); § 13031–14 (keeping a house for prostitution, etc.; "reputation of any place, structure, or building and of the person or persons who reside in or frequent the same and of the defendant" is admissible); § 6200 (use of liquor in house of ill-fame; sufficient to prove that the "building or place is generally reputed in the neighborhood" etc.); *Oklahoma:* 1913, Patterson *v.* State, 9 Okl. Cr. 564, 132 Pac. 693; 1913, Putman *v.* State, 9 Okl. Cr. 535, 132 Pac. 916 (weighty opinion by Furman, J.); 1919, Francis *v.* State, 16 Okl. Cr. App. 543, 185 Pac. 126 (reputation admissible, but not alone sufficient); *Oregon:* Laws 1920, § 2090 (bawdy-house; "common fame shall be competent evidence"); *Rhode Island:* Gen. L. 1909, c. 108, § 3 (common nuisance by keeping a place for prostitution, gaming, liquor-selling, etc.; "the notorious character of any such premises, or the notoriously bad or intemperate character of persons visiting the same", admissible); *South Carolina:* 1838, State *v.* McDowell, Dudley 345, 350 ("In a case in which character is its very gist, I am willing to make that which everybody says the evidence"); C. C. P. 1922, § 470 (abatement of prostitution nuisance; "general reputation of the place", admissible); *South Dakota:* Rev. C. 1919, § 3893 (to show the character of a house of ill-fame, "evidence of the general reputation of the house" is admissible); 1905, State *v.* Cambron, 20 S. D. 282, 105 N. W. 241 (the statute does not exclude other proper evidence); *Tennessee:* Shannon's Code 1916, § 5164 *a* 9 (in proceedings against a nuisance of prostitution, liquor-selling, gaming, etc., "general reputation of the place" is admissible); *Texas:* 1908, Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176 (disorderly house for illegal sale of liquor; reputation admitted; Davidson, P. J., diss.); *Virginia:* 1922, Wilson *v.* Com., — Va. —, 111 S. E. 96 (keeping a house of ill-fame; of course, proof of repute is not required); *Washington:* 1912, State *v.* Stone, 66 Wash. 625, 120 Pac. 76 (placing a female in a house of prostitution); Wash. St. 1913, c. 127, p. 391, § 3, R. & B. Code 1909, § 946–3 (houses of prostitution, etc.; "evidence of the general reputation of the

sale of liquor or *drugs*, is one which by some Courts, sometimes under statute, has been regarded as provable by reputation;[8] but perhaps the notion here

place shall be admissible for the purpose of proving the existence of said nuisance"); *Wisconsin:* Stats. 1919, § 4581 *g* (in prosecutions for keeping a house of ill-fame, etc., "common or general reputation" is admissible).

Excluded: 1833, U. S. *v.* Jourdine, 4 Cr. C. C. 338, overruling U. S. *v.* Grey, 1826, 2 Cr. C. C. 675; 1876, Wooster *v.* State, 55 Ala. 221; 1903, Ramsey *v.* Smith, 138 Ala. 333, 35 So. 325 (sale of a piano to a plaintiff for use in a house of prostitution; reputation not admitted to show the character of the house); 1846, Caldwell *v.* State, 17 Conn. 467, 472; 1900, Howard *v.* People, 27 Colo. 396, 61 Pac. 595 (keeping a house of ill-fame; petition of citizens to city council, inadmissible as constituting reputation); 1916, State *v.* Hunter, 173 Ia. 638, 155 N. W. 961 (prosecution under a city ordinance for keeping a disorderly house, in particular, for allowing unmarried persons to resort there, etc.; held that Code § 4944, admitting reputation on the trial of an indictment for keeping a house of ill-fame, did not authorize reputation as evidence here; nothing said about common-law principles; this is the kind of ruling that makes law regarded with repulsion and distrust by unsophisticated citizens); 1898, Shaffer *v.* State, 87 Md. 124, 39 Atl. 313 (keeping a disorderly house; its reputation inadmissible, until St. 1892, c. 522); 1885, Handy *v.* State, 63 Miss. 208; 1864, State *v.* Foley, 45 N. H. 466; 1863, Kenyon *v.* State, 26 N. Y. 203, 209 ("The general rule is that hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proved by the witnesses who speak from their own knowledge"); 1897, Nelson *v.* Terr., 5 Okl. 512, 49 Pac. 920; 1815, Com. *v.* Stewart, 1 S. & R. Pa. 342; 1895, State *v.* Plant, 67 Vt. 454, 32 Atl. 237; 1917, State *v.* Guyer, 91 Vt. 290, 100 Atl. 113; 1894, Barker *v.* Com., 90 Va. 820, 20 S. E. 776.

Undecided: 1905, State *v.* Harris, 14 N. D. 501, 105 N. W. 621.

So, also, excluding reputation of the *defendant himself as keeper* (compare the cases cited *ante*, § 78, note 3): 1833, U. S. *v.* Jourdine, 4 Cr. C. C. 338; U. S. *v.* Warner, ib. 342; 1858, State *v.* Hand, 7 Ia. 411.

It may be noted that in these cases it is not always easy to determine whether the Court proceeds upon the present principle or that of § 78, *ante*.

For reputation as evidence of *ownership* of such a house, see *ante*, § 1587, n. 8, and *post*, § 1626.

Compare the cases holding unconstitutional a statute which makes reputation *conclusive* (*ante*, §§ 1354–1356).

[8] *Accord: Alabama:* St. 1909, No. 193, Spec. Sess. p. 183, Aug. 25, § 5 ("general reputation of being gamblers, admissible in trial for gaming offences); *Florida:* Rev. G. S. 1919, § 5432 (keeping opium den; "general reputation" admissible to prove "the character of any building, structure, or shelter as an opium den"); *Indiana:* 1901, Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478 (disorderly beer-garden as a nuisance; reputation admitted, partly as affecting the depreciation of the value of plaintiff's premises); *Iowa:* Code 1897, § 5003, Comp. Code § 8865 ("general reputation" of a place, admissible for prosecution to show the character of the place on a charge of keeping an opium resort); *Maryland:* 1878, World *v.* State, 50 Md. 49, 54 (reputation admissible under St. 1864, c. 38, to show a defendant to be a "common thief"; and though the reputation must be shown to exist within the statutory period, reputation before that time is relevant to show it); *Nebraska:* Rev. St. 1922, § 3263 (liquor nuisance; "general reputation of the place" is admissible); *North Carolina:* 1921, State *v.* McNeill, 182 N. C. 855, 109 S. E. 84 (keeping liquor for sale; general reputation of the "place" as to selling whisky, admitted in corroboration); *North Dakota:* Comp. L. 1913, § 10128 (abatement of liquor nuisance; "general reputation of the place designated in the complaint" is admissible); *Oklahoma:* 1917, Cameron *v.* State, 13 Okl. Cr. 692, 167 Pac. 339 (liquor nuisance); 1919, Siebenaler *v.* State, 16 Okl. Cr. 576, 185 Pac. 448 (maintaining a public nuisance; reputation as a bootlegging joint, admitted); 1921, Tindell *v.* State, — Okl. Cr. —, 196 Pac. 557 (manufacturing intoxicating liquors; general reputation of the place, inadmissible; otherwise on a charge of possession with intent to sell; the distinction is unsound); *Oregon:* Laws 1920, § 2160 (opium offences; "general reputation shall be received in evidence to establish the character of any building as an opium den"); § 2224–64 (similar, for liquor nuisance); *Tennessee:* Shannon's Code 1916, § 3079 *a* 328 (soft-drink-stand nuisance; "general reputation", admissible to prove the nuisance).

Contra: 1906, State *v.* Brooks, 74 Kan. 175, 85 Pac. 1013 (liquor nuisance); 1834, Com. *v.* Hopkins, 2 Dana Ky. 419 (common gambler); 1913, Mitchell *v.* State, 9 Okl. Cr. 172, 130 Pac. 1175 (professional gambler); 1919, Levy *v.* State, 84 Tex. Cr. 493, 208 S. W. 667 (being a common prostitute; reputation of defendant and her associates, inadmissible).

Here compare the use of reputation to show *knowledge* merely (*ante*, § 257).

enters that reputation is a part of the issue.—The mode of proving such an offence by specific acts has already been noticed (*ante*, § 203).

Whether the foregoing offences can lawfully be constituted by repute alone is a constitutional question already dealt with (*ante*, §§ 1354–1356).

§ 1621. **Same**: (4) **Sanity**; (5) **Temperance**; (6) **Expert Qualifications**; (7) **Negligence**; (8) **Animal's Character.** (4) So far as the principle of necessity (*ante*, § 1610) is concerned, there is usually ample available evidence of sanity or *insanity* other than reputation. So far as the principle of trustworthiness (*ante*, § 1610) is concerned, although all the conditions that obtain for moral character obtain equally for sanity, yet opinions upon a standard of sanity differ so much that a reputation, without the opportunity to test its ground by cross-examination, would hardly be trustworthy. It is thus generally agreed that reputation is not admissible for this purpose:[1]

1849, NISBET, J., in *Foster* v. *Brooks*, 6 Ga. 290: "If reputation of insanity is competent, then reputation of sanity must also be. By this kind of evidence a fool may be proved a wise man, and a philosopher a fool. Public opinion declared Copernicus a fool when he promulgated the planetary system, and Columbus a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals. Hearsay evidence is excluded because a witness ought to be subjected to cross-examination, that being a test of truth. It ought to appear what were his powers of perception, his opportunities of observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth."

The use of a verdict or other *inquisition of lunacy* rests on a different principle (*post*, § 1671).

(5) A person's character or habits as *temperate*, or the reverse, in the use of *intoxicating liquor*, is sufficiently open to other sources of proof; and reputation is therefore unnecessary.[2]

(6) The qualifications of an *expert* or professional man, whether as a witness testifying on matters of skill, or as a party charged with lack of skill,

§ **1621**. [1] *Accord:* 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012; 1882, People *v.* Pico, 62 Cal. 53; 1880, State *v.* Hoyt, 47 Conn. 518, 539 (here for paternal insanity); 1900, Snell *v.* U. S., 16 D. C. App. 501, 511; 1860, Choice *v.* State, 31 Ga. 424, 470; 1838, Yeates *v.* Reed, 4 Blackf. Ind. 463, 466; 1885, Walker *v.* State, 102 Ind. 507, 1 N. E. 856; 1876, Ashcraft *v.* De Armond, 44 Ia. 233 (rumor in a neighborhood, inadmissible); 1920, Mitchell *v.* Slye, 137 Md. 89, 111 Atl. 814 ("People all said he was insane", excluded); 1868, Townsend *v.* Pepperell, 99 Mass. 40, 46 (settlement of insane pauper; common speech of the neighborhood as to her insanity, excluded); 1906, Reed *v.* State, 75 Nebr. 509, 106 N. W. 649; 1884, Barker *v.* Pope, 91 N. C. 168; 1894, State *v.* Coley, 114 N. C. 879, 885, 19 S. E. 705; 1875, Lancaster Co. Nat'l Bank *v.* Moore, 78 Pa. 407, 415; 1881, Yanke *v.* State, 51 Wis. 469, 8 N. W. 276.

Contra: 1760, Earl Ferrers' Trial, 19 How. St. Tr. 932, 937 (confinement in a private asylum, admitted); 1868, Com. *v.* Andrews, Mass., Davis' Rep. 134 (murder; insanity of deceased ancestors, held provable by reputation); 1859, State *v.* Christmas, 6 Jones L. 471, 475 (admissible to prove hereditary insanity of other members of the family, so as to avoid complicated issues as to particular conduct).

[2] 1893, Stevens *v.* R. Co., 100 Cal. 554, 570, 35 Pac. 165 (as to intemperance, excluded; the opinion misunderstands the point); 1894, Cosgrove *v.* Pitman, 103 Cal. 268, 273, 37 Pac. 232, *semble* (reputation not sufficient to prove a habit of intemperance); 1823, Brindle *v.* M'Ilvaine, 10 S. & R. Pa. 285 ("causes of physical depravity of the mental faculties are susceptible of a particular description by those who have witnessed them").

ought to be provable by reputation. So far as personal opinion by witnesses is excluded (*post*, § 1984), there remains practically no other mode of proof than the present, except such tests as can be obtained on the stand by cross-examination (*ante*, §§ 938, 992). Moreover, professional (not popular) reputation is usually highly trustworthy. The rulings have generally excluded reputation;[3] but the question arises comparatively seldom, partly because the character of parties in this respect is seldom relevant or in issue (*ante*, § 64), partly because it is usually not profitable by such evidence to discredit skilled witnesses, and partly because of the reluctance of professional men to bear such testimony.

(7) Character as to *negligence* or *care* is provable when it is in issue (*ante*, §§ 80, 208); and is also usable evidentially, under certain conditions, to show the doing or not doing of a specific act (*ante*, § 65). The character thus relevant has always been regarded as properly provable by reputation.[4] From such a hearsay use of reputation, distinguish its use circumstantially to show *notice*, for example, by an employer, of the employee's character (*ante*, §§ 246–260).

(8) That an *animal's character*, as properly as that of a human being, may be the subject of trustworthy reputation, for reasons similar to those already noted (*ante*, § 1610), would seem a just conclusion.[5]

E. Sundry Facts

§ 1623. **Reputation to prove Solvency or Wealth.** When the fact to be proved is the condition of a merchant's pecuniary resources as to *solvency* — that is, the ability practically to pay at maturity an ordinary debt —, considerations analogous to those already noted (*ante*, §§ 1586 and 1610) as

[3] *Excluded:* 1870, DePhue *v.* State, 44 Ala. 39 (witness); 1886, Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832 (negligent treatment by a physician; professional skill held to be in issue, but not provable for defendant by his reputation "in the community and amongst the profession"; the opinion is unsatisfactory, because it ignores the offer of reputation in the profession; no authority cited); 1901, Clark *v.* Com., 111 Ky. 443, 63 S. W. 740 (abortion; defendant's reputation as to skill as a surgeon, excluded; no authorities cited); 1897, People *v.* Holmes, 111 Mich. 364, 69 N. W. 501 (reputation not admissible to show an expert's competence).

Compare the cases cited *ante*, §§ 64, 67, 199, 208.

[4] See the citations in the sections above mentioned, where this is assumed. The only excluding decision seems to be Baldwin *v.* R. Co., 1855, 4 Gray Miss. 333 (character as a careless driver).

[5] The rulings differ: 1903, Fisher *v.* Weinholzer, 91 Minn. 22, 97 N. W. 426 (reputation of a dog, admitted; the foundation for such a repute, discussed); 1901, Jones *v.* Packet Co., — Miss. —, 31 So. 201 (pedigree of a jack, allowed to be proved by reputation); 1865, Whittier *v.* Franklin, 46 N. H. 23, 27 ("the character of a person for truth, it may well be presumed, cannot be bad without being known to the public; but it may be otherwise in respect to the vicious propensities of the horse"); 1852, Heath *v.* West, 26 N. H. 191, 199 (to the value of a horse, excluded); 1872, McMillan *v.* Davis, 66 N. C. 539 (Reade, J., admitting reputation of foal-getting qualities, value being in issue: "We suppose that with all stock-raisers there are two principal inquiries in selecting a sire: What is his pedigree? and, Is he a sure foal-getter? Other qualities are judged of by inspection; these cannot be. How are these inquiries to be answered? The most usual and satisfactory, if not the only way, is by reputation").

For the use of a *registry of pedigree* of an animal, see *post*, § 1706.

For the admissibility of the animal's *character* itself, see *ante*, §§ 68, 201.

making reputation a necessary and a trustworthy source of evidence seem to be here fulfilled. The argument has been well expounded in the following passages:

1845, GOLDTHWAITE, J., in *Lawson* v. *Orear*, 7 Ala. 786: "Insolvency is rather the conclusion which the law deduces from other facts, than the fact itself, and therefore it is quite probable that a witness would not be permitted to state this conclusion independent of the facts from which it was to be inferred. But in most cases, where the question of insolvency is collaterally involved [here the question was whether a purchase was made with notice of insolvency], it is nothing more than the attempt to show that the particular individual is not in a condition to be trusted as a debtor. In all such cases the common question which suggests itself to every mind is, Why is he not to be so trusted? or, What is his condition as to property or credit or the want of either? . . . From the very nature of things it is scarcely possible that there can be any certain means of acquiring exact information upon such a subject. . . . In all, or in a very large majority of all the trading classes, the information of the seller as to the ability of the purchaser to pay is derived from reputation and most generally from no other source whatever. To shut out from the jury the same evidence upon which the entire community acts would present a singular result." [1]

1863, ATWATER, J., in *Nininger* v. *Knox*, 8 Minn. 140, 147: "It would seem that the fact of insolvency, from its nature, must usually exclude direct proof, as no one save the person himself could ordinarily safely swear that a man had no property, or insufficient to meet his liabilities, at a given time. . . . The fact of insolvency is of such a nature that the opportunities of the public for forming a correct judgment in the matter must be usually as ample as those existing to form a judgment of character in any other respect, and indeed more so."

In the greater number of jurisdictions, reputation is accordingly admissible to show insolvency or solvency.[2] Distinguish the circumstantial use of reputation as evidence of *knowledge* by a purchaser of a debtor's insolvency (*ante*, § 253).

It has also been held occasionally that the *wealth* of a party (usually when material in proving damages for breach of promise of marriage) may be evidenced by reputation;[3] but this seems unsound.

§ 1623. [1] Citing Weeks *v.* Sparke, *ante*, § 1587.

[2] *Accord:* 1845, Lawson *v.* Orear, 7 Ala. 786, per Goldthwaite, J.; 1861, McNeill *v.* Arnold, 22 Ark. 482, *semble;* 1871, Hayes *v.* Wells, 34 Md. 518; 1864, Angell *v.* Rosenbury, 12 Mich. 241, 252; 1863, Nininger *v.* Knox, 8 Minn. 140, 147 (quoted *supra*); 1875, Burr *v.* Wilson, 22 Minn. 206, 211; 1893, West *v.* Bank, 54 Minn. 466, 469, 56 N. W. 54; 1895, Hahn *v.* Penney, 60 Minn. 487, 62 N. W. 1129; 1900, Garrett *v.* Weinberg, 59 S. C. 162, 37 S. E. 51; 1846, Hard *v.* Brown, 18 Vt. 97 (where the solvency of R. was material in determining the adequacy of his note as "sufficient security" under a contract); 1860, Noyes *v.* Brown, 32 Vt. 430; 1860, Bank of Middlebury *v.* Rutland, 33 Vt. 430.

Contra: 1837, Ward *v.* Herndon, 5 Port. Ala. 382, 385 (undecided; here, of a debtor guaranteed by the defendant); 1843, Branch Bank *v.* Parker, 5 Ala. 736: 1858, Price *v.* Mazange, 31 Ala. 701, 708 (fraudulent mortgage); 1876, Holten *v.* Board, 55 Ind. 199; 1903, Wolfson *v.* Allen B. Co., 120 Ia. 455, 94 N. W. 910 (financial condition of vendees procured by the plaintiff as commission agent for the defendant); 1903, Coleman *v.* Lewis, 183 Mass. 485, 67 N. E. 603 (but here admitted to corroborate testimony to an indorser's waiver of presentment); 1905, Allison's Ex'r *v.* Wood, 104 Va. 765, 52 S. E. 559 ("particular opinions and particular acts", inadmissible).

[3] *Accord:* 1895, Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; 1920, Weiss *v.* Weiss, 95 N. J. L. 994, 112 Atl. 184 (slander); 1921, Bahrey *v.* Poniatishin, 95 N. J. L. 128, 112 Atl. 481 (slander); 1864, Kniffen *v.* McConnell, 30 N. Y. 285, 289; in State *v.* Cochran, 1828, 2 Dev. 65, reputation was thus admitted on another issue.

Contra: 1920, Smillie *v.* De Mendoza, 68 Colo. 461, 190 Pac. 533, *semble* (here admitting

§ 1624. **Reputation to prove Partnership.** The use of reputation to prove the existence of an agreement of partnership does not seem justifiable either by the necessity of the case or by the trustworthiness of the evidence; for not only may the testimony of the alleged partners, their admissions, and the written agreement if any, be ordinarily obtained, but the possibilities of a misleading reputation are particularly strong. These considerations have been more than once clearly set forth judicially:

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1835, WAITE, J., in *Brown* v. *Crandall*, 11 Conn. 92, 95: "[The rule is that] hearsay evidence is incompetent to establish any specific fact which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. . . . [If reputation here were admissible,] a person of doubtful credit might cause a report to be circulated that another was in partnership with him, for the very purpose of maintaining his credit. His creditors also might aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts. There is nothing in the nature of the fact to be proved requiring the admission of such testimony."

1838, COWEN, J., in *Halliday* v. *McDougall*, 20 Wend. 81, 90 (after quoting the reasoning in *Brown* v. *Crandall, supra*): "It may be added that, independent of sinister misrepresentations, there is scarcely a question upon which common reputation is more fallible. A contract of partnership is in nature incapable of being defined by laymen; and whether an apparent partnership be really so or a contract of some other character is often a most embarrassing legal question with the ablest lawyer. General reputation of the more ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be a much more proper subject of proof by general report; this the law always rejects, and yet I am not aware that there is a necessity for a resort to such proof in the one case more than the other."

Accordingly, it is to-day almost everywhere agreed that reputation is not admissible to prove the existence of a partnership.[1]

But in two other ways reputation may here become admissible. (1) By the substantive law of partnership liability, one *holding himself out* as partner may be charged as such, though no agreement was actually made; and to suffer a reputation of partnership to exist may in law amount to a holding

testimony by the party himself to the amount of his property); 1894, Bliss *v.* Johnson, 162 Mass. 323, 38 N. E. 446 (not received to show lack of means of one claiming to have loaned money); 1902, Birum *v.* Johnson, 87 Minn. 362, 92 N. W. 1.

§ **1624.** [1] 1893, Knard *v.* Hill, 102 Ala. 570, 574, 15 So. 345 (excluded); 1900, St. Louis & Tenn. R. P. Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; 1853, Sinclair *v.* Wood, 3 Cal. 98, 100 (excluded); 1835, Brown *v.* Crandall, 11 Conn. 92, 95 (inadmissible; quoted *supra*); 1871, Bowen *v.* Rutherford, 60 Ill. 41 (excluded); 1904, Marks *v.* Hardy's Adm'r, 117 Ky. 663, 78 S. W. 864 (excluded); 1809, Bryden *v.* Taylor, 2 H. & J. Md. 396, 400 (reputation held "not sufficient"); 1835, Goddard *v.* Pratt, 16 Pick. 412, 434 (not admitted to show a dissolution); 1842, Grafton Bank *v.* Moore, 13 N. H. 99 (excluded); 1817, Whitney *v.* Sterling, 14 Johns. N. Y. 215 (admitted); 1833, M'Pherson *v.* Rathbone, 11 Wend. N. Y. 96 (same); 1838, Halliday *v.* McDougall, 20 Wend. 81, 89; 22 Wend. 264 (held inadmissible, without other evidence; quoted *supra*); 1842, Smith *v.* Griffith, 3 Hill N. Y. 333, 336 (inadmissible); 1889, Adams *v.* Morrison, 113 N. Y. 152, 156, 20 N. E. 829 (reputation not admissible in any case to prove the fact); 1850, Inglebright *v.* Hammond, 19 Oh. 343 (excluded); 1898, Farmers' Bank *v.* Saling, 33 Or. 249, 54 Pac. 190 (excluded); 1824, Allen *v.* Rostain, 11 S. & R. Pa. 362, 363, 373 ("not evidence, except in corroboration of a previous testimony"); 1845, Hicks *v.* Cram, 17 Vt. 449, 456 (inadmissible). *Contra: Tex.* Rev. P. C. 1911, § 607 (liquor offences; membership in a firm is provable by "general reputation").

out; thus, the existence of such a reputation may become itself a fact in issue, irrespective of the truth of the matter reputed:[2]

1889, EARL, J., in *Adams* v. *Morrison*, 113 N. Y. 152, 156, 20 N. E. 829: "When there is a general reputation that two or more persons are copartners, and they know it, and permit other persons to act upon it, and to be induced thereby to give credit to the reputed firm, these facts may be proved and may be sufficient sometimes to estop the reputed members of the firm from denying the copartnership in favor of outside parties."

(2) For the purpose of establishing *knowledge by a customer* of the dissolution of a partnership, the reputation of its dissolution may be admissible as circumstantial evidence of such knowledge (*ante*, § 255).

§ 1625. **Reputation to prove (1) Legal Tradition, (2) Incorporation.** (1) So far as the custom and consent of the *legal profession* is of weight in determining the application of a principle of law, it seems to have been recognized that common opinion or reputation in the profession may be taken as evidence of this custom or consent.[1]

(2) By statute in many jurisdictions, reputation has been made evidence of the *existence of a corporation* or of certain kinds of incorporation;[2] and

[2] *Accord:* 1907, Grey *v.* Callan, 133 Ia. 500, 110 N. W. 909; 1917, Anfenson *v.* Banks, 180 Ia. 1066, 163 N. W. 608 (partner in a bank).

§ 1625. [1] 1761, Buckinghamshire *v.* Drury 2 Eden Ch. 60, 64 (Lord Hardwicke, L. C.: "The opinion of conveyancers in all times, and their constant course, is of great weight"; here, as to whether an infant is bound by a marriage jointure); 1892, Venable *v.* R. Co., 112 Mo. 103, 125, 20 S. W. 493 ("common consent and opinion of the profession", considered to show that dower may be barred in eminent domain).

Distinguish the reference to mere contemporaneous *usage* as an aid to interpretation: 1821, Packard *v.* Richardson, 17 Mass. 122, 144; 1873, Scanlan *v.* Childs, 33 Wis. 663, 666; and cases cited *post*, § 2464.

[2] *Ariz.* Rev. St. 1913, P. C. § 1048 ("general reputation" admissible to prove incorporation, on charge of forgery of bill or note of company); *Ark.* Dig. 1919, §§ 3119, 3120 (banking company's existence, etc., in criminal cause, provable by "general reputation"); *Cal.* P. C. 1872, § 1107 (forgery, etc., of bank-bill; incorporation provable by general reputation); *Colo.* Comp. L. 1921, § 6570 ("general reputation", admissible to prove incorporation of bank or company in prosecution for forgery of its bill or note); *Del.* Rev. St. 1915, § 4227 (in criminal proceedings, a bank's incorporation may be proved by reputation); *Ida.* Comp. St. 1919, § 8954 (forging, etc., a bill, etc., of incorporated company or bank; "general reputation", admissible to prove incorporation); *Ia.* Code 1897, § 4870, Comp. Code, § 8771 (general reputation, admissible to prove incorporation of bank, etc., on charge of forging bill, etc.); *Kan.* Gen. St. 1915, § 8129 (banking corporation in criminal cause; incorporation provable by reputation); *Mo.* Rev. St. 1919, § 4032 (in criminal causes, the "existence, constitution, or powers of any bank company or corporation" are provable by "general reputation"); 1860, State *v.* Fitzsimmons, 30 Mo. 237, 239 (statute allowing in criminal cases the existence, etc., of a banking company to be proved by reputation; applied on a trial for selling counterfeit notes); 1904, State *v.* Knowles, 185 Mo. 141, 83 S. W. 1083 (statute applied); 1905, State *v.* Wise, 186 Mo. 42, 84 S. W. 954 (statute applied); *Mont.* Rev. C. 1921, § 11983 (like Cal. P. C. § 1107); § 11985 (so also for any criminal case in proving corporate existence, powers, or constitution); *Nev.* Rev. L. 1912, §§ 6683, 7175 (on trial for forgery, etc., of bill or note of "incorporated company or bank", general reputation admissible to prove incorporation); § 7176 (so for proof of incorporation in any criminal case); *N. Dak.* Comp. L. 1913, § 10862 (like Cal. P. C. § 1107); *Ohio:* 1846, Reed *v.* State, 15 Ohio 217, 224 (existence of a foreign banking corporation, in prosecutions for counterfeiting); *Okla.* Comp. St. 1921, § 2721 (like Cal. P. C. § 1107); *P. R.* Rev. St. & C. 1911, § 6281 (like Cal P. C. § 1107); *S. Dak.* Rev. C. 1919, § 4902 (like Cal. P. C. § 1107); *Utah:* Comp. L. 1917, § 8987 (like Cal. P. C. § 1107); § 8989 (like Mont. Rev. C. § 11985); *Wyo.* Comp. St. 1920, § 7294 (on trial for forgery, etc., of bill or note of incorporated company or bank, incorporation is provable by "general reputation").

this is not inconsistent with the general considerations of policy already noted (*ante*, § 1610). It is in effect a practical mode of shifting the burden of proof; and the rule of many jurisdictions on that point (*post*, § 2535) is in effect scarcely to be distinguished from the present one.

§ 1626. **Reputation to prove** (1) **Ownership or Title**; (2) **Sundry Facts.** (1) In a few special classes of cases, chiefly of modern statutory origin, *ownership* or *title*, either to *realty* or *personalty*, is in some jurisdictions provable by reputation.[1] This result may sometimes be justified by experience in those classes of cases; the party having the burden of proof is thus given a short cut for what might otherwise have been a needless journey through a complex field of proof.

But here must be distinguished the long-settled common-law use of reputation to evidence *ancient boundaries* (*ante*, § 1587). There the feature of ancientness is the vital one, for it represents a necessity to resort to such evidence. But as that common-law Exception tended to shade off so as to include title or possession, it came to be not easily distinguished, in some rulings, from the present principle, which if recognized admits contemporary and modern repute, regardless of time.

(2) Apart from the classes of cases above enumerated, there seem to be none which fulfil the requisite considerations of policy already noted (*ante*, §§ 1586 and 1610), as justifying the resort to reputation. In the remaining rulings, the use of reputation to prove sundry specific acts or conditions has usually

For reputation to show a corporation's *ownership* of realty of personalty, see *ante*, § 1587.

§ **1626.** [1] *Arkansas:* 1920, Pearrow *v.* State, 146 Ark. 201, 225 S. W. 308 (ownership of stolen goods);
California: C. C. P. 1872, § 1963, par. 12 (it is to be presumed "that a person is the owner of property, from exercising acts of ownership over it, or from common reputation of his ownership"); 1920, Simons *v.* Inyo Cerro Gordo M. & P. Co., — Cal. App. —, 192 Pac. 144 (issue as to the ownership of a water-right beginning with appropriation by C. before 1878; held, per Finlayson, P. J., (1) that C. C. P. § 1963, subd. 12, as to the presumption of ownership from repute is limited by C. C. P. § 1870, subd. 11, *supra*, n. 7, to matters of public or general interest; (2) that a claim to a water-right situated wholly on the public domain is such a matter of public interest; (3) that the repute must be ancient, *i.e.* dating back 30 years; (4) that the repute must concern the right to take water, not the title to the source, here a spring; and (5) that the witness must in form speak only to the repute of ownership, and not to the fact of ownership; this opinion seems well-reasoned and sound; but the Supreme Court "withhold our approval" from the second above statement, and "leave the question open for further consideration");
Indiana: Burns' Ann. St. 1914, § 2125 (trespass to State or U. S. lands or lands of non-resident; to prove ownership of such lands, it is 'prima facie' evidence if they are so "reputed in the neighborhood where such lands lie");
North Dakota: Comp. L. 1913, § 7936, par. 12 (like Cal. C. C. P. § 1963);
Oregon: Laws 1920, § 799 (like Cal. C. C. P. § 1963);
Philippine Islands: C. C. P. 1901, § 334, par. 11 (like Cal. C. C. P. § 1963, par. 12);
Porto Rico: Rev. St. & C. 1911, § 1470 (like Cal. C. C. P. § 1963).

In these days of complicated stockholdings the following departure seems sound: Reputation is admissible to show *ownership of railroad premises or vehicles* by a specific *corporation:* 1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050. *Contra:* 1903, Louisville & N. R. Co. *v.* Jacobs, 109 Tenn. 727, 72 S. W. 954 (reputation of ownership of locomotives causing a nuisance).

Compare the presumption of *ownership from possession* (*post*, § 2515).

Distinguish reputation of title as a *fact in issue:* 1915. Lowell Hardware Co. *v.* May, 59 Colo. 475, 149 Pac. 831 (notice of mechanic's lien must mention the "reputed owner").

been repudiated[2], though by statute an occasional rule is invented, *e.g.* admitting reputation to evidence an *illegal trust or combination.*[3]

[2] 1872, DeKalb Co. *v.* Smith, 47 Ala. 412 (action for personal harm done by disguised assailants; "rumor" admitted to show that the plaintiff had many enemies, in corroboration of the plaintiff); 1888, Louisville & N. R. Co. *v.* Hall, 87 Ala. 708, 715, 722, 6 So. 277 (that a person had been killed at a low bridge; excluded); 1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (repute as to prior injuries sustained by plaintiff, excluded); 1908, Knickerbocker Ice Co. *v.* Gray, 171 Ind. 395, 84 N. E. 341 (general repute, not admitted to show who were superintendent and engineer); 1889, State *v.* Evans, 33 W. Va. 417, 424, 10 S. E. 792 (excluded for showing one man's "influence" over another).

[3] *Cal.* St. 1907, p. 984, Mar. 23, § 6 (like Ohio Gen. Code § 6399); *Fla.* Rev. G. S. 1919, § 5725 (trusts and combinations; "general reputation" admissible); *Oh.* Gen. Code Annot. 1921, § 6399 ("The character of the trust or combination alleged [as illegal] may be established by proof of its general reputation as such"); 1908, Hammond *v.* State, 78 Oh. 15, 84 N. E. 416 (foregoing statute held unconstitutional; see *ante*, § 1354); *Utah:* Comp. L. 1917, § 4495 (trust or combination may be evidenced by "general reputation as such").

Sub-title II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

Topic VIII: OFFICIAL STATEMENTS

CHAPTER LIV.

A. General Principles of the Exception

B. Application to Specific Kinds of Documents

1. Registers and Records

2. Returns and Reports

3. Certificates (including Certified Copies)

A. General Principles of the Exception

§ 1630. **Name of the Exception.** The scope of this Exception is often designated by the term "public documents."

But this term is inadequate and misleading. In the first place, the word "public" is ambiguous. It may signify "open to all," "capable of being known or observed by all"; or it may signify "having an interest for persons in general"; or it may signify "made or done by an officer of the government." These are decidedly different senses. So far as the term may indicate a general principle, it is obvious that the principle may result in different rules according to the sense in which the word "public" is to be interpreted. This ambiguity of phrase has already caused an undesirable uncertainty in the scope of the exception; and it is better to avoid a confusing terminology. The word "official" more accurately signifies the essence of the principle dominating the exception. In the second place, the word "document" is here inapplicable. It is true that the exception includes only written statements. Nevertheless, the Hearsay rule applies only to statements or assertions offered testimonially (*ante*, § 1361), and thus the present exception, so far as it is an exception, is concerned with statements or assertions as such, and not with writings or documents as such. The Hearsay rule excludes them only as containing testimonial assertions, and therefore this exception deals with them only as assertions. The word "statement" indicates the ground of the objection to them, and the word "document" does not. In the third place, the word "document" is ambiguous in so far as it suggests also other rules quite distinct

from the Hearsay rule. To documents or writings, as such, applies the rule requiring the production of the original (*ante*, § 1177), and the rule requiring certain modes of authentication (*post*, § 2129); and still other rules may also have special application to certain kinds of documents. It is essential that these independent rules be kept distinct from each other and from the Hearsay rule; and the use of the word "document" to designate a Hearsay exception tends to prevent this separation of distinct principles.

For these reasons, the term "Official Statements" seems preferable as a designation of the present exception to the Hearsay rule.

§ 1631. **The Necessity Principle; Inconvenience of Requiring the Official's Attendance.** The principle of Necessity, which in one form or another is found in all the Hearsay exceptions (*ante*, § 1421), is satisfied in the foregoing exceptions by the impossibility of obtaining testimony in court from the same person; *i. e.* death, absence, insanity, or other like circumstance, has made it impossible to obtain the person's testimony now on the stand. But in the present and ensuing exceptions, this rigorous application of the principle of necessity is found relaxed. Something less than an absolute impossibility is regarded as sufficient. The necessity reduces itself to a high degree of expediency. In none of these exceptions is it required that the witness be shown to be *unavailable by reason of death, absence*, or the like circumstance.

In the present exception, it is easy to see why it is highly expedient, if not practically necessary, to accept the hearsay statement of an official, in certain classes of cases, instead of summoning him to attend and testify 'viva voce' before a court or by deposition before a commissioner. The public officers are few in whose daily work something is not done which must later be proved in court; and the trials are rare in which testimony is not needed from official sources. Were there no exception for Official Statements, hosts of officials would be found devoting the greater part of their time to attending as witnesses in court or delivering their depositions before an officer. The work of administration of government and the needs of the public having business with officials would alike suffer in consequence. Although, then, there is strictly no necessity for employing hearsay, in the sense that the personal attendance of the officer is corporally impossible to obtain, there is nevertheless a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay rule. The principle, therefore, is in spirit here identical with that of the preceding exceptions.

§ 1632. **The Circumstantial Guarantee of Trustworthiness; Official Duty; Publicity.** The second essential (*ante*, § 1422) for an exception to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found, to take the place of cross-examination so far as may be.

Two reasons are judically sanctioned as justifying the present exception in

this respect. The second, however, is of modern English suggestion, and has not received recognition in the United States. As its recognition involves a definite modification in the practical application of the rules, the two reasons deserve careful discrimination.

(1) The first reason is related in its thought to the presumption that public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. The consideration that regularity of habit, a chief basis for the exception for Regular Entries (*ante*, §§ 1422, 1522), will tend to this end is not here an essential one; for casual statements — such as certificates — may be admissible, as well as a regular series of entries in a registry. The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfilment. Possibly the duty may not be one for whose violation a penalty is expressly prescribed. Possibly the officer may not be one from whom in advance an express oath of office is required. No stress seems to be laid judically on either of these considerations; nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement.

Nor is the adequacy of this traditional principle to be to-day discredited or doubted. Official honor may or may not be what it has been or what it ought to be, and it may differ in different communities and persons. But, in the matters with which the law of Evidence is concerned, official duty is on the whole a vital force, more potent than might be supposed, even in a community where official ceremony and dignity are as little regarded as with us. And even if the traditional assumption of the potency of official duty and honor be in some regions or for some classes of incumbents more a fiction than a fact, it is at least a fiction which we can hardly afford in our law openly to repudiate.

That this assumption is the established basis of the present exception is indicated in the following judicial utterances:

1785, *Per* CURIAM, in *R.* v. *Aickles*, 1 Leach Cr. L., 3d ed., 436: "The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require. . . . In the present case Mr. N. has no private interest whatsoever in this book to induce him to make factitious entries in it. He is a public officer recording a public transaction."

1850, ERLE, J., in *Doe* v. *France*, 15 Q. B. 758: "It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth."

1845, PARKE, B., in *Irish Society* v. *Bishop of Derry*, 12 Cl. & F. 468: "The bishop

in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received."

1821, GIBSON, J., in *Stewart* v. *Allison*, 6 S. & R. 329: "What change in the law of evidence did the act of assembly [authorizing notaries' certificates] mean to produce? Evidently nothing more than to render that competent, under the sanction of an official oath, which would otherwise have to be attested by an oath taken in the presence of the Court and jury; thus substituting the oath of office, for the violation of which the notary would incur no temporal penalty, for the customary oath in court, which . . . renders the witness obnoxious to the penalties annexed to the crime of perjury."

1851, WAYNE, J., in *Gaines* v. *Relf*, 12 How. 472, 570: "Such writings [those which the law requires to be kept for the public benefit] are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses."

1858, FOWLER, J., in *Ferguson* v. *Clifford*, 37 N. H. 85, 95: "Official registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, — the obligation of an oath and the power of cross-examining the persons on whose authority their truth and authenticity may depend. This has been said to be because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty."

1917, MCPHERSON, J., in *Chesapeake & D. Canal Co.* v. *U. S.*, 3d C. C. A., 240 Fed. 903, 907: "We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are 'prima facie' evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage." [1]

§ 1632. [1] So also: 1824, Starkie, Evidence, 79.

It is apparently not material whether this sanction for official statements be spoken of as an *authority* or a *duty*. An authority implies a duty, and 'vice versa.' The two words seem merely to represent different aspects of the same relation; for when an official statement actually made is questioned, its propriety is apt to be justified by predicating an authority to make it, and when a refusal to do an official act is questioned, the claimant is apt to lay stress on the duty to do it; and thus the difference between the two words is (for the present purpose) merely the difference of emphasis which is naturally suggested by the different attitudes of claimant and opponent in the case in hand. The idea of an authority, moreover, makes prominent the objective validity in evidence of the statement authorized to be made; while the idea of duty suggests chiefly the subjective trustworthiness

(2) It has also been suggested by some judges that a second circumstance forms an essential part of the sanction for receiving such hearsay statements, namely, the circumstance of *publicity*. The thought here is a composite one, and is closely related to that which is recognized as a reason for the exception for Regular Entries (*ante*, § 1522). Where an official record is one necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected furnishes a special and additional guarantee of accuracy. Not only would the periodic inspection by members of the public tend to produce correction of errors actually perpetrated; but, chiefly, the knowledge that the record is to be open to public inspection would subjectively act in advance as a stimulus to care and sincerity on the part of the official.

This reason was first definitely expounded as an essential one in the following passages:

1838, DENMAN, C. J., in *Merrick* v. *Wakley*, 8 A. & E. 170 (the regulations of a public workhouse, prescribed by the statutory authorities, required the medical officer to make a weekly return to the board of the attendance, etc., of poor persons; but the book was rejected): "The endeavour was to put this document upon the same footing with the register of the Navy-office, the log-book of a man-of-war, the books of the Master's office, and other public books which are held to be admissible in evidence. But in these cases the entries are made by an officer in discharge of a public duty; they are accredited by those who have to act upon the statements; and they are made for the benefit of third persons. Here, it is true the book is kept by a public officer, but no credit is given him in respect of the entries; they are merely a check upon himself."

1880, Lord BLACKBURN, in *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623: "The principle upon which [a previous decision] goes is that it should be a public inquiry, a public document, and made by a public officer. . . . I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. . . . I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards. . . . Suppose the English Crown had required of a magistrate that some confidential report should be made, . . . I do not think it would come within the sense and meaning of the rule that a public officer, in making the statement for the public, was likely to speak the truth, and must be presumed 'prima facie' to have known and to have spoken the truth."[2]

This reasoning is plausible, and does, no doubt, add to many official documents a special measure of trustworthiness. But it should not be regarded as justifying a definite limitation of the scope of the exception; for its strict application would exclude many classes of official documents which are in fact admitted and ought in reason to be admitted. Apart from a few jurisdictions in which by statute the right is expressly given to every citizen to demand inspection of official documents, there are everywhere numerous official documents of which inspection cannot be demanded except in casual

of the statement made in fulfilment of it. It is therefore proper to speak of the justifying circumstance indiscriminately as either an authority or a duty.

[2] 1920, Casey v. Kennedy, 52 D. L. R. 326, N. B. (Lord Blackburn's view discussed by Macdonald, C. J. A.).

cases by persons having a specific interest in the subject-matter, — for example, the account-books of public officers. It can hardly be supposed that this bare possibility of inspection can have any appreciable subjective influence on the officer. Moreover, where a certificate of an official act done, or a certified copy of a record, is given out, the certificate is delivered usually to a single party in interest, and the possibility of its inspection and comparison by another person before use in court is small; so that the making of this particular official statement is hardly amenable to the influence above supposed. Finally, so far as the other element is concerned — the actual correction of errors by public inspection — its efficacy must be of the slightest moment; for it is not supposed that the public, or specific interested members of it, do in fact (whatever their rights may be) ever demand inspection of the vast majority of official records that are made; and there can be hardly any chance of checking or revision from that source.

It would seem that this second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception. How far the limitation thus suggested is to-day recognized as law may be later noted (*post*, § 1634).

§ 1633. **Nature of the Duty; General Principles (No Statute required; Foreign and De Facto Officers; Deputies; Required Statements by Non-official Persons; Writings; Motive to Misrepresent).** Whether a given statement was made under an official duty will depend chiefly upon the nature of the office, the subject of the statement, and the form of its making. The application of the general principle to specific official statements is best dealt with under the heads of the various kinds of offices and records (*post*, §§ 1639–1684). But at the outset a few general considerations governing all of them are to be noticed.

(1) It is clear that *no express statute or regulation* is needed for creating the authority or duty to make the statement. The existence of the duty, and not the source of its creation, is the sanctioning circumstance. Not all, nor the greater part, of an officer's conceded duties are expressly laid upon him by written law. They may arise from the oral and casual directions of a superior, or from the functions necessarily inherent in the office. Where the nature of the office fairly requires or renders appropriate the making and recording of a specific statement, that statement is to be regarded as made under official duty: [1]

1856, TERRY, J., in *Kyburg* v. *Perkins*, 6 Cal. 676: "To entitle a book to the character of an official register it is not necessary that it be required by an express statute to be

§ 1633. [1] *Accord:* 1847, Perth Peerage Case, 2 H. L. C. 875 (sundry records); 1892, Daly *v.* Webster, 1 U. S. App. 573, 611; 1896, White *v.* U. S., 164 U. S. 100, 17 Sup. 38; 1903, Hesser *v.* Rowley, 139 Cal. 410, 73 Pac. 156 (sheriff's books); 1840, Newman *v.* Doe, 4 How. Miss. 535 (an Indian agent's list of Choctaw family-names which were to be handed to the maker, though no list was expressly required to be kept); 1902, State *v.* Hall, 16 S. D. 6, 91 N. W. 325 (postmaster's record of money orders cashed).

kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper authority to be kept."

1878, STRONG, J., in *Evanston* v. *Gunn*, 99 U. S. 660: "It may be admitted that there is no statute expressly authorizing the admission of such a [meteorological] record as proof of the facts stated in it; but many records are properly admitted without the aid of any statute. . . . The record had been kept by a person whose public duty it was to record truly the facts stated in it. . . . To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty."

(2) The subjective influence of the official duty being the essential justifying circumstance, it follows that an official statement by a *foreign officer* is equally admissible with one made by a domestic officer. That the duty is not recognized by the domestic law is immaterial; it exists for the foreign officer; and so far as it exists, it affords an equally sufficient sanction.[2] This application of the principle, though plain, has rarely been drawn in question.

(3) It would seem to follow, that a *supposed duty, though non-existent*, suffices. This consequence, though logically inevitable, has received only a partial recognition in the admission of records of an officer of a *de facto government* constituted rebelliously and therefore without legal right.[3] But no further recognition would probably be given, nor ought it to be; for it can hardly be doubted that hundreds of official documents, rejected because not made within the scope of official duty, have been made in good faith under a supposed duty; and yet it would be utterly impracticable to inquire in each case into the official's honest belief and to allow that belief to cure an otherwise defective document.

(4) The statement — whether by register, certificate, report, or the like —

[2] *Accord:* 1905, Florscheim *v.* Fry, 109 Mo. App. 487, 84 S. W. 1023 (but the foreign law must be shown; here a record of incorporation); 1868, Condit *v.* Blackwell, 21 N. J. Eq. 193, *semble;* 1908, Miller *v.* Northern Pacific R. Co., 18 N. D. 19, 118 N. W. 344 (Minnesota weigh-master's record of grain weights, made under Minn. Gen. St. 1894, § 7705, admitted; approving the above passage); 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 ("It is the intent of the statute that the officer having the legal custody should make his certificate according to the law of the place of record"); and the instances under marriage-registers and deed-records, *post*, §§ 1644, 1652.

Contra: 1900, Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711 (Minnesota secretary of State's certificate of organization of incorporation, made receivable there by express statute, not admissible in Connecticut); 1921, Reed *v.* Stevens, 120 Me. 290, 113 Atl. 712 (crim. con.; to authenticate a New Hampshire marriage certificate, R. S. c. 64, §§ 15, 37, making certified copies admissible, held to "have no exterritorial force"; unsound).

Compare the rule for conflict of laws, *ante*, § 5.

[3] Because here the 'de facto' government, though non-existent as against the parent nation, is internationally existent, and its orders protect its officers and create duties for them. *Accord:* 1699, Underhill *v.* Durham, Freeman 509, 2 Gwill. 542 (surveys taken during the usurpation of Parliament, held admissible); 1824, Jones *v.* Carrington, 1 C. & P. 327, 331 (same); 1899, Oakes *v.* U. S., 174 U. S. 778, 19 Sup. 864 (archives of Confederate Government, being papers drawn up "by its officers in the performance of their supposed duties to that government," admitted to show whether a vessel was acquired by purchase or by capture).

Contra: 1873, Donegan *v.* Wood, 49 Ala. 242, 248 (notarial certificate of protest by one acting under the Confederate government of Louisiana, not recognized); 1873, Todd *v.* Neal, 49 Ala. 266, 272 (same; nor is this to be treated as a case of a 'de facto' notary, because the government was illegal and not recognizable, "and before there can be an officer 'de facto,' there must be a government known to the Court").

is admissible only so far as a duty exists to make statements on the *specific subject-matter*. Hence a statement as to matters not covered by the duty is inadmissible; this is conceded. Conversely, the statement is admissible for all matters properly included in the duty, for the duty of statement extends to each and all of the facts as to which the official was bound to inform himself in order to make the statement. This conclusion, too, cannot be doubted; the difficulty lying in its application to specific officers and their duties, as illustrated in the cases of assessors' books (*post*, § 1640) and marriage-records (*post*, § 1646).

(5) The statement must be *in writing;*[4] this is not doubted.[5] The policy of this limitation is unquestionable; for a written statement offers incomparable advantages with respect to accuracy of use and permanency of service; and since official records are commonly preserved after the death or retirement of the officer, there is commonly no practical need (as there is in the statements of private persons dealt with in the foregoing exceptions) of accepting oral statements.

(6) Since the assumption of the fulfilment of duty is the foundation of the exception, it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the *absence of any entry* about them is evidence that they did not occur; or, to put it in another way, the record, taken as a whole, is evidence that the matters recorded, and those only, occurred. Such would probably be the judicial result in dealing with the present exception;[6] although there is in the other exceptions, where a similar question arises, some difference of opinion (*ante*, §§ 1495, 1531, 1556). Distinguish, however, the question whether this absence of an entry, if admissible, may itself be *proved by the certificate of the custodian* of the record (*post*, § 1678).

(7) In the foregoing exceptions, it is sometimes maintained that a statement otherwise admissible is to be excluded where there existed for the declarant a special *interest or motive to misrepresent*. No doubt, in a given case, circumstances may justify the exclusion of an official statement where a strong motive to misrepresent appears to have existed; but it seems undesirable to

[4] 1894, Propst *v.* Mathis, 115 N. C. 526, 20 S. E. 710 (record-clerk's oral reading of will, not admitted); 1810, Bonnet *v.* Devebaugh, 3 Binn. 175 (oral assertions even of a deceased official, inadmissible).

[5] Except perhaps in England; there the oral report of an officer to his superior, made in the regular performance of duty, has been held admissible (*ante*, § 1528); and since there is in England a tendency to confuse the present exception for Official Statements with that for Regular Entries in the Course of Business (*ante*, § 1524), it is possible that the above-cited ruling might there be regarded as governing the present class of statements.

[6] 1917, Chesapeake & D. Canal Co. *v.* U. S., 3d C. C. A., 240 Fed. 903 (non-payment of dividends to U. S. Treasury; records of accounts kept in the Treasury, admitted to show non-payment, by lack of entries of receipt of payment); 1919, Chesapeake & Delaware Canal Co. *v.* U. S., 250 U. S. 123, 39 Sup. 407 (action for dividends due from the Canal Co. to the U. S. for 1873, 1875, and 1876; account books of the U. S. Treasury Department for years 1848 to 1914, admitted to show, by absence of appropriate entries, that no payment was received or made for the years in question, citing the text above); 1827, Jackson *v.* Miller, 6 Cow. N. Y. 753; N. D. Comp. L. 1913, § 469 (absence of record of license as physician by State board of medical examiners is 'prima facie' evidence of lack of license).

prescribe exclusion, as a general rule; and the usual judicial attitude favors admission.[7]

(8) The person having the duty and the person making the statement must, on principle, be identical. Therefore a statement made *by another person acting instead of the officer* having the duty will be inadmissible; for it is not made under the duty of office.[8] But it does not follow that only the person taking the oath of office, or only the person expressly vested by statute or otherwise with the duty, is competent to make the statement. Not only does practical necessity require that the details of duty be delegated; but, furthermore, such a delegation re-creates the duty with equal efficacy sufficient to satisfy the requirements of principle. The instances in which the statement may be made by a person other than the one specifically charged with the duty seem to be of two classes:

(*a*) The first and commonest is that of *deputy*, — as a clerk, registrar, surveyor, or the like. The duty — in the sense of the direct responsibility — of making the record or other statement is upon the general officer or head of department. But the authority to delegate a part of his work to subordinates is in effect a parcelling out of his duty, and the duty exists again for them in fractional form to the extent that the work has been thus assigned. Whether the duty of the subordinates may be thought to run directly to the immediate chief or else to the Government is not material. The fact is that they are not mere intruders or unauthorized substitutes, but possess lawfully the delegated duty; and the determining inquiry must be whether the general nature of the office authorized a delegation of the details of work. A statement, therefore, by a lawful deputy should be admissible.[9]

[7] 1845, Parke, B., in Irish Society *v.* Bishop of Derry, 12 Cl. & F. 641, 669 ("a marriage or burial register would certainly be admissible to prove a marriage or death, in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time. The observation that it might have been fabricated to advance the interests of the officer affects the value of the evidence and not its admissibility"); 1880, Lord Blackburn, in Sturla *v.* Freccia, L. R. 5 App. Cas. 623, 628; 1851, Marshall, J., in Ratcliff *v.* Trimble, 12 B. Monr. 32 (admitting a certified copy in the certifier's own favor: "The official character of the act, the duty and responsibilities of the clerk, the publicity and notoriety of the proceedings appearing of record and certified by him, the penal consequences of a false certificate, and facility of detection and exposure, are considerations which preclude the application of the rule against [parties' testifying for themselves]"); 1832, Briggs *v.* Murdock, 13 Pick. Mass. 316 (town-clerk's record of his own election and qualification, admitted).

Contra: 1818, R. *v.* Debenham, 2 B. & Ald. 185.

Another limitation, viz. that the entry must have been made *contemporaneously*, has once been laid down: 1913, Butcher's S. & M. Ass'n *v.* Boston, 214 Mass. 254, 101 N. E. 426 (drawtender's books).

[8] 1828, Doe *v.* Bray, 8 B. & C. 815 (Parke, J., rejecting an entry in a register made by another person, not the incumbent: "One ground why a register is evidence is because it is made by a person who has a public duty to perform. Here the register is made up by a person who, as far as this baptism was concerned, was a perfect stranger to the transaction").

[9] 1899, National Accid. Soc'y *v.* Spiro, 37 C. C. A. 388, 94 Fed. 750 (see the citation *post*, under § 1681); 1903, Laffan *v.* U. S., 68 C. C. A. 495, 122 Fed. 333 (a copy of an official bond, under U. S. R. S. § 886 may be certified by the acting Secretary of the Treasury); 1889, Keyser *v.* Hitz, 133 U. S. 138, 10 Sup. 290 (certificate of due incorporation of a bank, by the U. S. acting comptroller of the Treasury, under Rev. St. § 5154, held admissible); 1832, Triplett *v.* Gill, 7 J. J. Marsh. Ky. 431, 440 (copy of a will-record, subscribed in the clerk's name by the deputy clerk, sufficient; "the deputy had a right to sub-

(*b*) A *municipality or other corporation* or governing body may have an authority to make statements, and yet the statements themselves may be made by the officers, and not by the corporation itself, — as in the case of counties authorized to make surveys. Here, upon the same principle, the authority to do involves necessarily the delegation of performance to officers lawfully provided; and it must be immaterial whether the statement is made in the name of the corporation or of the proper performing officer.

(9) The duty of all officers runs in theory ultimately to the State. But it is not necessary that the duty to make a statement should be specifically created *directly by the sovereign State*. So far as the State has delegated the power of creating officers, the duties created for them are sufficient to satisfy the present Exception, whether created originally by the State or by the subordinate governing body. Thus, if a city is vested with ordinary municipal powers, it may create an officer whose duty it is to record marriages, and this officer's duty, though it runs directly to the city only, is still an official duty. So far as concerns the origin of such duties, no special discrimination can be made under the present Exception. Where an official duty would for purposes in general be deemed to exist, it exists equally for this exception.

§ 1633*a*. **Same: Required Statements by Non-official Persons.** Does the duty sufficiently exist *only* for persons having the general status of officials? Or may it exist (by express statute) solely for the purpose of furnishing a record or certificate, in a *person* who otherwise has *no official position?* For example, when a statute makes it the duty of a clergyman to record or certify a marriage ceremony performed by him, is the document to be regarded as made under an official duty in the sense of this exception?

In practice, little turns ordinarily on the answer to this question, because such statutes usually declare expressly that the document shall be admissible. But it is important, from the point of view of principle, to determine whether the use of such documents, sanctioned by statute, shall be regarded as forming an additional exception, standing on its own footing, or as merely an instance of the application by statute of the principle of the present exception? Can it be said that a private person, expressly required to make a record or certificate, makes it under an official duty? Or, is it to be said that the term "official" duty is too narrow, and that the principle includes in effect all documents made under *any duty created by law?*

scribe the principal clerk's name"); 1895, Com. *v.* Hayden, 163 Mass. 453, 456, 40 N. E. 846 (certified copy of register of marriage by the assistant-registrar, admitted, by implication of statute); 1916, Weitzel *v.* Brown, 224 Mass. 190, 112 N. E. 945 (certificate from the office of the U. S. Comptroller, bearing his seal, and signed by a deputy, admitted under U. S. Rev. St. 1878, §§ 884, 178, 327); 1854, Whitehouse *v.* Bickford, 29 N. H. 471, 480 (acting clerk of a corporation may certify a copy of its records); 1898, Steinke *v.* Graves, 16 Utah 293, 52 Pac. 386 (clerk's certificate may be signed by a deputy in the clerk's name).

Contra: 1816, Sampson *v.* Overton, 4 Bibb. Ky. 409 (certificate of copy-grant, in the name of the register himself, but in fact written by his clerk, excluded, though the clerk had taken an oath of office).

Distinguish the question (treated *post*, § 1635) whether a statement by the chief officer himself of transactions *done by subordinates*, and not by himself, is admissible.

It would at first seem that the latter mode of statement cannot be justified; for although, as already noticed (*ante*, § 1632), the oath of office is hardly to be regarded as the essential sanction, nevertheless the sanction does involve at least the idea of duty as created by official status, and not merely the idea of duty in the limited and imperfect sense of amenability to a penalty imposed by law. On the whole, however, it seems correct to say that such documents are made under an official duty, in the ordinary sense of a duty arising from status.

The objection to this view is dissipated when we reflect than an official duty does not involve the devotion of one's entire energies to official work. A justice of the peace, or a registrar of voters, or a coroner, may during the year devote but a small part of his time to official duties, and may occupy himself chiefly as lawyer, physician, or broker; his official duty exists none the less because it concerns only a small fraction of his doings. Conversely (as illustrated throughout this exception), it matters not that an official is completely devoted to official work, unless he has a specific duty to make the record or certificate desired to be admitted under this exception; for example, a city clerk ordinarily gives his entire time to scores of items of official duty, *i. e.* his status as an official is as complete as can be; and yet unless he has also the specific duty to record births, marriages, and deaths, his entries of such matters are inadmissible. In other words, it is not his general official status that renders such statements admissible, but the specific duty to make such statements. Since, then, the specific duty to make specific statements is what renders them admissible, and since this specific duty is not necessarily dependent on a general official status, it is difficult to see why the specific duty may not exist also for a person not having otherwise an official status. In short, a person may (so far as legal theory is concerned) be an officer for the purpose of doing a single specific class of acts, and may apart from this be merely a private person. It is therefore proper enough, where by statute such a specific and narrow duty has been created, to regard the statements made under it as statements under an official duty within the notion of the present exception.[1] There is, on principle, no obstacle to this view:

1824, *Richardson* v. *Mellish*, 2 Bing. 229, 240; the plaintiff ship-captain brought an action against the defendant ship-owner, in which a part of the issue of fact was the value or profit of a voyage to the East Indies by one of the East India Company's ships; as evidence of the value of such a voyage, a book was offered, "containing a list of passengers, made by the captain, and deposited in the India House, pursuant to the Act of 53 Geo. III,"

§ 1633a. [1] The above principle is exemplified in the following case: 1906, McInerney *v.* U. S., 143 Fed. 729, 736, C. C. A. (ship's manifest; cited more fully *post*, § 1672, n. 1); 1916, U. S. *v.* Elder, D. C. W. D. Ky., 232 Fed. 267 (violation of the oleomargarine law; to show the amounts received by defendant, the prosecution offered the monthly returns made by a manufacturer who sold to defendant; these returns were required by law to be filed with the Internal Revenue collector; held not admissible as official statements; this seems correct; but the opinion does not appear to be familiar with the interesting theoretical bearing of the question).

which provided that every ship in that trade should before clearing exhibit to the customs-officer upon oath, "a true and perfect list . . . setting forth the names, capacities, and descriptions of all persons embarked," etc., etc., and that the officer receiving such list should upon receiving it "transmit a copy of such list to the secretary of the court of directors of the said United Company." It was objected that "the captain's book is not such a public document as to entitle the plaintiff to give it in evidence." BEST, C. J. (overruling the objection): "I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the St. 53 Geo. III, c. 155, §§ 15, 16. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. 'This is a public paper made out by a public officer,[2] under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence, on the principle on which sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. But, it may be said, 'Ay, but those are papers which come from Government officers.' I go on: But the books of the Bank of England have been made evidence, — all those are evidence that are considered as public papers, made out by persons who have a duty to the public to perform, and whose duty it is to make them out accurately. On account of that duty and responsibility, credit is given to them. . . . These are papers which the captain is ordered, by the 15th section of the statute to which we have been referred, to make out upon oath, which oath an officer of the customs is authorized to administer; for what purpose? for the purpose of informing the East India Company (who, though subjects in England, are great sovereigns in India) what kind of persons, and with what sort of arms, these persons are going to settlements the administration of the affairs of which are committed to them. If these are not public papers, made with a view to great principles of public policy, I am at a loss to know what are public papers."

But in given instances, nevertheless, it remains to determine whether the statutory duty can properly be so construed; in other words, to discriminate between a genuine official duty created and a mere penal responsibility established. For example, a statute requiring every owner of property to make a return of the items of his property, or requiring every employer to make a return of minors and women employed, merely establishes a penal responsibility; while statutes requiring officiating clergymen to record or certify marriage-ceremonies may properly be regarded as creating an official duty. Of the latter class of statutes, a few other instances will be noted from time to time in the ensuing sections. Of the former class, there are many instances in which the statute expressly makes admissible the statements thus required of private persons (for example, certified records of a corporation by its secretary, or of a bank's books by its agent). Although they do not on principle belong under the present exception, but form a statutory class by themselves, it seems more convenient to place them in the present Chapter under the respective classes of documents concerned (*post*, §§ 1672, 1683).[3]

§ 1634. **Publicity of the Document as Essential.** It has already been noted (*ante*, § 1632) that the *opportunity of inspection by the public at large* has by some judges been advanced as one of the essential reasons on which

[2] This phrase of the learned judge was here applied liberally; for the ship was a private ship, owned by Messrs. S. T. & S., and chartered by the East India Company for six voyages.

[3] As to the *privilege* for these Documents, see *post*, § 2377.

the Exception is based. If it is an essential reason, and not merely an incidental and usual advantage, then it follows that documents not so open to general inspection are inadmissible, even though made under an official duty. Such seems now to be the law in *England*.[1] But this may perhaps be regarded as in fact a modern innovation in that country. Before the opinion of Lord Blackburn in Sturla *v.* Freccia, it does not seem to have been laid down distinctly as essential.[2]

In the *United States* no definite acceptance of this limitation seems to have been made; although in a few opinions the element of publicity has been referred to 'obiter' as essential.[3]

For the reasons already indicated (*ante*, § 1632) the limitation is not a desirable one. Should it be accepted, however, the class of official documents excluded by it will after all be a narrow one, namely, those only which are strictly confidential, — for example, reports by inspectors, tax-officers, and the like. These would perhaps usually be privileged from disclosure in any case (*post*, § 2378), so that perhaps the question is not likely often to arise. It can hardly be supposed that the scope of this limitation, as expounded by Lord Blackburn, was intended to include other than confidential documents, *i. e.* to include that vast class of official records (including certified copies) which are customarily not compiled for reference by the general public nor placed where the public has constant opportunity to inspect.

§ 1635. **Personal Knowledge of the Official; Notary's Knowledge; Certificate of Acknowledgment.** It has already been seen (*ante*, § 657) that an

§ 1634. [1] 1838, Merrick *v.* Wakley, 8 A. & E. 170 (cited *ante*, § 1632); 1880, Sturla *v.* Freccia, L. R. 5 App. Cas. 623 (stated fully, *post*, § 1670); 1904, Mercer *v.* Denne, 2 Ch. 534, 541, 544 (fishing-rights; a report of a surveyor, in 1610, made by order of the Warden of the Cinque Ports, and maps prepared in 1641–47 by the War Office, not admitted as public documents, following Sturla *v.* Freccia; Farwell, J.: "The test of publicity as put by Lord Blackburn is that the public are interested in it, and entitled to go and see it, so that if there is anything wrong in it, they would be entitled to protest"; but two charts prepared by order of the Admiralty were admitted); 1905, Mercer *v.* Denne, 2 Ch. 538, 554 (Mercer *v.* Denne, *supra*, affirmed on appeal; Vaughan Williams, L. J., referring to Sturla *v.* Freccia, thought that "Farwell, J., in his judgment carried the ruling of Lord Blackburn rather further than Lord Blackburn himself intended," and believed that under that principle "records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title are admissible against all the world" in a proper case; though the documents here offered did not satisfy that rule).

[2] For example, in Doe *v.* Arkwright, 2 A. & E. 183 (1834), and in Daniel *v.* Wilkin, 7 Exch. 429, 437 (1852), Parke, B., refers only to the official duty as the reason of the Exception. In some of the quotations *ante*, § 1632, publicity is referred to as one of the reasons, but not as essential. In Irish Society *v.* Bishop of Derry, 12 Cl. & F. 468 (1845), Parke, B., hints at it as essential. In R. *v.* Martin, 2 Camp. 101 (1809), M'Donald, C. B., does the same, speaking of a corporation vestry-book; but he is there probably thinking of the incorrect analogy of private corporation books, as to which access is necessary in order to treat the entries as admissions (*ante*, § 1074).

[3] 1878, Evanston *v.* Gunn, 99 U. S. 66, (Strong, J.: "[These records of weather] are as we have seen, of a public character, kept for public purposes and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure"); 1886, Cushing *v.* R. Co., 143 Mass. 78, 9 N. E. 22 (excluding a report by an official engineer describing preliminary surveys with reference to proposed harbor-works, and printed as a public document by the federal Senate; Field, J.: "Nor are the facts stated in the reports public facts, in the sense that they are facts which the United States have, under the authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested to know them").

essential qualification of a witness is that in general his knowledge or belief should be based on personal observation; and that testimony based on anything short of this is receivable only in a few classes of cases in which the source of knowledge is for practical purposes equivalent to personal observation. It has also been noted (*ante*, § 1424) that the same principle is applied to persons whose hearsay statements are receivable under exceptions to the Hearsay rule; and the application of the principle has been noticed from time to time in the foregoing exceptions.

How far is the principle to be maintained in the present exception? Must the officer whose statement is admitted have personal knowledge of the thing recorded, certified, or returned? In general, there can be no doubt that the principle applies here as elsewhere; but the principle itself need not be and is not judicially employed to the extent of unpractical strictness; and, as already noted (*ante*, § 664), it has its qualifications and exceptions, based on good sense and practical convenience. For the purpose of the present exception, the cases calling for its application seem to fall into three classes.

(1) Certain kinds of official statements are clearly intended by the law to be based upon actual personal observation. The transaction which the officer is authorized to record or certify is, in its nature, a transaction *done by him* or *done before him* by another person. He cannot fulfil his duty to do or supervise the transaction except so far as it is done by or before him, and thus the correlative duty to record, certify, or return involves necessarily a personal knowledge of the transaction. For example, a notary is authorized to certify that he himself protested a negotiable instrument, or to certify that some one "personally known" to him "personally appeared" before him and acknowledged a deed;[1] hence the nature of the duty and of the transaction presupposes the notary's ability to base his statement on personal knowledge.

That the principle applies to this class of cases has been well expounded in the following passages:

1821, GIBSON, J., in *Stewart* v. *Allison*, 6 S. & R. 327[2] (excluding a notary's certificate of protest stated by the notary on the stand to have been made on the information of his son, the notary not having served the notice himself): "Now put the case of a witness who has in his direct examination sworn positively to a fact, but from whom, on being cross-examined, it comes out that he personally knows nothing about the matter, having obtained all his information from a person on whose veracity he thinks he can depend. Ought not the Court to direct the jury that the whole of his evidence, taken with the explanation given, is incompetent and goes for nothing? . . . The assertion in a [notary's] protest of a fact founded on hearsay, which would be incompetent to be heard from a

§ 1635. [1] This has been true since the very origin of notaries: "scripsi quia et mihi preceptum est et omnia in presentia mea facta sunt," in a document of 1163 A.D.; quoted, with others, in Bresslau, Handbuch der Urkundenlehre (1889), I. 495.

[2] Gibson, J., here was dissenting in that he wished to exclude the certificate entirely, while the other judges admitted it, feeling unwilling to decide whether the notary was falsifying on the stand or in his certificate; but all agreed that if the notary's testimony was true his certificate was inadmissible.

witness attending in the ordinary way, is not made competent and legal by the Act of Assembly. . . . The Legislature surely never intended to permit an officer to authenticate by his certificate a fact to which he would not, after being examined touching his means of knowledge, be permitted to swear. . . . I hold the notary competent to certify only what he personally knows to be true, and not what he may conjecture to be so from the relation of others. . . . The confidence supposed to be reposed in the truth and integrity of those officers by the Executive who appointed them is the ground on which the Legislature rested the substitution of their certificate for the ordinary judicial evidence of the facts asserted in it; and it therefore never could have intended to permit them to delegate this high personal trust to a stranger, acting without oath or even official responsibility."

1861, DIXON, C. J., in *Adams* v. *Wright*, 14 Wis. 413: "The notary's official oath is substituted for the ordinary judicial oath taken in the presence of the Court and jury, and he cannot lawfully and conscientiously certify or record, as matters of fact, things which he would be incompetent to testify to as a witness if called to the stand in the trial of a cause and which would be excluded as mere hearsay."

1865, HOLMES, J., in *Commercial Bank* v. *Barksdale*, 34 Mo. 563, 572: "The protest is to be evidence of the facts stated in it, of which the notary is supposed to have personal knowledge and credit is given to his official statements by the commercial world on the faith of his public and official character. In court the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only, if the notary were himself upon the stand as a witness. The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another."

That the *notary* at any rate is one of those officers who are required to certify on nothing less than personal knowledge seems clear. For their certificates of *protest* of commercial paper, this has often been laid down.[3] For their certificates of *acknowledgment* of deeds, the rule is constantly enforced.[4]

[3] The practice of notaries to act in *protests* upon clerks' information has, however, obtained footing in some regions; and it is in England perhaps an unsettled question whether the practice would be legally recognized, at least for foreign bills; that it would not be was intimated by Buller, J., in Leftley *v.* Mills, 4 T. R. 170, 175 (1793), and was held by Lord Tenterden, C. J., in Vandewall *v.* Tyrrell, M. & M. 87 (1827), as reported by Mr. Chitty, in the seventh and following editions of his work on Bills, p. 458 (9th ed.); in the latter place is given a correspondence between the learned author and the notaries, in which the merits of the question are discussed.

That the *notary must act personally* is decided also in the following cases: 1844, Sacrider *v.* Brown, 3 McLean 481 ("This [the protest] must be done by the officer who acts under oath, and to whose official acts duly certified the law gives verity"); 1842, Onondaga Co. Bank *v.* Bates, 3 Hill N. Y. 53; 1843, Sheldon *v.* Benham, 4 Hill N. Y. 129, 131; 1845, Chenowith *v.* Chamberlin, 6 B. Monr. 60 (unless local custom sanctions the clerk's action); 1861, Adams *v.* Wright, 14 Wis. 408, 412; 1865, Commercial Bank *v.* Barksdale, 34 Mo. 563, 572 (two in partnership, one making demand, the other drawing up the protest, excluded; see quotation *supra*). Compare Joost *v.* Craig (1901), 131 Cal. 504, 63 Pac. 840, and cases cited. So many questions of the law of commercial paper and the requisites of protest are usually involved in these rulings that they cannot be further examined here; see Daniel, Negotiable Instruments, II, §1959; and a collection of cases in 96 Am. Dec. 605.

Distinguish the use of the deceased *clerk's entry* under the Regular Entries exception (*ante*, § 1522), as in Halliday *v.* McDougall, 20 Wend. 81, 85 (1838).

[4] The principle has been insisted upon repeatedly, but most of the decisions deal, not with the question of evidence whether the notary's statement of personal knowledge was true, but with the question of substantive law whether the omission of that statement from his certificate makes it useless for entitling the deed to record; the answer being always in the affirmative, and the implication being that the certificate would be equally useless if it were false in fact.

There is a collection of cases in a note to Livingston *v.* Kettelle, 41 Am. Dec. 168. The

In this respect, indeed, it deserves particular emphasis, as involving not merely the requirement of proper testimonial qualifications, but also the strict enforcement of the terms of his certificate. He certifies under his oath of office that A. B., known to him to be the person therein mentioned, personally appeared before him and executed the writing. If this was not so, then he is neither a good witness nor an honest officer. Yet in professional practice in some of our communities, it is not uncommon for a notary to give the certificate without such knowledge or in the absence of the person. Such practices tend to destroy the credit which the law gives to such certificates and to overturn the whole basis of security for the registration system. A specific penalty should be enforced for such violations of the oath of office. Courts should do what they can to insist on that faithful performance of official duty which alone is the justification for this branch of the Hearsay exceptions.

As for *other officers than notaries*, it may be difficult, no doubt, in particular instances, to determine whether the official statement belongs within this class. So far as the question has arisen, the cases may be elsewhere examined, under the different kinds of documents.[5] The proper test, in general, would seem to be whether the subject of the officer's duty is a transaction supposed in legal theory to be done by the officer or to occur or be done before him by another; if it is, then the recording or certifying of it presupposes the same conditions, in order to be admissible.

(2) Assuming still that the transaction is one in its nature required to be done by or before an officer, there are nevertheless many classes of public offices in which the work must be *apportioned among subordinates*. Clerks and treasurers, for example, have in populous districts one or more, perhaps scores, of assistants, to whom various parts of the work are assigned; the chief officer, on whom the general duty directly rests, retaining only a supervising function, and rarely doing in person the acts of recording, returning, or certifying. This is well understood and fully sanctioned as a proper and necessary mode of securing the performance of the official duty. The substantive law recognizes this; and it would be impossible and inconsistent in

following cases are a portion only: 1858, Fogarty *v.* Finlay, 10 Cal. 245; 1919, Anderson *v.* Aronsohn, 181 Cal. 294, 184 Pac. 12 (the opinion, by Lennon, J., sets forth forcefully the importance of preserving the principle of personal knowledge for a notary's certificate of acknowledgment, and offers a practicable definition of it); 1905, Ohio Nat'l Bank *v.* Berlin, 26 D. C. App. 218, 225; 1904, Lalakea *v.* Hilo Sugar Co., 15 Haw. 570; 1920, Myers *v.* Eley, 33 Ida. 266, 193 Pac. 77 (acknowledgment taken by telephone); 1857, Shephard *v.* Carriel, 19 Ill. 319; 1860, Gove *v.* Cather, 23 Ill. 641; 1868, Lindley *v.* Smith, 42 Ill. 527; 1870, Becker *v.* Quigg, 54 Ill. 396; 1861, Brinton *v.* Seevers, 12 Ia. 390; 1863, Reynolds *v.* Kingsbury, 15 Ia. 238; 1906, Com. *v.* Johnson, 123 Ky. 437, 96 S. W. 801 (whether a county clerk is liable for taking an acknowledgment of an impostor); 1907, Barnard *v.* Schuler, 100 Minn. 289, 110 N. W. 966 (good opinion by Start, C. J.); 1872, Callaway *v.* Fash, 50 Mo. 422; S. Dak. Rev. Code 1919, § 580 (the officer must "know, or has satisfactory evidence on the oath or affirmation of a credible witness, that the person making the acknowledgment is the individual" etc.); 1917, Figuers *v.* Fly, 137 Tenn. 358, 193 S. W. 117 (action against the notary).

For the question whether a *certificate of acknowledgment* is *conclusive*, *ante*, § 1347.

[5] See particularly §§ 1646, 1670, *post* (marriage-registers, etc.).

the law of Evidence to refuse equal recognition. When such an officer's record or certificate is made, no one supposes that the chief officer himself has had personal knowledge of the data stated over his name.

It cannot be doubted that such official statements are admissible. His duty makes him responsible for errors or defaults therein, no matter whose they are, and his duty should equally suffice to admit such statements. The question, it should be noted, is not whether a statement *in the deputy's own name* is admissible (as in § 1633, par. 8, *ante*), but whether a statement coming in the name of the officer himself is inadmissible if it appears that he made it, not on personal knowledge, but on the faith of a *subordinate's information*. Since the general nature of the official duty requires that the assistance of proper subordinates must be relied upon for its performance, it follows necessarily that the same assistance may be relied upon for the due recording of the things done. On principle, therefore, there seems to be no objection; and practical necessity certainly demands the same result.

Whether or not a given officer is one who in legal contemplation may properly employ the assistance of subordinates to do, and therefore to record, the transactions of his office is of course sometimes difficult to determine. It is easy to see, for example, that a notary's duty (as in the case above quoted) requires a strictly personal performance, and therefore personal knowledge. On the other hand, it is equally clear that the clerk of a busy court need not make in person the copies of records certified by him, nor know their correctness. In general, Courts are disposed liberally to enlarge the class of official statements which may properly be made on the faith of subordinates' acts.[6] But the principle extends only so far as the assistance relied upon is that of proper subordinates, and not that of outside persons or of other officers having independent duties; for in the latter alternative the statement belongs in the ensuing class.[7]

[6] *Ala.* 1881, Miller *v.* Boykin, 70 Ala. 469, 478 (postmaster's register of mail-arrivals and departures received, though not based on personal knowledge); *Cal.* 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (rule stated for an official stenographer's transcript of testimony); People *v.* Donnolly, 143 Cal. 394, 77 Pac. 177 (similar); *D. C.* 1892, U. S. *v.* Cross, 20 D. C. 380 (Marshal's record of measurements of convicted persons, admitted, the measurements being actually taken by some unknown subordinate); *Mass.* 1886, Worcester *v.* Northborough, 140 Mass. 397, 401, 5 N. E. 270 (printed record of Massachusetts volunteers, published by adjutant-general under legislative resolve, admitted to show town of residence of a soldier; "this class of evidence is not strictly confined to facts within the personal knowledge of the officer making the record"); Mass. St. 1912, c. 64 (register of deeds for Worcester Co. may authorize in a specified manner an employee "to certify or attest as chief clerk records or copies of records," and such certified or attested documents shall be equally admissible as those done by "the register in person").

Contra: 1913, Butchers' S. & M. Ass'n. *v.* Boston, 214 Mass. 254, 101 N. E. 426 (drawtenders' official record of vessels passing, not admissible so far as made on reports by substitute drawtenders; unsound; decided on the principle of § 1530, *ante*, but that principle does not apply here, because the substitute is equally an official, hence need not be called; Worcester *v.* Northborough, not noticed).

[7] The following ruling, perhaps illiberal, illustrates this: 1820, Governor *v.* Jeffreys, 1 Hawks 208 (a certificate of the adjutant-general that the defendant, a colonel, did not make his return to the major-general as required by law, was held inadmissible, because the adjutant-general could not have had personal knowledge of the fact; although his certificate in general was evidence of the delinquencies of officers).

(3) Where the officer's statement is concerned with a *transaction* done, not by him or before him, but *out of his presence* (and out of the presence of his subordinates), the case is one in which obviously he can have no personal knowledge; the assumption must therefore be that his statement is inadmissible. It is to be noted, however, that the sufficient explanation is usually that the officer's duty does not extend to transactions out of his presence, and thus the recording or certifying of them is not covered by his official duty. For example, under the English ecclesiastical system it was the duty of the priest officiating at a baptism or a marriage to record the performance of the ceremony as an act done officially by him; but his duty was confined to the performance of the ceremony, and hence his record of the age of the persons baptized or married was not made as a part of his duty, since the age depended on the date of occurrence of birth at another time and place (*post*, § 1646). Thus, for matters not occurring in the presence of the officer, his record or certificate is inadmissible, not only because in general a witness must have personal knowledge, but also because an officer's duty is usually concerned only with matters done by or before him. Tested by either principle, there is a shortcoming.

Now there may be cases in which the officer's duty clearly does involve his ascertainment of facts occurring out of his presence and requiring his resort to sources of information other than his own senses of observation; for example, an assessor's record of the value of real estate and of its occupancy, or a registrar of voters' record of electors' residences. When such a duty clearly exists, the general doctrine above, that a witness should have personal knowledge, need not stand in the way, for (as already noted) it has its conceded limitations; and where the officer is vested with a duty to ascertain for himself by proper investigation, this duty should be sufficient to override the general principle. It is true that due caution should be observed before reaching the conclusion that the law has in fact in a given case intended to invest the officer with such an unusual duty. But when it clearly appears that a duty has been prescribed to investigate and to record or certify facts ascertained other than by personal observation, then it follows that, in accordance with the general principle of the present exception, the statement thus made becomes admissible. Such, in general, is the judicial attitude towards this class of questions. On the one hand, we find a general exclusion of statements not based on personal knowledge (of the officer or his subordinates); this exclusion being rested usually on the circumstance that the duty does not extend to such matters.[8] On the other hand, we find a few kinds of statements where it has clearly been made the officer's duty to investigate and record or report irrespective of personal knowledge; in such cases the statements are admitted; but Courts are disinclined to recognize many instances as belonging within this class.[9]

[8] *Post*, §§ 1639, 1646, 1648, 1664.

[9] *Post*, §§ 1670–1672.

Occasionally a statute makes the result clear by expressly declaring such statements admissible; but, in the absence of statute, Courts are found slow to infer merely from the nature of the office any specific duty to record or certify, on the faith of information derived from other persons, matters occurring without the officer's presence, — or, at least, any duty sufficient to render such statements admissible in evidence. This attitude is, on the whole, and apart from specific vagaries, a safe and practical one, because, so far as the sources of the officer's information are not personal to himself, they will in general be equally and sufficiently available in the ordinary way as testimony for the party desiring to make proof. The various instances in which this general question is illustrated may best be noted under the different kinds of documents.

§ 1636. **Proposed Enlargement of Rule.** It cannot be doubted that the rule of Evidence, in this vast field of application, is suffering seriously from failure to expand with change of circumstances. The principle of the common law was not liberal enough, and it was never liberally applied; Chief Justice Marshall's early pronouncement (*post*, § 1677) never found any vogue. The common law implied an authority in every official to keep a record of his doings, but it did not imply an authority (beyond a few instances) to make a report or return, or to make a certificate.

This narrow principle served well enough, perhaps, in the period and the community where it was generated; for there was but one jurisdiction, and all judicial records were centralized under the Chancellor in a single depository (*post*, § 1677); these circumstances, and the theory of a specific authority given by each impress of the Chancellor's seal, served to obviate serious inconvenience. But in a community like the United States, with now fifty jurisdictions, with the judicial system in each of them so decentralized that every county has one or more independent courts of record, and with an even more extensive hierarchy of State and county officials having independent functions, and scattered over wide areas, the multiple occasions for using the records, returns, and certificates of these various independent officials, make a far more complex demand on the original principle. Circumstances have so changed the entire condition of things that the primitive principle is outworn, and no longer serves the needs for such evidence.

Moreover, mechanical facilities have also changed, so that the strict safeguards of trustworthiness, suitable for the earlier modes of life, are no longer required. Rapid communication by telegraph makes it possible to verify doubts and check errors, as well as to prepare against forgery. Prompt transit by steam and electrical power make it possible to summon an official for 'viva voce' testimony if needed. Improved methods of copying, filing, and preserving records, make them readily accessible and verifiable.

In short, changes of condition make it both safe and imperative that a liberal rule of extensive scope should be recognized, as the logical modern

development of the earlier principle. This conclusion is corroborated by the great bulk of legislation giving such an expansion in detail in every State. The thousands of statutes which expressly declare admissible the records, returns, and certificates of various specific officers prove that there is a legitimate demand in professional opinion for an enlargement of the narrow common-law rules. The unfortunate feature of these statutes is that they encumber the law with petty meticulous rules, each applicable only to an individual class of officers or documents. They virtually, in combination, rest upon a single large principle of official duty or authority. That large principle, already recognized in part in a few jurisdictions, should be explicitly formulated and recognized. It would not only save us from the lucubrations represented by the thousands of existing statutes, but would serve as a simple basis for the new kinds of officers and documents that may from time to time develop.

Accordingly, the following is offered as the sound rule for present and future conditions: [1]

1. *Any statement in writing, made by a public officer acting under a duty or authority to make the statement, is admissible; subject to the following provisions:*

2. *The statement is admissible without calling the officer who made it or showing that he is deceased or otherwise unavailable.*

But in the trial Court's discretion he may be summoned for cross-examination; and in the cases hereinafter provided for the party offering the statement must give reasonable notice before trial so that the opponent may apply seasonably for a summons for cross-examination.

3. *The statement may be one made under a duty or authority expressly declared by statute, regulation, or order. If not expressly declared, the duty or authority will be implied in the following cases:*

4. *Registers and Records. Wherever there is a duty or authority for an officer to do or observe a thing, there is an implied duty or authority to enter in a record or register a statement of what is done or observed; and the statement is admissible.*

5. *Returns and Reports.* (a) *Wherever an officer's duty or authority requires him, while without the premises of his office, to do or observe something, he has an implied duty or authority, on returning to the official premises, to write down in a return or report what he did or observed; and the return or report is admissible.*

(b) *Whenever the officer's duty or authority requires him to obtain information other than by personal observation, he has an implied duty or authority to write down the results of such information; and the return or report is admissible, provided it has been kept on file in his or another office accessible to all persons interested.*

§ 1636. [1] For a more elaborate and less liberal formulation, see the present writer's Pocket Code of Evidence, §§ 1090–1164.

6. *Certificates. Every officer has an implied duty or authority to prepare and deliver out to an applicant a certificate stating anything which has been done or observed by him or exists in his office by virtue of some authority or duty, and the certificate is admissible.*

7. *Certified Copy. Every official custodian of a document has an implied authority or duty to make a copy of any document, not confidential, lawfully existing in his office and to deliver out therewith to an applicant a certificate stating that the copy is correct; and the certificate is admissible,*

(a) to evidence the contents and genuineness of all official records lawfully kept in his custody;

(b) to evidence the contents of all private documents lawfully deposited in his custody;

(c) to evidence the execution of all private documents lawfully deposited in his custody, if by law the deposit is accompanied by some evidence of genuineness, such as the testimony of witnesses to execution, or the party's acknowledgment, or a certificate of such probate or acknowledgment from some other officer authorized thereto.

B. APPLICATION OF PRINCIPLES TO SPECIFIC KINDS OF DOCUMENTS

§ 1637. **Three Types of Document: Register, Return, and Certificate.** Official statements may of course be classified from various points of view. That classification will here be most serviceable whose distinctions rest on salient circumstances marking general limitations of the implied authority of officers, and therefore suggesting something as to the admissibility of a given document. These circumstances seem to concern mainly the *form* and the *custody* of the document. As to form, the statements may be regularly made in a series and collected in a general register or record, or they may be drawn up for each occasion as separate documents. As to custody, they may be preserved by the officer in official custody, or they may be given out to be carried away by the person wishing to use them. There thus arise three classes, in general sufficiently distinct, within which it would seem that all the various sorts of documents may be subsumed, namely, Registers (or Records), Returns (including Reports), and Certificates (including Certified Copies).

(1) A *register* or *record* differs from a return or report in that it comprises in a single volume a series of homogeneous statements, recorded by entries made more or less regularly; it differs from a certificate in that it is kept in the official custody. (2) A *return* or *report* differs from a register in that it is a single document, made separately for each transaction as occasion arises (perhaps filed or indexed with others, but having a separate existence of its own); this difference arising usually in practice from the circumstance that the statement deals with something done outside the official precincts and therefore not so fitted for entry in a single office volume. The return differs from the certificate in that it is preserved in official custody. A further

distinction, within this class, between a *return* proper and a *report* is that the former deals with something personally done or observed by the officer, while the latter records the results of his investigations as to something that has occurred out of his presence. (3) A *certificate* differs from a return in that it is not preserved by the official, but is given out by him to an applicant for the latter's use. It differs from a register in that it is not a series of entries in a single volume.

In general, the practical importance of this distinction of terms appears in the following ways: (1) A *register* is usually *authorized by implication* to be kept by every officer to record his doings, and is therefore generally admissible without express authority to keep it. (2) A *return* is also usually *by implication authorized* for any officer whose duties involve the doing of things outside of the premises of his office, — for example, a sheriff or a surveyor; yet, so far as it is merely a report — *i. e.* not based on personal knowledge — few officers, if any, are found vested by implication with such authority, and consequently an express authority must be sought; moreover, the number of officers whose duties necessarily authorize the making of a return proper is small. (3) A *certificate* seems at common law *rarely*, if ever, to have been regarded as *authorized by implication*, and therefore an express authority must be sought in each instance. Thus, the distinction between the three classes has important consequences in determining the admissibility of the various sorts of official statements.

The terms above taken are not, it is true, employed in common usage with such precision as to mark these specific distinctions; nevertheless, the terms are sufficiently typical, and the ideas ordinarily conveyed by them do roughly correspond to the above definitions; it is enough if here they are understood to be employed in those senses. Furthermore, the lines between these three classes, while broadly enough marked in general, cannot always be strictly marked. Some official documents — for example, a justice's certificate of marriage, recorded with the town clerk — may conceivably be placed under one or another of the classes. In other cases, the officer prepares the document in two forms or prepares it in different forms in different jurisdictions, — for example, a notary, who in some localities gives out separate certificates of protest, in others enters the protest in a general register and gives out copies of the register. Nevertheless, the broad distinctions, and the legal consequences already mentioned, are clear enough, and serve sufficiently to group the various sorts for considering their admissibility in evidence.

§ 1638. **Other Rules applicable to Official Documents, discriminated (Production of Original, Authentication, Privilege, etc.).** The sole inquiry here is the scope of an exception to the Hearsay rule, *i. e.* the admissibility of an official document as testimony to the facts asserted in it by the officer. Other rules of evidence will also find application to the same document; but their bearing must be discriminated:

(1) The rule requiring the Production of the Original (*ante*, § 1179) finds

constant application; but, assuming the original to be produced, the question still remains whether it is receivable as an assertion of fact under the present exception to the Hearsay rule.

(2) The rule of Authentication (*post*, § 2129) has always to be satisfied; for an official document may belong to a class clearly admissible under the present exception, and still the document actually offered must be authenticated as genuinely that which it purports to be.

(3) The rule of Completeness (*post*, § 2094), requiring the whole of a document to be used, and not merely a portion of it, has constant application to official documents, and may exclude that which would be admissible so far merely as the present exception was concerned.

(4) The rules of Preference (*ante*, §§ 1265, 1325, 1335, 1345) apply frequently to official documents, by way of requiring their use in preference to other kinds of testimony.

(5) The rules of Privilege (*post*, § 2367) occasionally forbid the use of official documents, or allow the officer to refuse to permit their use.

(6) The rule of Integration, or Parol Evidence rule (*post*, § 2400), has a frequent bearing on official documents.

1. REGISTERS AND RECORDS

§ 1639. **General Principle, and Sundry Applications.** *Wherever there is a duty to record official doings, the record thus kept is admissible.* This much is conceded; the judicial language already quoted (*ante*, §§ 1632, 1633) sufficiently illustrates the principle. The only matter of doubt can be whether there is in a given case a duty to record. It is clear that such a duty need not be expressly prescribed by statute or regulation, but may be implied from the nature of the office (*ante*, § 1633, par. 1).

Further, it may safely be laid down, as a general principle, that *wherever there is a duty to do*, then there is *also a duty to record* the things done. It is not conceivable that governmental work could be adequately carried on without the written preservation of the doings. The necessity for supervision and correction and for future reference to past doings makes this conclusion inevitable. Such a general principle seems not to have been expressly adopted by the Courts, but it is distinctly implied in the body of the decisions.

It must of course be taken with certain natural qualifications. The theory of official duty does not suppose every officer without exception to be engaged alike in doing and writing; some merely do, and others merely write. The theory applies not so much to individual officers as to each office or administrative group taken as a whole. It is the doings of the office, as such, that are to be recorded by some appropriate officer therein. For example, no one need maintain that the duty of the jail-sentry to watch on the wall implies also a duty to record from time to time the fact that he has watched certain prisoners; and yet the general duty of the prison-warden to keep the persons

committed to him does imply a duty to record the persons committed and the length of time during which they are kept. With this qualification, then, that the principle applies to the doings of an office considered as a whole or as a distinct subdivision, the principle still remains true that wherever an official duty to do is found, there is also a duty on some appropriate person for the office to record the doings. Practically, then, the admissibility of a given register or record depends ultimately on whether the officer has the duty to do the class of things recorded; if they are within his duty, then the record is admissible; otherwise not.

The question of Evidence thus depends largely on the question of administrative law. Not all the judicial rulings conform strictly to this principle, but it unquestionably represents the general judicial attitude.[1]

§ 1639. [1] In the following list are contained only cases dealing with *registers* and *records* of sundry sorts; instances of documents in the nature of certificates and returns of sundry sorts will be found *post*, §§ 1672, 1674; in the following list are also placed judicial rulings made under statutes:

England: 1785, R. *v.* Aickles, 1 Leach Cr. L., 3d ed., 436 (prison-register expressly required by law to be kept, admitted); 1802, Salte *v.* Thomas, 3 B. & P. 190 (prison-books, not admitted; partly because "the gaoler is not required by law to keep them"); 1813, Henry *v.* Leigh, 3 Camp. 499 (clerks in the Bankruptcy Court who saw the Lord Chancellor sign the certificates, and then made entries of the fact in a book kept for and consulted by the public, the clerks not being sworn officers; the entries not received); 1815, R. *v.* Grimwood, 1 Price 369, 371 (official excise-books, admitted; Thomson, C. B.: "If all the officers during the period to which they relate were necessarily to be called to substantiate them by proof, there would in most instances be an end of recovering duties in arrear"); 1829, Arnold *v.* The Bishop, 5 Bing. 316 (a bishop's register, admitted to prove "the business transacted at the bishop's visitation"; here, the existence of a custom as to a curate's election); 1838, Merrick *v.* Wakley, 8 A. & E. 170 (medical officer's book of returns of attendance, etc., in workhouse, excluded; see quotation *ante*, § 1632); 1845, Irish Society *v.* Bishop of Derby, 12 Cl. & F. 641, 657 (limits of admissibility of records of bishops as ecclesiastical officials, determined); 1863, The Maria das Dorias, 32 L. J. Adm. 163 (government lighthouse-journals, admitted); 1866, The Catherina Maria, L. R. 1 Ad. & Ec. 53 (returns of coastguard, admitted in a collision suit to show the weather conditions); 1920, Casey *v.* Kennedy, 52 D. L. R. 326, [illegible] B. (assault and battery; medical history sheet, by a medical board examining plaintiff under the Military Service Act, 1917, admitted as a public document).

United States: *Federal:* 1878, Evanston *v.* Gunn, 99 U. S. 660 (records of weather kept by U. S. Meteorological Bureau, admitted); 1882, The Sandringham, 10 Fed. 556, 508 (reports of a storm, from a U. S. signal-station, admitted); 1892, Daly *v.* Webster, 1 U. S. App. 573, 611, 4 C. C. A. 10, 56 Fed. 483 (copyright clerk's book, received to show deposit of a play); 1896, White *v.* U. S., 164 U. S. 100, 17 Sup. 38 (book of entries of receipts and discharges of convicts, kept by a jailer, admitted); 1917, Chesapeake & Delaware Canal Co. *v.* U. S., 3d C. C. A., 240 Fed. 903 (payment of dividends to U. S. Treasury; records of accounts kept in the U. S. Treasury Department, admitted); 1919, Chesapeake & Delaware Canal Co. *v.* U. S., 250 U. S. 123, 39 Sup. 407 (action for dividends due to the U. S.; books of account of the U. S. Treasury Department, kept pursuant to U. S. laws, admitted as public records); *Alabama:* 1881, Miller *v.* Boykin, 70 Ala. 469, 478 (postmaster's required register of arrival and departure of mails, receivable; but said groundlessly to serve only for collateral issues); *Connecticut:* 1902, Mears *v.* R. Co., 75 Conn. 171, 52 Atl. 610 (weather in Waltham, allowed to be evidenced by the Federal bureau's records at Boston, 10 miles away, the nearest office of the bureau); *Columbia (Dist.):* 1892, U. S. *v.* Cross, 20 D. C. 380 (record of the measurements of convicted persons, kept by the marshal for the Department of Justice, admitted); 1900, Snell *v.* U. S., 16 D. C. App. 501, 513 (entries in the books of the Georgia State Sanitarium, concerning insane persons, not admitted to show facts of their history occurring before entering); *Florida:* 1918, Branch *v.* State, 76 Fla. 558, 80 So. 482 (embezzlement; official records of the State comptroller's office, showing the account of the defendant tax-collector as rendered to the State treasurer, admitted, applying several statutes); *Illinois:* 1921, Carlin *v.* Chicago & W. I. R. Co., 297 Ill. 184, 130 N. E. 371 (personal injury; issue as to fencing the right

Statute has of course frequently stepped in to make expressly admissible many kinds of registers and records. In most instances the statutory

of way; records of Chicago commissioner of public works, in the form of "letter-press copies" of documents signed by him, addressed to all railroads, etc., and kept at his office in bound volumes, admitted without proof of mailing or receiving, as official records); *Iowa:* 1876, Butler v. Ins. Co., 45 Ia. 93, 96 (record of State insane hospital, kept by assistant physician, not under any authority or duty, excluded); 1897, Huston v. Council Bluffs, 101 Ia. 33, 69 N. W. 1130 (United States Meteorological Office's records, admitted); 1905, Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co., 127 Ia. 511, 103 N. W. 493 (Huston v. Council Bluffs approved); 1906, Jones' Estate, 130 Ia. 177, 106 N. W. 610 (record of supervisors of a county as to a pauper, held not authorized); *Maine:* 1915, Inhabitants of Rumford v. Inhabitants of Upton, 113 Me. 543, 95 Atl. 226 (pauper supplies; town treasurer's books of account, received as public records); *Massachusetts:* 1857, Gurney v. Howe, 9 Gray 407 (postmaster's record of registered letters, admitted); 1904, Jordan v. Carberry, 185 Mass. 181, 69 N. E. 1062 (town clerk's issuance of dog-license to C. is no evidence of C.'s ownership or keeping, unless brought to C.'s knowledge); 1904, Cashin v. N. Y. N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930 (certain hospital records, excluded); 1908, Allen v. Kidd, 197 Mass. 256, 84 N. E. 122 (assistant city engineer's notebook, kept with the public records, not admitted to show the side lines of any and all streets, his duty not having that scope; this is a narrow decision); 1909, Delaney v. Framingham G. F. & P. Co., 202 Mass. 359, 88 N. E. 773 (records of the Massachusetts General Hospital and the Carney Hospital, made before the duty imposed by St. 1905, *infra*, n. 2, requiring the keeping of records of "cases under their care," not admitted); 1916, Fondi v. Boston Mutual Life Ins. Co., 224 Mass. 6, 112 N. E. 612 (to evidence tuberculosis in the deceased, the insurer offered a copy of a destroyed original card, made at the office of the State Board of Health, and containing a record of the bacteriologist's analysis of some sputum, identified as taken by a physician from the defendant and sent to the Board; excluded, as "not a public record in the sense of Rev. L. c. 35, § 5"; nothing is said about any common law principle; in this instance, the authentication appears to have been defective; but it is a serious matter to refuse the quality of official statements to records of a State Board of Health; and this learned Court has indicated, in its several rulings, a marked tendency to be needlessly and obstructively strict on this point); 1921, Cawley v. Northern Waste Co., — Mass. —, 132 N. E. 365 (owner's action against lessee for damage to the building by fire; chief of fire departments' "entry made as to the cause of the fire," excluded; unsound); for hospital records in this State, see *post*, § 1707; *Michigan:* 1887, People v. Foster, 64 Mich. 717, 720, 31 N. W. 596 (record of weather by U. S. Signal Service, not admitted in a criminal case; unsound; compare § 1398, *ante*); 1911, Worden L. & S. Co. v. Minneapolis St. P. & S. S. M. R. Co., 168 Mich. 74, 133 N. W. 949 (Federal weather records, here excluded because relating to the wind at another point); *Mississippi:* 1840, Newman v. Doe, 4 How. Miss. 535 (Indian agent's record of names, admitted); *Missouri:* 1906, Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275 (public school teacher's register of pupils' ages, kept by requirement of law, admitted); 1922, State v. Tarwater, — Mo. —, 239 S. W. 480 (murder; plea, insanity; certain records of an insane asylum in 1885, purporting to be made under Rev. St. 1919, § 12283, held not admissible; unsound); *New Hampshire:* 1921, Laird v. Boston & M. R. Co., — N. H. —, 114 Atl. 275 (action for injury to the plaintiff's eye in 1913; defendant offered to show that the war-draft board had accepted the plaintiff as physically fit in 1917 or 1918; excluded; unsound; the official examination fulfilled all the requisites of an official statement; the opinion goes upon the fallacious analogy of a judgment which must be binding on both parties; this is an ancient notion, which it is astonishing to find relied upon by this court; the opinion does not understand the point); *New Jersey:* 1849, Browning v. Flanagin, 22 N. J. L. 567, 572 (clerk's "sealing docket," containing entries of the issue and return of writs, held "an official register"); 1920, State v. Matarazza, 94 N. J. L. 263, 109 Atl. 304 (appraiser's record of a liquor license, admitted; "whether it be a book, or sheets of paper in a binder, or a box of cards on the card-index system, . . . if made up as a record, it has that evidential quality"); *North Carolina:* 1922, Peterson v. Tidewater Power Co., — N. C. —, 111 S. E. 8 (value of property burned); *Oregon:* 1903, Scott v. R. Co., 43 Or. 26, 72 Pac. 594 (U. S. Weather Bureau records of rainfall, admitted; here both the records verified by the incumbent on the stand and the records of his predecessor were admitted; of course the predecessor, under the principle of § 1422, *ante*, did not need to be called; compare § 665, *ante*); *Pennsylvania:* 1865, Howser v. Com., 51 Pa. 332, 338 (warden's record of prisoner's presence etc., treated as admissible); 1910, Hufnagle v. Delaware & H. Co., 227 Pa. 476, 76 Atl. 205 (a diary kept by law in a U. S. Weather Bureau station, held not improperly excluded; here the Supreme Court gives the law of Evidence a needless rebuff in order to save

declaration was unnecessary. Liberal judicial rulings would have saved the law from the copious statutes.[2]

reversing the case; better have held that the ruling was erroneous but harmless); *Vermont:* 1887, State v. Spaulding, 60 Vt. 228, 233, 14 Atl. 769 (assessment-rolls of collector of internal revenue, admitted to show the issuance of a liquor license to the defendant); *Washington:* 1905, Anderson v. Hilker, 38 Wash. 632, 80 Pac. 848 (records of the U. S. Weather Bureau, read by the officer in charge, admitted); *Wisconsin:* 1901, Hempton v. State, 111 Wis. 127, 86 N. W. 596 (record of insane person kept by law at State hospital, admitted).

For *postmasters' certificates*, see *post*, § 1674.

For *postmarks* as evidence of *date*, see *post*, § 2152.

For *hospital records* in general, see *post*, § 1707.

For other specific kinds of registers, see the ensuing section-titles.

[2] In the following list, only registers and records are dealt with; statutes about certificates and returns will be found *post*, §§ 1672, 1674; it is sometimes difficult to say in which class a document properly belongs:

CANADA: *Dominion:* Rev. St. 1906, c. 145, Evid. Act § 26, as amended by St. 1921, 9–10 Geo. V, c. 12 ("A copy of any entry in any book kept in any office or department of the Government of Canada, or in any commission, board or other branch of the public service of Canada, shall be received as evidence of such entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department, commission, board or other branch of the said public service, that such book was, at the time of the making of the entry, one of the ordinary books kept in such office, department, commission, board or other branch of the said public service, that the entry was made in the usual and ordinary course of business of such office, department, commission, board or other branch of the said public service, and that such copy is a true copy thereof"); § 28, as amended by St. 1921 (seven days' or more notice required for using such copies); *Alberta:* St. 1910, 2d sess., c. 3, Evid. Act, § 31 (like Ont. R. S. c. 76, § 28); *British Columbia:* Rev. St. 1911, c. 78, § 37 (like Dom. Evid. Act, § 26); *Manitoba:* Rev. St. 1913, c. 65, § 17 (like Dom. Evid. Act, § 26, applying also to any province of Canada); § 21 (like ib. § 22); *New Brunswick:* Consol. St. 1903, c. 127, § 57 (like Dom. Evid. Act, § 26, including "this Province" also); *Newfoundland:* St. 1919, c. 21, Evid. Act, § 2 (like Dom. Evid. Act, § 26); *Nova Scotia:* Rev. St. 1900, c. 163, § 13 (like Dom. Evid. Act, § 26, including also the books of a department of Nova Scotia); *Ontario:* Rev. St. 1914, c. 76, § 28 ("any entry in any book of account kept in any department of the government of Canada or of this province" is admissible to prove the facts recorded, "if it is proved by the oath or affidavit of an officer of such department that such book was at the time of the making of the entry one of the ordinary books kept in such department, that the entry was, apparently and as the deponent believes, made in the usual and ordinary course of business of such department"); *Saskatchewan:* Rev. St. 1920, c. 44, Evidence Act, § 12 (like Dom. Evid. Act, § 26); *Yukon:* Cons. Ord. 1914, c. 30, § 13 (like Dom. Evid. Act, § 26, adding "or of this Territory").

UNITED STATES: *Federal:* Rev. St. 1878, § 886, Code 1919, § 1389 (in a suit for delinquency of a money officer, books of the Treasury Department are admissible); § 887, Code, § 1390 (on trial for embezzling public moneys, books and proceedings of the Treasury Department are admissible); § 889, Code, § 1391 (certain account-books in the Post-Office Department, admissible); § 896, Code, § 1399 ("all official entries in the books or records" of a U. S. consul, vice-consul, or commercial agent, admissible); Code, § 10375 (embezzlement of public money; a "transcript from the books and proceedings of the Treasury," admissible); *California:* Civ. C. 1872, § 2471 (county clerk's register of partnership names, etc., admissible); C. C. P. 1872, §§ 1920, 1926 ("Entries in public or other official books or records, made in the performance of his duty by a public officer of this State or by another person in the performance of a duty specially enjoined by law," receivable; entry "made by an officer or board of officers or under the direction and in the presence of either, in the course of official duty," receivable to show "the facts stated in such entry"); § 1946 (regular entries of a decedent "in the performance of a duty specially enjoined by law" are admissible); *Georgia:* Rev. C. 1910, § 1300 (books of State railroad — the Western & Atlantic — to be evidence in actions by or against it); § 3819 (county surveyor's certified plot of boundaries, made by processioning, admissible); § 5756 (Georgia Soldier Roster Commission's roster of State Civil war service, admissible); *Hawaii:* Rev. L. 1915, § 2139 (possession of such receipt on premises is evidence of keeping for sale, etc.); § 120 (election records, to be evidence); *Idaho:* Comp. St. 1919, § 7954 (like Col. C. C. P. § 1920); § 7959 (like ib. § 1926); § 7967 (like ib. § 1946); *Illinois:* Rev. St. 1874, c. 15, § 6 (State auditor's books of account with collectors, etc., admissible); c. 79, § 15 (county clerk's record of swearing, resignation, etc., of justices and constables, admissible); *Indiana:* Burns' Ann. St. 1914, § 2130 (books of State or county auditor or county board,

It is to be remembered that a register or record otherwise admissible may fail to be received for one of the general reasons already noted (*ante*, §§ 1633–

admissible to show a balance against officials charged with embezzlement); *Kansas:* Gen. St. 1915, § 7289 ("books and records required by law to be kept by any probate judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or other public officers," admissible); *Kentucky:* Gen. St. 1899, c. 81, § 17, Stats. 1915, § 3760 (official records in general; quoted *ante*, § 1352, n. 11); § 2572 *d* (livery keeper's register of hirings, required to be kept, and made admissible in evidence for offences under this act "if the livery keeper at the time issue a duplicate memorandum to the person hiring," etc.); *Louisiana:* Rev. Civ. C. 1920, § 6 (Secretary of State's register, admissible to prove publication of a law); *Maine:* Rev. St. 1916, c. 11, § 15 (town clerk's record of tax collector's bond, to be evidence of its contents); *Massachusetts:* Gen. L. 1920, c. 233, § 79 (replacing St. 1905, c. 330, St. 1908, c. 269, St. 1912, c. 442; records of hospitals supported by the State or a town or public charity, admissible; quoted *post*, § 1707, and cases applying it); *Michigan:* Comp. L. 1915, § 12522 (weather conditions provable in civil causes by U. S. signal service record); *Minnesota:* Gen. St. 1913, § 2714 (records of board of education admissible); § 8423 ("The original record made by any public officer in the performance of his official duty shall be 'prima facie' evidence of the facts required or permitted by law to be by him recorded"); *Missouri:* Rev. St. 1919, § 4720 (books of State board of pharmacy, admissible); *Montana:* Rev. C. 1921, §§ 10570, 10576, 10594 (like Cal. C. C. P. §§ 1920, 1926, 1946); *Nebraska:* Rev. St. 1921, § 6083 (books and records of county clerk and county treasurer, to be evidence of sale, etc., in tax proceedings); § 6149 ("all records and documents kept on file by any officer" under the delinquent taxes law, to be 'prima facie' evidence of matters stated therein); *Nevada:* Rev. L. 1912, §3951 (State librarian's entries, admissible to prove delivery of books and date thereof, in action for fines, etc.); *New Jersey:* Comp. St. 1910, Evidence, § 27 (public record in a foreign State, etc., admissible, if there admissible); *New Mexico:* Annot. St. 1915, § 73 (records of cattle sanitary board, admissible); *New York:* Con. L. 1909, Insanity, § 93 (on habeas corpus, a patient's "medical history" as it appears in the case-book of a State hospital is admissible); C. P. A. 1920, § 375 (records of N. Y. State and other named official weather bureau, or a certified copy, admissible to prove the conditions of weather and of precipitation); *North Dakota:* Comp. L. 1913, § 513 (records of State board of dental examiners, admissible to prove the facts stated); §§ 7917, 7918 (like Cal. C. C. P. §§ 1920, 1926); § 6432 (register of partnerships by clerk of district court, admissible); § 517 (record of State board of pharmacy, to be 'prima facie' evidence "of the matters therein recorded"); § 2713 (State board of veterinary medical examiners; books and records to be evidence of "all the matter therein recorded"); *Ohio:* Gen. Code Ann. 1921, § 13674 (books of State auditor or county auditor or commissioners, admissible to prove a balance due against a public officer charged with embezzlement); § 145 (Governors' records of pardons, extraditions, notaries, etc., admissible); § 99 (penitentiary record of pardon-case, admissible); § 2407 (county commissioners' record of proceedings, admissible); *Oklahoma:* Comp. St. 1921, § 5765 (county clerk's road record, admissible); § 6541 ("The books and records required by law to be kept by any probate judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or any other public officers, may be received in evidence"); *Oregon:* Laws 1920, § 768 (like Cal. C. C. P. § 1920, inserting "or of the U. S."); § 790 (like ib. § 1946, inserting after "writings," "of a like character," and after "deceased," "or without the State"); § 2752 (State treasurer's book, admissible); *Philippine Islands:* C. C. P. 1901, § 315 (like Cal. C. C. P. § 1920); § 328 (like Cal. C. C. P. § 1946); Admin. C. 1917, § 652 (official embezzlement: auditor's books admissible, and provable by copy; also "bonds, contracts, or other papers," but the Court may require production of the original); *Porto Rico:* Rev. St. & C. 1911, § 1439 (like Cal. C. C. P. § 1920); § 1444 (like C. § 1926); Rev. St. & C. 1911, § 1461 (like Cal. C. C. P. § 1946, adding the words "contract or employment"); *Rhode Island:* Gen. L. 1896, c. 62, § 11 (school district clerk's record of notice of meeting, admissible); *South Dakota:* Rev. C. 1919, §§ 2726-7 (like Cal. C. C. P. §§ 1920, 1926); § 1339 (register of partnerships by clerk of circuit court, admissible); § 10324 (illegal sale of liquor; quoted *post*, § 1680); *Tennessee:* Shannon's Code 1916, § 5583 (records of State Department of this or other domestic State or foreign State, or public documents purporting to have been printed by order of the Legislature or either branch, receivable to prove "acts of the Executive"); *Texas:* Rev. Civ. Stats. 1911, § 3698 (in State suits for official money defaults, records, etc., of comptroller of public accounts are admissible); *Utah:* Comp. L. 1917, § 7093 (like Cal. C. C. P. § 1920); § 7099 (like ib. § 1926); § 7113 (like ib. § 1946); § 3417 (State engineer's maps and records to be 'prima facie' evidence of the facts stated or delineated therein); *Vermont:* Gen. L. 1917, § 1902 (U. S. weather records "taken under direction of any department of the U. S. government," admissible

1635); in particular, a register of things done or occurring *not within the personal knowledge* of the officer may sometimes be excluded on that ground alone.

§ 1640. **Assessors' Books; Electoral Register.** (1) The duty of a *tax-assessor* requires him ordinarily to ascertain, for each piece of property, the person owning or occupying it and the value of the property. It is also clearly his duty to record the facts thus ascertained.

The only objection to the admissibility of his record as evidence of these facts must arise from the principle already considered (*ante*, § 1635), that the record of the assessor is not of his own personal deeds or observation, but of facts occurring without his observation. This objection is of no force when the officer's duty clearly requires him — as in the assessor's case — to depend upon investigation. If the assessor does not merely record the sworn statement of the claimant, but also satisfies himself by independent means, and follows his own judgment, his finding deserves some credit. It is true that the record is not made expressly for use as evidence in court; but it is certainly made for a weighty purpose; and few official documents are made expressly for use in evidence. It is also true that in many communities the assessment-book notoriously assesses values far below the actual standards; and that in others the assessor accepts without question the owner's filed statement; where these practices prevail, it is simple enough to reject those particular books as untrustworthy evidence of value, and as inadmissible. But where the books are not thus notoriously untrustworthy, there seems to be no sound objection to receiving them. No one maintains that they are conclusive; but at least they afford some evidence to a rational mind seeking the truth.

There is much judicial difference of opinion as to their admission. It would seem that to prove the *value* of property [1] they should be admissible,

in civil cases, by certified copy under oath by the officer at the place of taking and keeping); *Washington:* R. & B. Code 1909, § 7088 (State weigher's bill of weight of shingles or lumber, to be evidence of the facts stated); § 7078 (State logscaler's books, to be evidence of the matters stated); *West Virginia:* Code 1914, c. 150, § 29 *b* (State board of pharmacy's "books and register," admissible); § 29 *e* (State board of optometry's record of licenses, admissible); *Wisconsin:* Stats. 1919, § 4161 (records of village, as to boundaries, etc., admissible); § 4162 (records in office of county treasurer or clerk, admissible); *Wyoming:* Comp. St. 1920, § 2893 (records of clerk of board of county commissioners and county treasurer, admissible to prove sale of realty for taxes, etc.).

§ 1640. [1] In the following list are included those rulings which receive the assessors' records only as containing the admission of the owner as a party-opponent in the case (as noted *post*):

Admitted: IRELAND: 1844, Welland *v.* Middleton, 11 Ir. Eq. 603, Sugden, L. C. (assessment-book admissible to show value); 1848, Swift *v.* M'Tiernan, 11 Ir. Eq. 602, Brady, L. C. (same).

UNITED STATES: *Federal:* 1830, Ronkendorff *v.* Taylor, 4 Pet. 349, 360 (legality of sale for taxes; the assessor's book "was made out and arranged by an officer in pursuance of a duty expressly enjoined by law; this not only makes the tax-book evidence, but the best evidence which can be given of the facts it contains; in this book are stated the name of the owner of the property, and his residence, if known; the number of the square, the number of the lot, the square feet it contains; the rate of assessment, the valuation, and the amount of the tax"); *Alabama:* 1890, Birmingham M. R. Co. *v.* Smith, 89 Ala. 305, 7 So. 634 (eminent domain; tax-assessor's valuation said to be inadmissible, but the owner's sworn statement of value filed with the assessor, held admissible against him); *Arkansas:* 1898,

White *v.* B. & F. G. Co., 65 Ark. 278, 45 S. W. 1000 (admitted to show value of personalty); *California:* 1907, Central Pacific R. Co. *v.* Feldman, 152 Cal. 303, 92 Pac. 849 (allowable on cross-examination, to test an expert); *Colorado:* 1875, Beckwith *v.* Talbot, 2 Colo. 639, 651 (cattle-sale; defendant's agent's tax-schedule of the cattle, admitted against him); *Georgia:* 1861, Lynch *v.* Lively, 32 Ga. 575, 577 (administration; the intestate's return of taxable property, admitted against an applicant for administration); 1895, Vernon S. R. Co. *v.* Savannah, 95 Ga. 387, 22 S. E. 625 (eminent domain; the owning corporation's return for taxation, admitted); *Illinois:* 1921, People ex rel. Miller, V. C. B. & Q. R. R., 300 Ill. 399, 133 N. E. 325 (official records and reports of State tax commission, admitted, in a suit for delinquent taxes); *Maryland:* 1905, Gossage *v.* Phila. B. & W. R. Co., 101 Md. 698, 61 Atl. 692 (county commissioners' books, based upon the plaintiff's admissions, received against him to show the value of a ship); *Massachusetts:* 1899, Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160 (cited *ante*, § 1060; received as containing the owner's admission); *Missouri:* 1897, Banking House *v.* Darr, 139 Mo. 660, 41 S. W. 227 (cited *ante*, § 1060; similar); 1898, St. Louis O. H. & C. R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771 (defendants' assessment list, admitted against him); *Pennsylvania:* 1877, Hanover Water Co. *v.* Iron Co., 84 Pa. 285; 1891, Mifflin Bridge Co. *v.* Juniata Co., 144 Pa. 365, 375, 22 Atl. 896 (eminent domain; the owning corporation's officers' sworn valuation, admitted against itself); 1897, West Chester & W. P. R. Co. *v.* Chester Co., 182 Pa. 40, 51, 37 Atl. 905 (similar); *Texas:* 1903, Boyer and Lucas *v.* St. Louis S. F. & T. R. Co., 97 Tex. 107, 76 S. W. 441 (damage by a railroad; the plaintiff's rendition of taxable property, received as an admission); *Vermont:* 1895, Hubbard *v.* Moore, 67 Vt. 539, 32 Atl. 465, *semble* (tax inventory, receivable only so far as it is an admission); 1907, Ripton *v.* Brandon, 80 Vt. 234, 67 Atl. 541 (quadrennial appraisal, admitted to show value of realty); *West Virginia:* 1910, McHenry *v.* Parkersburg, 66 W. Va. 533, 66 S. E. 750 (assessment admitted under Code 1899, c. 29, § 115, Code 1906, § 801).

Excluded: Arkansas: 1884, Texas & St. L. R. Co. *v.* Eddy, 42 Ark. 527 (eminent domain; assessor's valuation of land, excluded, because "being for a different purpose, not a fair criterion of its market value"); 1909, St. Louis I. M. & S. R. Co. *v.* Magness, 93 Ark. 46, 123 S. W. 786 (assessor's valuation, excluded); *Illinois:* 1905, Sanitary District *v.* P. F. W. & C. R. Co., 216 Ill. 575, 75 N. E. 248 (question reserved); 1906, Lewis *v.* Englewood Elev. R. Co., 223 Ill. 223, 79 N. E. 44 (eminent domain; the assessed valuation of the land, not allowed to be asked of the owner producing his tax receipts; on the ground that, for real property, the owner is not required to list its value for taxation and therefore the assessed valuation does not involve any admission on his part; as to the theory of official statements by the assessor, the Court merely adds that "the assessor himself might have been a competent witness"); 1914, Kelley *v.* People's Nat'l F. Ins. Co., 262 Ill. 158, 104 N. E. 188 (assessor's schedule of value of household goods, not admissible against the owner; whether admissible as a return made by the owner or agent, not decided); *Kentucky:* 1901, Scott *v.* O'Neil, — Ky. —, 62 S. W. 1042 (assessment excluded as "hearsay"); *Massachusetts:* 1855, Brown *v.* R. Co., 5 Gray 35, 40 (eminent domain; "it is questionable whether any valuation made for the special purpose of taxation," several years before, is admissible); 1863, Flint *v.* Flint, 6 All. 34, 37 (not admitted to show "the actual value of the house"); 1869, Kenerson *v.* Henry, 101 Mass. 152, 155 (assessed valuation of an estate, excluded); 1869, Com. *v.* Heffron, 102 Mass. 148, 151 (excluding an assessor's book as evidence that the defendant's house was within a certain town's boundary different from that alleged in the indictment; Gray, J.: "The assessment can be no better evidence of the situation of land than it is of the value of land or the domicil of the person. The domicil of persons, the situation and value of property, and other facts, are required by the tax acts to be ascertained and recorded by the assessors, according to their best information and belief, for the sole purpose of the assessment and collection of the tax; and there would be great danger of injustice if their estimates of any of these details or incidents were held to be competent evidence against third persons of any fact of which better evidence is obtainable"); 1894, Anthony *v.* R. Co., 162 Mass. 60, 65, 37 N. E. 780 (assessors' valuation, not received to show value of a building burned); 1908, Atherton *v.* Emerson, 199 Mass. 199, 85 N. E. 530 (official appraisal by appraisers in bankruptcy, excluded); 1922, Johnson *v.* Lowell, — Mass. —, 134 N. E. 629 (land-condemnation; assessed value of other parcels, held not admissible under St. 1913, c. 401, nor otherwise); *Nevada:* 1873, Virginia & T. R. Co. *v.* Henry, 8 Nev. 165, 174 (eminent domain; defendant's sworn valuation to the assessor, said *obiter* to be inadmissible, except to contradict him); *North Carolina:* 1899, Ridley *v.* R. Co., 124 N. C. 37, 32 S. E. 379 (tax-list made by assessors, not admissible to show value of land); 1904, Suffolk & C. R. Co. *v.* West End L. & I. Co., 137 N. C. 330, 49 S. E. 350 (assessor's list, not admitted to show value; collecting cases); *Rhode Island:* 1904, Spink *v.* N. Y. N. H. & H. R. Co., 26 R. I. 115, 58 Atl. 499 (damage by a railroad fire; the assessor's valuation not admitted); *Wisconsin:* 1886, Tuckwood *v.* Hanthorn, 67 Wis. 326, 337, 30 N. W. 705 (sale in fraud of creditors; tax-roll held not admissible to show

subject to the above limitations, as well as to prove its *occupancy*,[2] or the *ownership* or the *lack of property* by a particular person;[3] the objection, in the last instance, that the title-deeds should be produced, is disposed of by the same reasoning (*ante*, § 1246) that makes it proper for a person to testify on the stand that he is or is not the owner of property. They should also be admissible, it would seem, to prove any *other facts* which the duty of the assessor may require him to ascertain for the purpose of taxation, — for example, location,[4] age,[5] alienage, coverture, and the like.

It is to be noted that wherever the books are required to be based in part on the sworn statement, return, or list of a claimant or owner, then, as against that person, the statement, or the book containing it, may be used against him as involving in effect his *admission;*[6] and it is upon this theory

plaintiff's lack of money, being receivable only by statute in a proceeding to enforce the tax; but the plaintiff's statements to the assessor were received as admissions).

So too, the *valuation of benefit* found by a *jury of viewers* has been held inadmissible, though the individual jurors may be called as witnesses: 1921, Re County Ditch No. 33, 150 Minn. 69, 184 N. W. 374 (citing prior cases).

[2] *Eng.* 1824, Doe *v.* Cartwright, Ry. & Mo. 62 (tax-collector's entry of payment, admitted to show occupation by Y.; but put on the ground of a declaration against interest, *ante*, § 1458); 1834, Doe *v.* Seaton, 2 A. & E. 171, 176, 178 (land-tax books admitted as corroborative evidence of occupation); 1833, Doe *v.* Arkwright, ib. 182, note (land-tax books not admitted to show occupation by an individual member of a family, in view of a practice to assess merely in the general family name); 1888, Blount *v.* Layard, cited in 1891, 2 Ch. 681, 691 (assessments for church and poor rates, admitted to show who were tenants); 1891, Smith *v.* Andrews, 2 Ch. 678, 694 (union-workhouse tax-books assessing a tax upon specific occupiers of land, admitted, the officers' "duty being to ascertain who is the occupier of the property and to enter his name as the person rateable in respect of it"); *U. S.* 1886, Fletcher *v.* Fuller, 120 U. S. 534, 552, 7 Sup. 667 (title by presumption of lost grant; the assessment of taxes for many years on the claimants, "such assessment being required to be made, under the laws of the State, to occupants or owners," said to be "circumstances of great significance").

[3] *Ark.* 1875, Winter *v.* Baudel, 30 Ark. 362, 371 (assessor's books, received to show that persons listed had no property above the exemption-limit); *Ga.* 1861, Tolleson *v.* Posey, 32 Ga. 372, 375 (assessor's books, admitted to show the defendant's wealth, as being based on his admissions); 1905, Ivey *v.* Cowart, 124 Ga. 159, 52 S. E. 436 (tax-return, receivable as an admission, to show the contents of lots of land); *Ill.* 1920, People *v.* Thompson, 295 Ill. 187, 129 N. E. 155 (under St. 1917, p. 661, the assessment book is evidence of ownership and liability); *Ind.* 1881, Painter *v.* Hall, 75 Ind. 208, 213 (assessment list, admitted as an official document "to show the amount of property owned by the assessed"); 1881, Hall *v.* Bishop, 78 Ind. 370, 371 (list admitted as embodying the admission of a party); 1904, Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. 565 (action on a note; plaintiff's tax schedules received as an admission of non-ownership by omission of the note); *N. C.* 1918, Belk *v.* Belk, 175 N. C. 69, 94 S. E. 726 (tax-lists, admitted); *Or.* 1892, Beekman *v.* Hamlin, 23 Or. 313, 314, 31 Pac. 707 (assessment-rolls, admitted to show a debtor insolvent, in connection with a presumption of payment); *Tex.* 1921, Santikos *v.* State, 90 Tex. Cr. 81, 233 S. W. 848 (violating Sunday amusement law; to prove defendant's ownership of theatre, the tax assessment record was received; approving the text above).

Contra: Ia. 1881, Adams *v.* Hickox, 55 Ia. 632, 8 N. W. 485; 1895, Hetch *v.* Eberke, 95 Ia. 757, 64 N. W. 650; 1897, Allbright *v.* Hannah, 103 Ia. 98, 72 N. W. 421; *Mass.* 1916, Com. *v.* Quinn, 222 Mass. 504, 111 N. E. 405 (false representations as to F. and M. as wealthy manufacturers at S.; the assessors' books at S., *semble* not admissible to show that F. and M. were not assessed for any property either real or personal; but it is time that this hoary error be repudiated; it offends common sense and it is unsound on principle).

[4] *Contra:* 1869, Com. *v.* Heffron, 102 Mass. 148 (quoted *supra*); 1902, Philadelphia *v.* Gowan, 202 Pa. 453, 52 Atl. 3 (assessment-books, held not admissible under statutes to prove for the city that property was assessed as urban).

[5] *Contra:* 1843, Clark *v.* Trinity Church, 5 W. & S. 266, 269, *semble* (assessor's entries, not admissible to prove the assessee to be of age).

[6] On the principle of § 1060, *ante*; the cases going on this theory are placed with the others in the notes *supra*. The following ruling therefore seems erroneous: 1795, Weaver *v.* Pratt,

that most of the receiving rulings seem to have been made. In this view, a person's *failure to list* certain property would be evidence of a failure to claim, amounting (on the principle of § 1072, *ante*) to an admission.[7] Furthermore, so far as the *proceedings of assessment* and collection are material in determining the lawfulness of a tax, the amount due from a collector, or the like, the books are admissible without regard to the present principle (on the theory of § 2427, *post*).[8]

Statutes in many jurisdictions expressly make admissible these and other taxation-books; but whether this would authorize their use for any but the purpose last mentioned may be doubtful.[9]

(2) The *electoral register*, poll-books, tally-books, and the like, are clearly admissible in so far as they embody the doings of the election officials and the doings of others in their presence.[10] But so far as they record persons as

1 Esp. 369 (tax-collector's books, not admitted, *semble*, to prove that A had paid taxes on property as to which he was now charged as owner).

[7] 1902, Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003 (tax-books admitted to show that S. did not make a return for taxation); 1912, Enfield *v.* Woods, 212 Mass. 547, 99 N. E. 331 (adverse possession; assessors' entry of the property as "town property and exempt under the law," held admissible to show that the party was not in occupation as owner); 1887, Austin *v.* King, 97 N. C. 339, 342, 2 S. E. 678; 1896, Pasley *v.* Richardson, 119 N. C. 449, 26 S. E. 32. In the following case, substantive law was involved: 1892, Bowman *v.* Dewing, 37 W. Va. 117, 119, 16 S. E. 440 (by law the failure to have land entered in assessor's books is ground of forfeiture; the books are of course receivable to show such failure). Compare § 1072, *ante*.

[8] 1880, Dudley *v.* Chilton Co., 66 Ala. 593, 598 (moneys due from tax-collector to county; assessor's book, probate judge's book, and treasurer's book, kept by law, receivable).

[9] *U. S. Ala.* Code 1907, § 2310 (legally required books and records of tax-collector or probate judge, admissible in issue of sale of realty for taxes); § 5943 (books of auditor or of superintendent of education, admissible to show amount due from county superintendent); § 2277 (tax collector's tax-book to be evidence of amounts due in suits for collection); *Cal.* Pol. C. 1872, § 3789 (assessment-book or delinquent list is evidence of assessment, property assessed, delinquency, amount of taxes, due and unpaid); *Colo.* Comp. L. 1921, § 7188 (tax-roll, list of lands sold, etc., admissible); *Fla.* Rev. G. S. 1919, § 1120 ("drainage tax book," to be evidence of all matters therein contained); *Haw.* Rev. L. 1915, § 1286 (assessment or tax lists, tax-books, and delinquent lists, admissible to show the amount due, etc.); *Ida.* Comp. St. 1919, § 3253 (assessment-book or delinquent list, admissible to prove property assessed, and amount of delinquency); *Ill.* St. 1897, June 14, § 49 (local improvements; assessment roll to be evidence of "the correctness of the amount assessed," but "shall not be counted as the testimony of any witness or witnesses in the cause"); *Mich.* Comp. L. 1915 § 4098 (all tax-records, etc., to be 'prima facie' evidence of the facts stated); *Mo.* Rev. St. 1919, § 7751 (tax-books kept by auditor, collector, assessor, etc., admissible "as evidence of all the facts stated therein"); § 12974 (assessment-book, and all taxation-books in office of clerk of county court, admissible in controversies as to tax-sales of land); § 4621 (drain and levees; the levee tax-book of the district, to be evidence of "all matters therein contained"); § 4400 (district drainage tax-book, to be 'prima facie' evidence); *Mont.* Rev. C. 1921, §§ 2216, 2227 (county assessment book, etc., is evidence of assessment, delinquency, etc.); *Nev.* Rev. L. 1912, § 3658 (delinquent tax-list, admissible to prove "assessment, property assessed," delinquency and its amount); *N. M.* Annot. St. 1915, § 5511, St. 1921, c. 13 § 456 (records, lists, etc., of assessor, etc., admissible to prove facts there stated as to assessment, levy, or sale); *N. C.* Con. St. 1919, § 5955 (electoral register, and a certified copy thereof, shall be 'prima facie' evidence of a voter's right to vote); § 5971 (poll-books shall be evidence in a trial for illegal or fraudulent voting); *Or.* Laws 1920, § 4391 (all books connected with assessment, admissible); *Pa.* St. 1915, Apr. 21, Dig. 1920, § 21862 (in eminent domain cases, the tax-assessment is receivable for the claimant "as a declaration against interest"); *R. I.* Gen. L. 1896, c. 48, § 15 (tax-collector's return in sales of realty, to be evidence of facts stated); *Utah:* Comp. St. 1417, § 6048 (county auditor's certified copy of assessment is evidence of tax due); *Wis.* Stats. 1919, § 4162 ("all assessments and tax-rolls and certificates and warrants thereto attached," as well as notices and proofs of publication, etc., required in relation to taxes, admissible).

[10] On the theory of § 2427, *post*.

residing within a district and as otherwise possessing electors' qualifications, they are open to the objection already noted for assessors' books, namely, the registrars' lack of personal knowledge. Nevertheless, this objection, for the reasons noticed, seems to be insufficient; for the registrars of election, in almost every electoral system and usually in practice, are charged with the duty of ascertaining by investigation the qualifications of persons registered and are supposed to enter the names only after satisfying their own judgment upon the facts. This result is generally accepted.[11]

§ 1641. **Military and Naval Registers; Ship's Log-book.** (1) In the Navy and the Army are kept certain *muster-books* and other records as a necessary part of administration; these have always been regarded as admissible to prove the facts customarily there recorded.[1] Moreover, by statute in many jurisdictions, records of enlistment, muster, discharge, death, and the like, are required to be kept by local officers who would not ordinarily have these duties, such records being made up by compilation from the original records of the officers within the service. The objection to these, namely, that they are not based on personal knowledge (*ante*, § 1635), is overcome by the circumstance that this duty is expressly created by statute;[2] this objection, moreover, has never availed even against the books, kept by custom and necessity, in the central administrative offices of Army and Navy. Distinguish the use of *certificates of service*, or of *death*, given out to the individual applicant (*post*, § 1675*a*).

(2) A *ship's log-book* is no doubt an entry made in the regular course of business; and, if the entrant is deceased or otherwise unavailable, it would undoubtedly be receivable under the exception for such statements (*ante*,

[11] 1860, Reed *v.* Lamb, 6 Jur. N. s. 828, *semble* (a register of voters, admissible); 1883, Patton *v.* Coates, 41 Ark. 111, 130 (poll-books and certificates of election-officers, receivable, though not expressly admitted by statute); 1891, Merritt *v.* Hinton, 55 Ark. 12, 15, 17 S. W. 270 (approving Patton *v.* Coates); Cal. Pol. C. 1872, § 1117 (entry in the great register of electors, admissible to prove the person named to be an elector of the county); 1851, New Milford *v.* Sherman, 21 Conn. 101, 112 (register of voters, not admissible to prove evidence for a pauper settlement); 1896, Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818 (list of the registrar of elections, with B's name on it checked off, admitted to show that B was an elector and had voted there; New Milford *v.* Sherman disapproved on this point); 1895, Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300 (registry of voters, admitted to show residence, etc.; but here treated as a judicial finding of a lower court in an appeal from the finding); Vt. Gen. L. 1917, § 88 (check-list used at a general election, admissible to show that a person voted).

§ 1641. [1] *Eng.* 1741, R. *v.* Fitzgerald, 1 Leach Cr. L., 3d ed., 24 (muster-book of the navy, admitted); 1742, R. *v.* Rhodes, 1 Leach Cr. L. 29 (muster-book of the navy, made up of reports sent in by the captains, admitted to show the death of the seaman); 1800, Barber *v.* Holmes, 3 Esp. 190, *semble* (admitting the muster-roll of a frigate, from the Admiralty, to prove J. H. a member of the crew); 1804, Wallace *v.* Cook, 5 Esp. 117 (book of returns made by officers of royal ships to the Admiralty admitted to show the death of a sailor, as "a book of office kept by a public officer under the Admiralty"); *U. S.* 1879, Board *v.* May, 67 Ind. 561, 565 (to prove enlistment, muster, and discharge, the Adjutant-General's military record-books received); 1874, Hanson *v.* South Scituate, 115 Mass. 340 (army muster-roll, admitted).

[2] 1870, Wayland *v.* Ware, 104 Mass. 46, 48, 52 (record of names of enlisted townsmen required to be kept by a town-clerk, admitted); 1874, Hanson *v.* South Scituate, 115 Mass. 340 (town record of enlistments kept under statute, admitted); 1886, Worcester *v.* Northborough, 140 Mass. 401, 5 N. E. 270 (admitting a volume published by the Adjutant-General's office under a resolve of the Legislature, and stating the towns to which soldiers were credited).

§ 1521). But can it be received under the present exception, *i. e.* without showing the entrant unavailable?[3]

In *England*, it seems to have been generally considered that the log-book of a government war-vessel was in effect an official record, and therefore admissible; while the log-books of ordinary merchant-ships were at common law excluded.[4] The latter have, however, there been made admissible by statute.[5]

In the *United States*, the case of a government ship's log does not seem to have been presented. The merchant-ship's log has invariably been held inadmissible as a matter of common law. Two exceptions, apparent only, have been recognized. First, a log-entry may plainly be used as an admission, against the ship whose master made it; secondly, by Federal statute, the entries concerning desertion and other offences of seamen are not only allowed but required to be put in evidence.[6] But it may be argued that, although a merchant-ship's log is not kept under an official duty, it is at least kept under a duty imposed by law, and therefore ought to be admissible under the principle already considered (*ante*, § 1633*a*).

[3] See citations in note 1, *supra*.

[4] 1796; D'Israeli *v.* Jowett, 1 Esp. 427 (log-book of a royal convoy-ship, admitted to show the time of sailing of another ship in the convoy); 1809, The Eleanor, 1 Edw. Adm. 135, 163 (merchant-ship; Sir W. Scott: "The evidence of the log-book is to be received with jealousy where it makes for the parties, but it is evidence of the most authentic kind against the parties"); 1811, Le Niemen, 1 Dods. Adm. 9 (Sir W. Scott; log of naval vessel not admitted in her own interest to show the circumstances of capture); 1815, Watson *v.* King, 4 Camp. 272, 275 (log-book of naval ship, and official letter of captain, admitted to prove that a merchant-ship was in its convoy); 1816, L'Etoile, 2 Dods. Adm. 106, 113 (Sir W. Scott; log of sloop-of-war, used as evidence of the circumstances of a capture; possibly here as an admission); 1842, The Sociedade Feliz, 1 W. Rob. 303, 311 (Dr. Lushington; log of a naval vessel excluded; "The log-book of a party suing can never be made evidence in his favor under any shape"); 1880, R. *v.* Tower, 20 N. Br. 168, 202 (log-book received, as containing admissions of the defendant captain).

[5] St. 1854, 17 & 18 Vict. c. 104, §§ 280, 285 ("all entries made in any official log-book," *i. e.* kept on any ship according to the official form naming certain required topics of entry, "shall be received in evidence"; the later St. 1894, 57 & 58 Vict. c. 60, § 239, contains substantially the same provision); Can. Rev. St. 1906, c. 113, §§ 211, 246, 288 § 112 (all entries in a log-book, of facts directed by law to be entered, shall be admissible); 1861, Biccard *v.* Shepherd, 14 Moo. P. C. 471, 475, 489 (log-book of merchant-ship; ruling obscure); 1878, The Henry Coxon, L. R. 3 P. D. 156 (Sir R. Phillimore; log of a merchant-ship by the deceased mate, not admitted, to prove the circumstances of a collision, partly because the entry was not made till two days after the collision).

[6] UNITED STATES: *Federal:* St. 1790, July 20, c. 29, § 6, St. 1872, June 7, c. 322, § 58, Rev. St. 1878, §§ 4290–4292, 4547, 4550, 4555, 5465, Code 1919, §§ 7781–7783, 8114, 8118, 8123, (vessels required to keep "an official log-book," containing entries on specified topics; production by master, compellable, but nothing said otherwise about using in evidence); R. S. § 4597, Code § 8158 (entry of seaman's offence required to be made; and "in any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved," and in default of production, the Court may refuse to hear evidence of the offence); 1800, Jones *v.* The Phœnix, 1 Pet. Adm. 201 (entry admitted to prove desertion under the statute; but "it ought not to be admitted to any fact but that in which the act of Congress permits it to be evidence"); 1805, Malone *v.* Bell, 1 Pet. Adm. 139 (entry of a seaman's tardy return on board, admitted apparently under the statute); 1805, Thompson *v.* The Philadelphia, 1 Pet. Adm. 210 (similar); 1811, U. S. *v.* Mitchell, 2 Wash. C. C. 478 (debt on embargo bond; defendant not allowed, in proving his excuse for the breach, to use the ship's log-book without authentication); s. c. 3 id. 95, 96 (second trial; log-book now admitted as "better identified than it was"); 1829, Douglass *v.* Eyre, Gilp. 147 (entry of desertion, admitted under the statute); 1834, U. S. *v.* Gibert, 2 Sumn. 19, 78 (Story, J.: "The log-book is in no just sense proof 'per

§ 1642. **Registers of Marriage, Birth, and Death ; Records of Vital Statistics ; History and General Policy.** The facts of birth, marriage, and death, with their times and places and the persons' names, are facts of pivotal importance in legal controversies, especially as affecting the title to property. The length of time that may elapse before a dispute arises or is litigated, the variety of place and lineage that may be involved, and consequently the difficulty of adducing upon a trial an ample and satisfactory array of evidence to prove even the simplest data, of which there need never have been any doubt whatever, combine to create a special need for the preservation of proof of that class of facts. It is of interest to the State that assistance be furnished to parties in whose cases such facts may be involved. The prime element of security of title is alone a sufficient consideration to justify some provision on the part of the State. Moreover, for few other classes of facts is it so easy for the machinery of State administration to be effectively employed; since registration by a State official will ordinarily for this class of facts (usually notorious and undisputed at the time of occurrence) furnish a simple, trustworthy, and serviceable class of evidence. As a matter of abstract expediency, one can hardly doubt that every community having rational government should by means of a system of official, universal, and compulsory registration authorize the preservation of an adequate source of evidence for this purpose.

Such a system has long been familiar in many parts of the European Continent and in Asiatic countries; it is commonly known on the Continent as the "register of civil status." But the deep-seated Anglo-Saxon individualism and its repugnance to State interference in family life and private affairs has availed until comparatively recent times to leave its communities lacking such an advantage. In England, indeed, a system of ecclesiastical registration, confined to the ministrants of the established church, provided for the recording of ceremonial occurrences, — baptisms, weddings, and burials.

se' of the facts therein stated, except in certain cases provided for by statute. . . . It would be mere hearsay not under oath. . . . I am yet to learn that parties can thus create evidence for themselves by inserting facts in a log-book. . . . In the most common class of cases in which the log-book is used, those of insurance, the log-book has never, to my knowledge, been allowed (if objected to) as proof of the loss for the assured"); 1836, The Rovena, Ware 309 (entry of desertion, admitted under the statute); 1848, The Hercules, 1 Sprague 534 (similar); 1882, The Sandringham, 10 Fed. 556, 558, 565, *semble* (log of merchant-ship, evidence only by way of admissions); 1907, The Kentucky, 148 Fed. 500, D. C. (log-books admitted, after being used by the other party for cross-examination, though "ordinarily the entries in such books are not receivable in support of the party who makes them"); *Haw.* 1851, Cobb *v.* Makee, 1 Haw. 51 (log-book not receivable except in the statutory cases; unless offered as an admission against the party keeping it); *Mass.:* 1829, Bixby *v.* Ins. Co., 8 Pick. 86, 89 (log-book of a former voyage, held inadmissible).

The following cases, though not involving log-books, should serve to indicate a common-law basis for any such books required by law to be kept: 1824, Richardson *v.* Mellish, 2 Bing. 229 (list of passengers, kept under statute, admitted; quoted *ante*, § 1633); 1846, Buckley *v.* U. S., 4 How. U. S. 251, 258 (Richardson *v.* Mellish, Eng., *supra*, cited with approval); 1906, McInerney *v.* U. S., 143 Fed. 729, 736, C. C. A. (manifest of a shipmaster, required to be made by St. 1891, Mar. 3, c. 551, § 8, 26 Stat. 1805, reporting the name etc., of immigrants, admitted to show the time of arrival of the defendant in the U. S.).

But, even if this system had been thoroughly enforced, as it was not,[1] the ceremony was not the essential fact. Moreover, to sanction registration for members of a privileged church only, and to penalize religious dissent by refusing to dissenters the just facilities for proving the facts of family history, was irrational.[2]

In the United States, the harshest and most culpable features of this unthrift have disappeared in great part. Almost everywhere State and local officials are now authorized and required to provide by registration a source of proof.[3] But the racial disinclination to State control early showed itself. No thorough system was until recent times established. In a large number of jurisdictions, a municipal office was made the repository of returns from clergymen, physicians, undertakers, and midwives. But the important principle of placing upon the head of the family, the physician, and the undertaker the responsibility of reporting the desired facts was long neglected. In many jurisdictions, a general recognition was given to church registers of all sorts; but this indiscriminate sanction was only a makeshift, and failed to provide proper safeguards for the regularity, permanence, and accuracy of records. Compulsoriness, centralization, ease of authentication,[4] — these essential features of a proper system were in general lacking until the decade beginning 1910. About that time began a movement, supported by the American Medical Association and the National Conference of Commissioners of Uniform State Laws, which led to the rapid adoption by successive States of a standard adequate system.

No doubt many circumstances suggest easily an explanation, if not an excuse, for the early backwardness. But the fact remains; and one of its unfortunate results is seen in the difficulties of harmonizing safe legal principles with practical necessities, and consequently in the still uncertain and

§ 1642. [1] "An Irish Peer asked me in the House of Lords how the marriage of his grandfather was to be proved. I told him that it must be proved in the usual manner, by production of the register of the parish where the marriage was celebrated. 'But, my dear,' says he, 'in Ireland there are very few parish registers; I don't know in what parish my grandfather was married, but it has no register.' 'How do you know that,' said I, 'if you don't know the parish?' 'Oh, aye,' said he, 'that's true, it did not occur to me. But it is very hard, my lord; won't *my* testimony, my dear, be sufficient to prove my grandfather's marriage?' 'Certainly, my lord,' said I, 'it will, — if you were present at your grandfather's marriage; otherwise not.'" (Twiss' Life of Lord Eldon, II, 606; from the Chancellor's Anecdote Book).

[2] The pharisaism of this exclusive sanction for the parish registers is exposed by a remark made of them by Lord Eldon, in 1812 (Walker *v.* Wingfield, 18 Ves. 444): "There is not one in one hundred that is kept according to the canons." Tales told by genealogists searching records in England show also the carelessness with which these registers were often kept and ease with which they could be falsified. A novel of George Macdonald, "Wilfrid Cumbermede," takes as the main incident of its plot the tampering with a parish register.

An interesting litigation, in which copious forgeries of parish registers played an important part, and the dangerous possibilities of such registers under the old system were fully revealed, is described in Mr. Earwaker's "A Lancashire Pedigree Case" (the Harrison estates), Warrington, Eng., 1887.

[3] John Locke's code of laws for the Carolinas, in 1669, contained perhaps the earliest statute.

The Federal laws of the Northwest Territory, in 1791 (c. VII) provided for the recording of certificates of marriage in the county register "an exemplification of which shall be evidence of such marriage."

[4] Compare Bentham's remarks: 1827, Rationale of Judicial Evidence, b. IV, c. X (Bowring's ed., vol. VI, p. 570).

imperfect condition of the law respecting proof of the great common facts of family history by registers and certificates.

§ 1643. **Same : Theories of Admissibility of Registers.** Five distinct theories appear by which the admissibility may be tested of registers of births (or baptisms), marriages, and deaths (or burials).

(1) Theory of *duty arising from office.* The orthodox theory, as established in England, was the general one governing the present Exception (*ante*, § 1632). The clergyman or priest of the Anglican church (and of the Irish church before disestablishment) were officers under the ecclesiastical branch of the government; by law it was expressly made a part of their duty as ecclesiastical officers to record the ceremonies of baptism, marriage, and burial, as officially performed by them. This register thus became admissible as one kept under an official duty:

Ante 1726, Chief Baron GILBERT, Evidence, 76: "The register is good evidence, or a copy of it. The register began in the 30th of H. VIII [1539] by the instigation of the lord Cromwell, who at that time was vested with all the authority that the Pope's legate formerly had, under the title of Vicar-general to the King, and all wills that were above the value of £200 were to be proved in this court; and therefore it served his purpose [1] to set on foot a registry of all persons that were christened and buried; and this might be very well appointed by the King's authority as supreme head of the Church, since christening and burying are ecclesiastical acts; and when a book was appointed by public authority, it must be a public evidence. This was afterwards confirmed by the injunction of Edward VI, and the particular manner of registering appointed."

(2) Theory of *statutory duty.* A theory closely related to this, but not identical, finds the sanction for admission in a duty imposed by statute to keep such a record. This statutory duty is usually imposed upon persons already officers of some sort — for example, town clerks or magistrates; but so far as it is imposed upon private persons — for example, ministers of a church, in this country — it is obviously not an official duty in the strict sense. That such a statutory duty imposed upon a private person is after all to be assimilated in principle to a strictly official duty has already been seen (*ante*, § 1633*a*); yet it is worth noting that the two are not identical.

This theory of admissibility by virtue of statutory duty, which leaves admissibility to depend purely on the statutory terms (and may thus, for example, exclude a register of baptisms or of burials), represents the rule prevailing in most jurisdictions of the United States, and is expounded in the following passage:

1865, GRAY, J., in *Kennedy* v. *Doyle*, 10 All. 161, 162: "In England, a church record of baptisms kept by a clergyman of the established church is admissible, even before his death. . . . In the Church of England, from the time of the Reformation, registers of

§ 1643. [1] This slur on the motives of Cromwell is probably unjust, as is explained in Hubback on Succession, 470 ff.; Mr. Hubback believes the more natural explanation to be that the then recent dissolution of the monasteries by Henry VIII rendered it desirable to provide something to take the place formerly filled by the monastic records.

baptisms, weddings, and burials were kept by order of the Crown as head of that church. . . . The ordinances of the English Commonwealth in 1644 and 1653 provided for the registration of births, deaths, and marriages. But these ordinances were annulled upon the restoration of Charles II, and registers kept under ecclesiastical authority continued to be admitted in evidence by the Courts, although not required to be kept, nor declared to be evidence, by any statute. . . . [About 1700] Acts of Parliament began to be passed, which were repealed or altered from time to time, for the registration of births or baptisms, marriages, and burials, generally limited to the established church; and (unless for a few years towards the end of the last century) the law of England does not seem to have provided for registering births or deaths of any person, nor baptisms, marriages, or burials, in any form except that of the established church, from 1706 until 1836,[2] when the general registration act of 6 & 7 Wm. IV, c. 86, was passed. The English judges, adhering to the principle of admitting in evidence as public documents those registers only which the law require to be kept, have considered all others as mere private memoranda, and have refused to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them or [of] other witnesses. . . . Almost two centuries before the passage of the statute of William IV, the founders of the Massachusetts colony, though not less attached than other Englishmen to their own forms of worship, had the wisdom to perceive that it was more important for the civil government to preserve exact records of the dates of births and deaths than of religious ceremonies from which they might be imperfectly inferred; and that the importance of recording those facts did not depend on the particular crede or church government of the individual, but applied equally to the whole people. They accordingly left the baptism of the living and the burial of the dead to the churches, but, by an ordinance of 1639, enacted 'that there be records kept of the days of every marriage, birth, and death of every person within this jurisdiction'; and similar statutes have been ever since in force in Massachusetts. The record of a marriage by the justice of the peace or the minister, or the town clerk's or registrar's record of births, marriages, and deaths, kept as required by these statutes, or a duly certified copy of either, is held competent evidence. . . . It is perfectly true that in this Commonwealth the law makes no distinction between different sects of Christians, and the record of a Roman Catholic priest is of no less weight as evidence than that of a Congregational, or Protestant Episcopal, or any other minister. But, our law not requiring any record of baptisms, the church record [of baptisms] offered in this case, not having been kept under any requirement of law, was not a public record, and would not, had the priest who made the entries been still alive, have been admissible in evidence, unsupported by his testimony."

(3) Theory of *regular entries in the course of business*. A third theory invokes the ordinary Exception (*ante*, § 1523) for regular entries in the course of a business or occupation:

1865, GRAY, J., in *Kennedy* v. *Doyle*, 10 All. 161, 167: "In the United States the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded. . . . An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor or a physician, in the course of his secular occupation."

There seems to be no difficulty in accepting the principle of that Exception as applicable. The regular entries of a minister or a physician, concerning

[2] This date seems incorrect; compare the statute of 1753, cited *post*, § 1644, note 1.

the services performed as a part of his occupation, fulfil adequately the demands of that Exception. Its peculiar limitation, however, is that the entrant must first be accounted for as deceased, out of the jurisdiction, or otherwise unavailable; and this is in the present class of cases a cumbersome and unnecessary burden. This theory may of course be availed of for admitting registers otherwise not sanctioned by either of the foregoing theories.

(4) Theory of *regular entries*, modified. A fourth theory accepts such registers unreservedly, without requiring either the sanction of an official or statutory duty (as under the first and the second) or the unavailability of the entrant (as under the third theory). This result is strictly not supportable under the Exception for Regular Entries (*ante*, § 1523), which is based fundamentally upon the impossibility of securing the entrant's testimony upon the stand. Nevertheless, it is to be regarded as based on that Exception, with a modification resting upon grounds of practical convenience. It is expounded in the following passage:

> 1887, CAMPBELL, C. J., in *Hunt* v. *Chosen Friends*, 64 Mich. 671, 674, 31 N. W. 576: "The rule laid down in England, and followed until recent times, which recognized none but registers and similar records of churches of the established religion, has been abrogated there by statute, so as to open the door to many other records which all churches keep, and which are quite as likely to be as accurate as those of an established church. Those registers . . . in this country are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs. . . . There is no more reason to suppose these entries will be incorrect or falsified than any other. Fraud is possible anywhere; but it cannot be presumed in records of churches any more than in any other documents preserved for similar purposes. The rejection of such proofs would be disastrous. They are relied on by the whole community."

This rule has little acceptance; but it has attractive features, for, in spite of its anomalous principle, it will often serve to relieve from those hardships which our lack of proper administrative provisions must frequently cause. As the basis of a system of legislation, this principle has no merits; but, as a makeshift to remedy the consequences of defective legislation, it seems a worthy expedient. Perhaps its value as a working rule will depend chiefly on experience. If the principle of the foregoing (third) theory were liberally carried out, by recognizing absence from the jurisdiction as equivalent to death (*ante*, § 1521), there would be little occasion to resort to the present form of rule.

(5) Finally, *express statute* in many jurisdictions declares certain kinds of registers admissible, — usually the registers of State and municipal officers, but sometimes also church registers of every sort. Such statutes, so far as they go, remove almost entirely the necessity for judicial construction of the principles involved.

§ 1644. **Same: State of the Law in the Various Jurisdictions.** (1) In *England* and *Canada*, the long line of judicial rulings and statutes covers

a period of more than three centuries.[1] Several general features may be noted:

§ 1644. [1] The statutes and rulings are as follows:

Statutes (for the earlier church ordinances, see the next two notes):

ENGLAND: 1695, St. 6 & 7 W. & M. c. 61, § 24 (registers first required by parliamentary statute to be kept); 1753, St. 26 Geo. II, c. 33, §§ 14, 15 (marriage register to be "preserved for public use"; entries to be made "in order to preserve the evidence of marriages, and to make the proof thereof more certain and easy"; the statute applying throughout to registers in a "parish church or public chapel," *i. e.* apparently to the dissenting chapel as well as to the established church); 1781, St. 21 Geo. III, c. 53, § 3 (registers, in churches or chapels, of certain marriages performed without publication of banns, "shall be received in all courts of law and equity as evidence of such marriages in the same manner" as those of marriages lawfully performed); § 4 (chapel registers to be removed to parish churches in certain cases); 1804, St. 44 Geo. III, c. 77 (similar curative act); 1808, St. 48 Geo. III, c. 127 (similar); 1823, St. 4 Geo. IV, c. 76, §§ 5, 6 (duty of keeping marriage-registers extended to licensed chapels of dissenting churches); 1836, St. 6 & 7 Wm. IV, c. 86, § 37 (general system provided for the official registration, in a special office, of births, marriages, and deaths; "all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates"); 1840, St. 3 & 4 Vict. c. 92, §§ 6–17 (certain non-official registers of births, marriages, deaths, etc., having been examined and authenticated by a commission, those deposited in official custody are made admissible, with certain limitations); 1858, St. 21 Vict. c. 25 (St. 3 & 4 Vict. c. 92, admitting non-parochial registers, enlarged in scope); in addition, there are a number of minor statutes dealing with colonial and sundry registers.

CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 984 (to prove the age of a child or young person, on certain charges, on entry, or record by an incorporated society, etc., having care of children, etc., is admissible); *Alta.* St. 1916, c. 22, § 38 (vital statistics; the registrar-general's certified extract of "original entries of all births, marriages, and deaths," to be 'prima facie' evidence); *B. C.* Rev. St. 1911, c. 22, § 11 (registrar's certified copies of entries of birth, marriage and death, to be evidence of the facts stated); c. 151, § 22 (certificate or copy of any registration or document under this Act, certified by the clergyman or registrar is 'prima facie' evidence of "all the matters and things contained therein"); *Man.* Rev. St. 1913, c. 203, § 53 (certain religious bodies' records, deposited in the department, are "declared to be authentic and to be the official registers"); § 6 (certificate "of the details of any birth, marriage, or death of which there is a record," given by the Minister of the Department or the inspector of vital statistics, to be evidence of "the facts certified to be recorded"); *N. Br.* Consol. St. 1903, c. 127, § 40 (clerk of the peace's or registrar's certified copy of the recorded certificate of marriage is "evidence of the marriage"); c. 54, § 19 (registrar's certified copy of a register-entry of birth, death, or marriage, to be evidence "of the facts therein stated"); St. 1910, 10 Edw. VII, c. 43, § 3 (certified copy by the diocesan registrar of Fredericton, admissible to prove documents of church history deposited with him); *Newf.* Consol. St. 1916, c. 121, §§ 5, 9 (register of marriages, kept by celebrant or by Colonial secretary, to be evidence of "the celebration of any marriage in this colony or dependencies"); *N. W. Terr.* Consol. Ord. 1898, c. 14, § 20 (certified extracts of registry of births, marriages and deaths, to be evidence of the facts stated); *N. Sc.* St. 1908, 8 Edw. VII, c. 1, § 31, St. 1919, c. 3, Vital Statistics, § 8 (certificate of registrar of births and deaths, to be evidence "of the facts certified to be recorded"); *Ont.* Rev. St. 1914, c. 49, § 7, St. 1919, c. 23, § 7, Vital Statistics, § 7 (registrar-general's certificate "of the details of any birth, marriage, or death" recorded, to be evidence "of the facts certified to be recorded"); *P. E. I.* St. 1889, § 22 (a certificate of marriage, baptism, or burial, out of the province, under the hand of the officiating clergyman or officer, or an extract from a register certified by the clergyman or officer "being the legal custodian," is evidence "of the contents thereof"); St. 1919, c. 10, Vital Statistics, § 5 (like Ont. R. S. c. 49, § 7); *Sask.* R. S. 1920, c. 26, § 7 (commissioner of vital statistics; his certificate of "the details of any birth, marriage, or death, of which there is a record in his office," admissible); *Yukon:* Consol. Ord. 1914, c. 8, § 20 (certified extract of returns of births, marriages, and deaths, by the registrar of vital statistics, "shall be evidence of the entry and 'prima facie' evidence of the facts therein stated").

Judicial Rulings: ENGLAND: 1595, Vicary *v.* Farthing, Cro. Eliz. 411, Moore 451 ("to prove the nonage of the plaintiff, . . . a churchbook was given in evidence"); 1608 (?), Tyrwhite *v.* Kynaston, Noy 146 ("Note by Cooke, C. J., that the keeping of a church-book for the age of those which should be born and christened in the parish began in the 30th year of H. VIII, by the instigation of the Lord Cromwell"); 1658, Dudly's Case, 2 Sid. 71 (perjury for falsifying a parish register; Glyn. C. J.: "A register-book for the entry of mar-

(*a*) In the first place, no statute, until 1836, expressly declared any registers admissible. In that year a general system of secular registration was first

riages, births, etc., is an evidence by our law, and the falsifying of it, whether it be by conspiracy or not, ought not to be unpunished"); 1695, Stayner *v.* Droitwich, 12 Mod. 86, Skin. 623 ("[There have been admitted] register-books of parishes in christenings and marriages, though no law for it; for the nature of the thing requires it"); 1737, May *v.* May, 2 Stra. 1073 ("the general register of the parish," admitted to prove legitimacy; "this register, the clerk said, was a book into which the entries were made once in three months, out of the day-book, wherein the entries are made immediately after the christening, or next morning"; but the day-book, by two judges to one, was excluded, since "there could not be two registers in one parish"); 1779, Birt *v.* Barlow, 1 Doug. 174 (Mansfield, L. C. J.: "The registers [under the marriage act, St. 26 Geo. II] were directed to be kept as public books and accompanied with every means of authenticity. . . . A copy is proof of a marriage in fact"); 1786, Huet *v.* Le Mesurier, 1 Cox 275 (Guernsey register of baptisms, excluded); 1798, Leader *v.* Barry, 1 Esp. 353 (register in a foreign chapel, excluded); 1811, Newham *v.* Raithby, 1 Phillim. Eccl. 315 (register of dissenting chapel, admitted); 1820, Ex parte Taylor, 1 Jac. & W. 483 (register of dissenting chapel, excluded); 1824, Bain *v.* Mason, 1 C. & P. 202 (parish register, admissible); 1830, Whittuck *v.* Waters, 4 C. & P. 375 (register of a Wesleyan chapel, excluded); 1834, Doe *v.* Wollaston, 1 Moo. & R. 389 (Denman, L. C. J.: "It is the clergyman's duty to enter the marriage correctly"; parish register admissible); 1839, Malone *v.* L'Estrange, 2 Ir. Eq. 16 (marriage record of a Catholic priest, excluded); 1839, O'Connor *v.* Malone, 6 Cl. & F. 572, 576, 583 (register of marriage in a Catholic chapel, admitted, and justified by counsel on the principle (*ante*, § 1523) of regular entries by a deceased person; but the Court did not notice the point); 1841, Athlone Peerage, 8 Cl. & F. 262 (entry of marriage in a register kept at the house of the British Ambassador in Paris by his chaplain, excluded, as "not like a parish register"); 1844, D'Aglie *v.* Fryer, 13 L. J. Ch. 398 (register of a Catholic chapel, excluded); 1844, Davis *v.* Lloyd, 1 C. & K. 275 (register kept by the chief rabbi at a synagogue, containing an entry of the circumcision of the plaintiff, excluded); 1846, Parkinson *v.* Francis, 15 Sim. 160 (register of the General Register Office, admitted, under statute, to prove death); 1848, Dufferin and Claneyboye Peerage, 2 H. L. C. 47 (entry in a register of baptism in a parish church in Ireland, from a certificate of a chaplain to the British minister at Florence, "not deemed sufficient, under the circumstances"); 1848, Perth Peerage Case, 2 H. L. C. 865, 873 (French registers of marriages, births, and deaths, kept at the town hall, according to French law, admitted; register of deaths kept in a nunnery at Antwerp, admitted); 1853, Stockbridge *v.* Quicke, 3 C. & K. 305 (register kept apparently privately by a clergyman of the established church in Ireland, excluded); 1857, Shrewsbury Peerage Case, 7 H. L. C. 1, 14 (register of a Catholic chapel at Bristol, deposited with the general registrar under statute, admitted); 1859, Ratcliff *v.* Ratcliff, 5 Jur. N. S. 714 (register kept by the authority of the East India Company having governmental powers in India, admitted as an official register); 1860, Abbott *v.* Abbott, 4 Sw. & Tr. 254 (register of marriage, kept in Chile according to requirement of local law, admitted); 1879, Queen's Proctor *v.* Fry, L. R. 4 P. D. 230 (register of baptisms in India, kept by Government order, admitted); 1889, Burnaby *v.* Baillie, L. R. 42 Ch. D. 283, 291, 296 (French register of marriage, kept at the mayor's office, admitted); 1900, Whitton *v.* Whitton, Prob. 178 (certified copy of a marriage-register in the Mariners' Church, Kingston, Ire., admitted, under certain statutes); 1902, Wigley *v.* Solicitor, Prob. 233 (Scottish marriage registry, admitted); 1904, Goodrich's Estate, Prob. 138 (certified copy of an entry of "a register of births" for 1844, admitted, as "evidence of its contents"; here, to show the date of birth of defendant); 1912 Drew *v.* Drew, Prob. 175 (divorce for desertion; marriage proved by a registrar's certified copy from the register of marriages in Edinburgh, under St. 1856, 19–20 Vict. c. 96, § 2); 1913, *In re* Woodward, Kenway *v.* Kidd, 1 Ch. 393 (registers of the Society of Friends, prior to 1837, deposited at the General Registry office under St. 3–4 Vict., 1840, c. 92, were offered to be proved by certified extract from the Society's unofficial digest kept at its own office, because no index was available at the government office; excluded; this is not in keeping with the liberal informality which the Judicature Act was supposed to install); 1920, Best *v.* Best, Prob. 75 (divorce for adultery during husband's absence in military service; birth of a child may be evidenced by a certified copy of the official register of births, "with evidence identifying the respondent's signature as informant in the register"); 1920, Perry *v.* Perry, Prob. 361 (restitution of conjugal rights; marriage proved by a copy of a register certified by an assistant priest of St. George's Cathedral in Cape Town, Cape Colony, without evidence as to the validity of the marriage or the local law of Evidence).

CANADA: 1884, Sutherland *v.* Young, 1 Manit. 38 (baptismal certificate under the hand of the custodian of the parish register, admitted under statute); 1912, Zdrahal *v.*

established. In the Marriage Act of 1753 words had been used which clearly implied admissibility, but the Courts seem not to have acted under them.

(*b*) The admissibility thus depended on the existence of a duty to keep the register. But, as to the source of this duty, the important inquiry cannot be definitely answered whether the duty was implied from the nature of the office or was solely the creature of the statute. The registers were originally kept under ecclesiastical ordinances [2] having the effect of law, and the early decisions are all subsequent to these ordinances. From the time of the Restoration (1660) to the first parliamentary statute, in 1695, these ordinances ceased apparently to be in force; [3] but during that interval there are no decisions; and the statutory duty of 1695, reënforced by later statutes, underlay all subsequent decisions.

(*c*) It might therefore be argued that the judicial admissibility of such registers rested on the statutory duty to keep them. Against this, however, are two circumstances. First, their admission was not placed upon that ground until 1779, in Birt *v.* Barlow, by Lord Mansfield, and even thereafter it is rarely mentioned. Secondly, as early as the Marriage Act of 1753 (26 Geo. II), the statutory duty was imposed equally upon the ministers of "public chapels" (*i. e.* dissenting churches) as on the rectors and curates of parish churches; and, if the statutory duty was the ground of admission, it would thereafter have sufficed equally to admit the registers of dissenting chapels. Yet in the subsequent rulings such registers were almost uniformly excluded. From these circumstances, and from the general tenor of the decisions, the English judicial attitude appears to have had this anomalous feature, that it received the registers by virtue of an official duty which had a purely statutory origin, and yet ignored the statute so far as it applied to any but officers of the ecclesiastical establishment. The result was practically to place the admission on the ground of an official duty, not an express statutory duty; and this is seen in the recognition accorded to foreign registers kept according to official duty.

(*d*) In 1836, admissibility was expressly granted to registers to be kept by secular officials according to the system then established; and in 1840 a large collection of dissenting registers, approved by a commission and gathered into official custody, was made admissible. Alongside of these statutory

Shatney, Man., 7 D. L. R. 554 (criminal conversation; a purporting official certificate of marriage in Hungary, with no evidence of authenticity nor of the law of Hungary, excluded; too strict); 1839, Montgomery *v.* McLeod, Ber. N. Br. 375 (certificate of marriage, duly filed, admitted, under a local St. 52 Geo. III, c. 21); 1913, R. *v.* Hutchins, Sask., 12 D. L. R. 648 (marriage in Minneapolis, proved by certified copy of clerk's record of marriage license, etc.); 1915, Chiniquy *v.* Begin, 24 D. L. R. 687, Que. (marital authorization; certificate of marriage by the clerk of the county court at Kankakee, Ill., admitted; also certificate of baptism by the pastor of a church at St. Anne, Ill.); 1920, Robson *v.* Thorpe, 55 D. L. R. 139, Sask. (crim. con.; registry of a marriage in England, proved by certified copy signed by the purporting superintendent registrar for the district, held admissible under St. 6–7 Wm. IV, c. 86, § 33, and St. 14–15 Vict. c. 99, § 14).

[2] Beginning with 1539; see the quotation from Gilbert, *ante*, § 1642.

[3] They are to be found in Scobell's Ordinances; in Hubback on Succession, pp. 470, 503, 516, is given a full account of them and also of the history of the different kinds of registers.

provisions, the principle already established by judicial practice remains apparently still in force.

(*e*) In one respect a distinct exception (now of purely historical interest) was made to the general principle. In the populous precints of the Fleet prison there lived a number of persons, convicted of crime or abandoned in character, who still were (or pretended to be) ordained clergymen; and some of these were accustomed to keep registers of marriages. These Fleet registers, if kept by clergymen of the established church still in orders, would presumably have been admissible, and originally they seem to have been received like others.[4] But they came to be known as notoriously fraudulent and untrustworthy, and by the beginning of the 1800s they were refused recognition.[5]

(2) In the *United States*, the laws of the various jurisdictions are in a state of variegated inconsistency.[6] Not only does each one of the five theories

[4] 1706, Fielding's Trial, 13 How. St. Tr. 1352, 1367.

[5] 1795, Read *v.* Passer, 1 Esp. 215; 1803, Cooke *v.* Lloyd, Peake's Evidence, App. 74; 1815, Lloyd *v.* Passingham, Cooper 155, 16 Ves. 63; 1824, Nokes *v.* Milward, 2 Add. 391; 1838, Doe *v.* Gatacre, 8 C. & P. 578. The reporters of the last case give the following explanation, from Burn on Fleet Registers: "There were in the neighborhood of the Fleet prison about sixty marriage-houses; some of which were also public-houses, others not. They were known by having a sign-board with joined hands, in addition to the public-house sign. At the doors of these houses persons called Pliers solicited the passers-by to come in and be married, and at these houses persons who were or pretended to be clergymen performed the marriage ceremony, and made entries in registers that were kept at the respective houses. There is little doubt that many entries had false dates, that persons who were married personated others, and that women who wish to plead a plea of coverture or to hide their shame by a Fleet marriage certificate were here married." In Walter Besant's novel, "The Chaplain of the Fleet," is an interesting picture of one of these Fleet parsons.

[6] Where a ruling is apparently based on a statute, it is so noted; statutes which deal with certified copies, as a substitute for the original, are also noted *post*, § 1680, with other statutes of the sort; statutes and rulings on certificates, involving the question of § 1645, *post*, are placed here, for convenience of comparison.

Federal: 1831, Lewis *v.* Marshall, 5 Pet. 469, 476 (register of burials in Christ's Church, Philadelphia, admitted "in a case like the present"); 1851, Gaines *v.* Relf, 12 How. 472, 513, 522, 569 (an ecclesiastical record of proceedings for bigamy in the Catholic church court was admitted on the footing of a judgment; but Wayne, J., diss., treating it as a register, held that American church registers, not being official, are in general inadmissible; a certificate by a deceased Catholic priest in New York, made in 1806, of a marriage celebrated in 1790, excluded, partly because of lack of identity of parties, partly because it was made so long after the purported fact, and partly because "if it were allowable in this country to give such certificate in evidence, where every clergyman of all denominations can perform the ceremony of marriage, and where it is performed by justices of the peace in many of the States, it would open a door to frauds that could not be guarded against"); 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 182, 183, 189, 191 (baptismal register of a Catholic church in Washington, required by church usage to be kept, held admissible as "entries made by the writer in the ordinary course of his business"; the private memorandum or register of another priest of the same church at a prior time when no official register was kept, held admissible, the entrant being in France); 1917, Young Ti *v.* U. S., 3d C. C. A., 246 Fed. 110 (birth certificates of Chinese from the Chicago vital statistics department, admitted, but disregarded); 1918, Phelan *v.* U. S., 9th C. C. A., 250 Fed. 43 (failure to register under the Selective Service Act; the defendant's age being in issue, a Catholic baptismal record, verified by the testimony of the priest, was admitted); 1918, Lee's Will, U. S. Court for China, 1 Extraterr. Cas. 699 (inheritance, certificate of baptism from the parish register of a church in St Louis, "authenticated by the priest in charge," admitted);

Uniform Acts: Uniform Vital Statistics Act, 1920, § 23 (copy "of the record of a birth or death" registered under this Act, "when properly certified by the State registrar, shall be 'prima facie' evidence in all courts and places of the facts therein stated");

ib. § 7 ("the certificate of death shall contain the following items, which are hereby declared necessary for the public health, welfare and

above mentioned (§ 1643) find support in one or another jurisdiction, but it is often difficult to determine in any one jurisdiction the precise effect of deci-

convenience, and for legal, social, and sanitary purposes, which are hereby declared to be subserved by registration records:

1. Place of death, including state, county, township, village or city. If in a city, the ward, street, and house number; if in a hospital or other institution, the name of the same to be given instead of the street and house number. If in an industrial camp, the name of the camp to be given.

2. Full name of decedent. If an unnamed child, the sur-name preceded by "Unnamed."

3. Sex.

4. Color or race — as white, black, mulatto (or other negro descent), Indian, Chinese, Japanese, or other.

5. Conjugal condition — as single, married, widowed or divorced.

6. Date of birth, including the year, month and day.

7. Age, in years, months and days. If less than one day, the hours or minutes.

8. Occupation. The occupation to be reported of any person, male or female, who had any remunerative employment, with the statement of (a) trade, profession or particular kind of work; (b) general nature of industry, business or establishment in which employed (or employer).

9. Birthplace; at least state or foreign country, if known.

10. Name of father, provided that if the child or person is illegitimate, the name or residence of or other identifying details relating to the father or reputed father shall not be entered without his consent; [provided further, that whenever a judgment has been entered determining the paternity of an illegitimate child, the clerk of the court where entered shall report the facts to the State Registrar who shall record the name of the father and sufficient data to identify the judgment, in connection with the record of the death of the child appearing in his office. A report by the clerk of any court subsequently vacating such judgment shall be made and recorded in like manner].

11. Birthplace of father; at least state or foreign country, if known.

12. Maiden name of mother, provided that if the child or person is illegitimate, the name or residence or other identifying details relating to the mother shall not be entered without her consent; [provided further, that whenever a judgment has been entered determining the paternity of an illegitimate child, the clerk of the court where entered shall report the facts to the State Registrar who shall record the name of the mother, and sufficient data to identify the judgment, in connection with the record of the death of the child, appearing in his office. A report by the clerk of any court subsequently vacating such judgment shall be made and recorded in like manner].

13. Birthplace of mother; at least state or foreign country, if known.

14. Signature and address of informant.

15. Official signature of registrar, with the date when certificate was filed, and registered number.

16. Date of death, year, month and day.

17. Certification as to medical attendance on decedent, fact and time of death, time last seen alive, and the cause of death, with contributory (secondary) cause of complication, if any, and duration of each, and whether attributed to dangerous or insanitary conditions of employment; signature and address of physician or official making the medical certificate.

18. Length of residence (for inmates of hospitals and other institutions; transients or recent residents) at place of death and in the state, together with the place where disease was contracted, if not at place of death, and former or usual residence.

19. Place of burial or removal; date of burial.

20. Signature and address of undertaker or person acting as such.

The personal and statistical particulars (Items 1 to 13) shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts.

The statement of facts relating to the disposition of the body shall be signed by the undertaker or person acting as such.

The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive and the hour of the day at which death occurred. And he shall further state the cause of death, so as to show the course of disease or sequence of causes resulting in the death, giving first the name of the disease causing death (primary cause); and the contributory (secondary) cause, if any, and the duration of each. Indefinite and unsatisfactory terms, denoting only symptoms of disease or conditions resulting from disease, will not be held sufficient for the issuance of a burial or removal permit; and any certificate containing only such terms, as defined by the State Registrar, shall be returned to the physician or person making the medical certificate for correction and more definite statement. Causes of death which may be the result of either disease or violence shall be carefully defined; and if from violence the means of injury shall be stated, and whether (probably) accidental, suicidal, or homicidal. And for

sions and local statutes in combination, for the rulings have seldom been frequent enough to develop a general principle. Moreover, the statutory

deaths in hospitals, institutions, or of non-residents, the physician shall supply the information required under this head (Item 18), if he is able to do so, and may state where, in his opinion, the disease was contracted;"

§ 14 "The certificate of birth shall contain the following items which are hereby declared necessary for the public health, welfare and convenience, and for legal, social, and sanitary purposes which are hereby declared to be subserved by registration records:

1. Place of birth, including state, county, township or town, village or city. If in a city, the ward, street, and house number; if in a hospital or other institution, the name of the same to be given, instead of the street and house number.

2. Full name of child. If the child dies without a name, before the certificate is filed, enter the words "Died unnamed." If the living child has not yet been named at the date of filing certificate of birth, the space for "full name of child" is to be left blank, to be filled out subsequently by a supplemental report, as hereinafter provided.

3. Sex of child.

4. Whether a twin, triplet, or other plural birth. A separate certificate shall be required for each child in case of plural births.

5. For plural births, number of each child in order of birth.

6. Whether legitimate or illegitimate.

7. Date of birth, including the year, month and day.

8. Name of father, provided that if the child or person is illegitimate, the name or residence of or other identifying details relating to the father or reputed father shall not be entered without his consent; [provided further, that whenever a judgment has been entered determining the paternity of an illegitimate child, the clerk of the court where entered shall report the facts to the State Registrar who shall record the name of the father and sufficient data to identify the judgment, in connection with the record of the death of the child appearing in his office. A report by the clerk of any court subsequently vacating such judgment shall be made and recorded in like manner].

9. Residence of father.

10. Color or race of father.

11. Age of father at last birthday, in years.

12. Birthplace of father; at least state or foreign country, if known.

13. Occupation of father. The occupation to be reported of any persons, male or female, who had any remunerative employment, with the statement of (a) trade, profession or particular kind of work; (b) general nature of industry, business or establishment in which employed (or employer).

14. Maiden name of mother, provided that if the child or person is illegitimate, the name or residence or other identifying details relating to the mother shall not be entered without her consent; [provided further, that whenever a judgment has been entered determining the paternity of an illegitimate child, the clerk of the court where entered shall report the facts to the State Registrar who shall record the name of the mother, and sufficient data to identify the judgment, in connection with the record of the death of the child, appearing in his office. A report by the clerk of any court subsequently vacating such judgment shall be made and recorded in like manner].

15. Residence of mother.

16. Color or race of mother.

17. Age of mother at last birthday, in years.

18. Birthplace of mother; at least state or foreign country, if known.

19. Occupation of mother. The occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work; (b) general nature of industry, business or establishment in which employed (or employer).

20. Number of children born to this mother, including present birth.

21. Number of children of this mother living.

22. The certificate of attending physician or midwife as to attendance at birth, including statement of year, month, day (as given in Item 7), and hour of birth, and whether the child was born alive or stillborn. This certification shall be signed by the attending physician or midwife, with date of signature and address; if there is no physician or midwife in attendance, then by the father or mother of the child, householder, owner of the premises, or manager or superintendent of public or private institution where the birth occurred, or other competent person, whose duty it shall be to notify the local registrar of such birth, as required by Section 13 of this act.

23. Exact date of filing in office of local registrar, attested by his official signature, and registered number of birth, as hereinafter provided;"

Alabama: Code 1907, § 3978 (registers of marriages, births, and deaths, "kept in pursuance of law or any rule of a church or religious society," are to be presumptive evidence of "the facts therein stated," when certified by the custodian); § 4886 (probate judge's record of marriage licenses issued by him is "presumptive evidence of the facts"); § 4887 ("all persons or religious societies solemnizing marriage in virtue of a license or according to their peculiar forms must within one month thereafter certify the fact in writing to the judge of probate, setting forth the names of

provisions of the various jurisdictions differ widely in their scope. The Uniform Vital Statistics Act will in the course of time eliminate uncertainty from

the parties and the time and place of celebration thereof"; the certificate to be recorded and a certified copy to be "presumptive evidence of the fact"); § 4882 (clerk's or minute keeper's record of marriages solemnized by religious city, or a sworn copy, is "presumptive evidence of the fact"); 1876, Beggs *v.* State, 55 Ala. 108, 109 (marriage evidenced by the probate judge's record of a justice of the peace's certificate); 1889, Hawes *v.* State, 88 Ala. 37, 69, 7 So. 302 (the statute applies to registers kept out of the State); 1900, Eldridge *v.* State, 126 Ala. 63, 28 So. 580 (certified copy of license, with certificate of celebrant, admitted under Code §§ 2846, 2847); 1918, Darrow *v.* Darrow, 201 Ala. 477, 78 So. 383 (rival widows; a Georgia marriage record in the court of ordinary, offered by copy, admitted); St. 1919, No. 658, p. 909, § 13, sub. 21; amending Code 1907, § 711 (vital statistics; State registrar's record of birth or death, admissible by certified copy, to prove "the facts therein stated");

Alaska: St. 1913, April 25, c. 35, § 1 (Territorial registrar of vital statistics, covering birth, death and marriage; "all records made under the provisions of this Act" to be 'prima facie' evidence of "the facts purporting to be set forth therein");

Arizona: Rev. St. 1913, Civ. C. § 1716 ("any certificate of marriage executed in accordance with the laws of this State, or the record thereof, or a duly certified copy of such record" is 'prima facie' evidence of "the facts stated therein"); § 3843 (marriage ceremony must be witnessed; "and a certificate, evidence of such marriage, must be signed by at least two such witnesses"); § 4426 (State registrar of vital statistics, certified copy of register of birth or death, to be 'prima facie' evidence "of the facts therein stated"); 1920, Ford *v.* State, 21 Ariz. 567, 192 Pac. 1117 (bigamy; Mexican official marriage certificate, admitted);

California: Pol. Code 1872, § 3083 (State registrar's record of marriage or birth to be 'prima facie' evidence of "the facts therein stated"); § 2984 (same provision applied to record of death); St. 1905, c. 498, P. C. 269 *b* (open adultery; "a recorded certificate of marriage or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this section"); St. 1915, p. 575, May 19, § 21 (State registrar of vital statistics; certified copy by State or local registrar of record of birth or death, to be evidence "of the facts therein stated"); 1886, People *v.* Stokes, 71 Cal. 263, 12 Pac. 71 (recorded certificate of marriage, made according to law, admitted);

Colorado: Comp. L. 1921, § 5562 (county recorder's book of marriages, admissible); 1874, Kansas P. R. Co. *v.* Miller, 2 Colo. 442, 453, 462 (extracts from a German parish register of baptisms, found in the deceased's effects, admitted as statements of family history, under the rule of § 1480, *ante*, apparently without regard to the present question); § 990 (State registrar's certified copy of register of birth or death, admissible);

Columbia (Dist.): Code 1919, § 1295 (record of marriage licenses and certificates kept by clerk of supreme court; a copy of "any license and certificate of marriage so kept and recorded," certified by the clerk under seal, is admissible);

Connecticut: Gen. St. 1887, § 2788 (town registrar's or officiating person's certificate of marriage, to be evidence of the facts stated); 1794, Huntly *v.* Compstock, 2 Root 99 (minister's record of baptisms, admitted); 1810, Swift, Evidence, 5 ("Courts have permitted marriages to be evidenced by the certificate of the magistrate or minister who performed the ceremony. On principle, it should be under oath and not by certificate; but we [in Connecticut] have experienced no inconvenience from the practice, and it has continued so long that it seems to have become common law"); 1885, Northrop *v.* Knowles, 52 Conn. 522, 525 (certificate of marriage by a magistrate, received, following "in this jurisdiction from the earliest times the practice" to do so, on proof of genuineness); 1892, Erwin *v.* English, 57 Conn. 562, 19 Atl. 238, 61 Conn. 502, 23 Atl. 753 (marriage certificate of a minister in Ohio, admitted; abstract of a marriage register of a Roman Catholic chapel in Ireland, excluded because imperfect); 1902, Murray *v.* Supreme Lodge, 74 Conn. 715, 52 Atl. 722 (city registrar's record of marriage license, marriage certificate, and birth certificate, admitted, the record being a part of the statutory duty of the officer);

Delaware: Rev. St. 1915, § 2171 (religious society's register of marriage, birth, death, or burial, admissible); § 805 (record certified copy of record of birth, marriage, or death, by State registrar or county recorder, admissible to prove "the facts therein stated"); § 2996 (marriage record book of county clerk of the peace, admissible); St. 1921, c. 182, § J (substituting a new § 2996 in Rev. Code; marriage record book kept by county clerk of the peace "shall be a public record. . . and shall be admitted as evidence for the facts therein contained");

Florida: Rev. G. S. 1919, § 2091 (State registrar's certified copy of record of birth or death, to be evidence "of the facts therein stated"); § 3936 (the original license and certificate "shall be filed as evidence of the marriage" with the county judge); § 3937 (if no license or certificate is available, proof by

most parts of the field; but that legislation affects only records kept since the installation of the uniform system. The different theories (*ante*, § 1643),

recorded affidavit is allowable; cited more fully *post*, § 1719);
Georgia: St. 1914, No. 466, p. 157, § 20 (vital statistics; State registrar's certified copy of record of a birth or death, to be evidence "of facts therein stated");
Hawaii: Rev. L. 1915, § 1140 (record of birth, marriage, and death, kept by the board of health, admissible to prove "the facts therein contained"); § 177 (Territorial secretary's certificate of Hawaiian birth, or any such certificate issued under prior law, to be evidence "of the facts therein stated"); § 2607 (certificates of Hawaiian birth, issued by U. S. department of commerce and labor, admissible); § 2912 (certificate of marriage, by person solemnizing, delivered to the parties, to be evidence "of the fact of marriage"); St. 1915, Apr. 6, No. 48, amending Rev. L. § 1133 (registrar's record of births "reported later than 6 months after the date of said birth," not to be admissible "as evidence of any statement made therein"); 1852, Whittit *v.* Miller, 1 Haw. 82 (certificate of marriage, not required by law to be given, held not admissible, in crim. con., to evidence a domestic marriage; otherwise of the marriage registry or a copy of it); 1896, Republic *v.* Waipa, 10 Haw. 442 (marriage record of a Roman Catholic Church in Maui, admitted, being required by law to be kept; marriage certificate of the same priest, not decided); 1905, Kapiolani Estate *v.* Thurston, 16 Haw. 471 (a "book of marriage records," kept by a minister, recording marriages among his parishioners, admitted); 1906, Godfrey *v.* Rowland, 17 Haw. 577, 581 (baptismal record by a clergyman in Australia, admitted); 1920, Akona *v.* Kalnai, 25 Haw. 392 (ejectment; marriage record book of the Catholic Church at Halawa, required by R. L. 1915, § 2912, to be kept, admitted);
Idaho: Comp. St. 1919, § 4617 (county recorder's "books of marriages" to be "evidence in all courts"); § 1644 (certified copy of record of birth or death by department of public welfare to be evidence "of the facts therein stated"); § 4608 ("original certificate and record of marriage made by the judge, justice, or minister, as prescribed in this chapter," and the county recorder's record on certified copy thereof, admissible as "presumption evidence of the fact of such marriage");
Illinois: Rev. St. 1874, c. 89, § 12 (county clerk's registry of a certificate of marriage by the celebrant, or "such certificate or a copy of the same," admissible "as evidence of the marriage of the parties as therein stated"); St. 1915, June 22, p. 660, § 20 (vital statistics; copy of record of "a birth, stillbirth, or death, when properly certified to by the State board of health or the local registrar or the county clerk, shall be 'prima facie' evidence . . . of the facts therein stated"); 1840, Jackson *v.* People, 3 Ill. 231 (marriage license and certificate of domestic justice of the peace, proved by certified copy, admitted); 1886, Tucker *v.* People, 117 Ill. 91, 7 N. E. 51 (marriage register, admissible only when kept under statutory duty); 1887, Tucker *v.* People, 122 Ill. 583, 592, 13 N. E. 809 (like Jackson *v.* People, under statute); 1901, Howard *v.* Illinois T. & S. Bank, 189 Ill. 568, 59 N. E. 1106 (physician's return of birth, made under statute, receivable; here excluded because it was impeached by both parties as knowingly falsified by the maker); 1904, Sokel *v.* People 212 Ill. 238, 72 N. E. 382 (marriage record of N. Y. City health department, not shown to be official, excluded; but a marriage contract purporting to be by the law of Moses was admitted); 1904, Murphy *v.* People, 213 Ill. 154, 72 N. E. 779 (N. Y. Catholic church register excluded because the priest's handwriting was not proved);
Indiana: Burns' Ann. St. 1914, § 7596 (State board of health's record of birth or death, by secretary's certified copy, to be evidence "of the facts therein stated"); § 8374 (marriage certificate recorded with county clerk; the "record, or a copy thereof," admissible);
Iowa: Code 1897, § 3146, Comp. Code, § 6590 (court clerk's register of marriages, not expressly declared admissible; this provision supersedes Code 1873, § 2197, under which some ensuing cases were decided); Comp. Code, § 1373 (State registrar of vital statistics; his certified copy of "the record of a birth or death," to be 'prima facie' evidence); St. 1921, c. 222, § 21 (State registrar of vital statistics; his certified copy of a record of birth or death to be 'prima facie' evidence "of the facts therein stated"); 1862, Niles *v.* Sprague, 13 Ia. 198 (certified copy, by an Ohio clerk, of his record-memorandum, and not of the recorded certificate of marriage itself, excluded); 1866, Verholf *v.* Van Houwenlengen, 21 Ia. 429, 430 (marriage register, received under statute); State *v.* Matlock, 70 Ia. 229, 30 N. W. 495 (county marriage record, admitted under statute); 1903, Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725 (parish register of St. Just, Cornwall, kept by the vicar, as required by law, admitted);
Kansas: Gen. St. 1915, § 7281 ("When by ordinance or custom of any religious society or congregation in this State a record is required to be kept of marriages, births, baptisms, deaths, or interments," such register is admissible); § 10167 (registration of vital statistics; State registrar's certified copy of record of birth or death, to be evidence of "the facts stated therein"); § 6143 (State registrar's certified copy of marriage records, admissible); § 6152, St. 1867, c. 84 ("the

considered together with the rulings and statutes in each jurisdiction, will perhaps suffice to unravel the law in a given jurisdiction of the United States.

books of record of marriage licenses issued," kept by the county probate judges, "shall be evidence in all courts"); 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (copy of a Russian parish record, excluded, because not shown to be official);

Kentucky: Stats. 1915, § 2062 *a*, par. 21 (vital statistics; State registrar's certified copy of record of birth, sickness, or death, to be evidence of "the facts therein stated"); § 1638 (certified copy of "any register of births and marriages" in any "State, nation, province, colony, city or town, out of the United States," "if the same shall have been registered in due form according to the laws of such sovereignty," is admissible); St. 1916, Mar. 18, p. 162, Stats. 1915, § 4526 *c*–6 (age for school attendance; "a passport, a duly attested transcript or the certificate of birth or baptism, a certified copy under oath of a record in the family Bible or other religious record, showing the date and place of birth of such child, shall be produced as evidence"; if not available, "the record of the age stated in the first enrollment to be formed shall be considered as evidence thereof; if there be no school enrollment showing such fact, other evidence as to the age of such child shall be considered"; it is fortunate that so crude a type of legislative drafting does not appear to have been followed in other States); St. 1921, Mar. 23, c. 76, amending Carroll's Ky. Stats. 1900, § 6062 *a* (quinquennial index of births and deaths, published by the State board of health; "the information contained . . . shall . . . be accepted as 'prima facie' evidence of facts"); 1892, Faustre *v.* Com., 92 Ky. 34, 17 S. W. 189 (register of marriages by registrar of an Ontario town, not admitted, for lack of evidence that the marriage "was registered in due form according to the laws of that sovereignty"; the certificate of the officer reciting the Ontario law not being sufficient; unsound); 1912, Apkins *v.* Com. 148 Ky. 662, 147 S. W. 376 (bigamy; record of marriages in Illinois, proved by the deputy county clerk on the stand, admitted); 1912, Royal Neighbors *v.* Hayes, 150 Ky. 626, 150 S. W. 845 (Irish parish priest's baptismal record, dated 1844, not admitted under Stats. § 1638; it is odd that it was not ruled in on the principle of § 1523, *ante*);

Louisiana: Rev. Civ. C. 1920, § 193 (filiation of legitimate children, provable "by a transcript from the register of birth or baptism, kept agreeable to law or to the usages of the country"); §§ 194–196 (quoted *ante*, § 1606) St. 1877, ex. sess., No. 80, § 12 (registration of marriage in deputy recorder's office of State board of health in parish of New Orleans; certificate of marriage celebrated prior to date of act and recorded here, provable by certified copy); St. 1914, No. 60, § 4 (State or local registrar or other custodian of vital statistics records; certified copy of record of birth or death, to be 'prima facie' evidence, "of the facts therein recited"); St. 1918, July 11, No. 257, § 21 (vital statistics, copy of the record of a birth or death, certified by the State or local registrar or his deputy, of parish of Orleans and city of New Orleans, to be 'prima facie' evidence "of the facts therein stated"); 1881, Hebert's Succession, 33 La. An. 1099, 1105 (marriage register kept by law, admitted); 1896, Justus' Succession, 48 La. An. 1096, 20 So. 680 (German official parish register, admitted); 1920, State *v.* Bischoff, 146 La. 748, 84 So. 41 (bigamy; certified copy of county clerk's record of marriage in Texas, admitted); compare also the citations *ante*, § 1336, as to the *conclusiveness* of the register of civil status;

Maine: Rev. St. 1916, c. 64, § 12 (record of marriage, in town clerk's office, admissible by copy by town clerk, "as evidence of the fact of marriage"; State secretary's license to solemnize marriages, admissible, or provable by certified copy); § 15 (copy of record of marriage, attested or sworn to by justice of the peace, commissioned minister, or town clerk, admissible to prove "the fact of marriage"); § 37 (town clerk's record of any birth, marriage, or death, or a duly certified copy, admissible as evidence of "such birth, marriage or death"); 1824, Sumner *v.* Sebec, 3 Greenl. 225 (town clerk's record of births, etc., admitted); 1829, Damon's Case, 6 Greenl. 148, 149 (certified copy of justice's recorded certificate of marriage, admitted); 1830, Wedgwood's Case, 8 Greenl. 75 (same as Sumner *v.* Sebec); 1841, Jones *v.* Jones, 18 Me. 308 (justice certificate, admitted); 1921, Reed *v.* Stevens, 120 Me. 290, 113 A. H. 712 (crim. con., to prove the marriage a document was offered purporting to be a certificate of marriage, naming the parties and celebrant, and ending, "State of New Hampshire. I hereby certify that the above marriage record is correct to the best of my knowledge and belief. Fred E. Quimby, clerk of Dover, N. H. [Seal]"; held (1) that the Maine statute making such records and copies admissible did not apply to records out of the State; see *ante*, § 1633; (2) that the document did not satisfy the Federal statute; see *post*, § 1680; (3) that no other mode of validation was satisfied; the opinion candidly admits that "this decision may seem in these liberal days to be ultratechnical", which it assuredly is, *i. e.* it sets up an artificial formula for performance by the plaintiff on the pretext of establishing truth, instead of asking whether the fact was really disputed at all); 1921, Smith *v.* Heine S. B. C., 119 Me. 552, 112 Atl. 516 (widow's claim for compensation; certificate of marriage purporting to be made by

In general, the courts do not show sufficient liberality in recognizing such records.

J. M., justice, in Pennsylvania, held admissible "without authentication");
Maryland: Ann. Code 1914, Art. 62, § 9 (certified copy of recorded marriage license and certificate, under hand of clerk of circuit or common pleas court, and seal of court, admissible); Art. 43, § 18 (State registrar of vital statistics; certified copy of record of birth or death, to be 'prima facie' evidence "of the facts therein stated"); 1879, Weaver *v.* Leiman, 52 Md. 709, 720 (entries of baptism and marriage in a Lutheran church in Baltimore, admitted as regular entries receivable after the entrant's death; here the clergyman was alive, but by agreement his calling was dispensed with);
Massachusetts: Gen. L. 1920, c. 207, § 45 (record of marriage kept by law by the person solemnizing, or by a city or town clerk or registrar, or a certified copy thereof, admissible); c. 207, § 46 (record or certificate of U. S. consul or diplomatic agent, admissible to prove a marriage solemnized by him); c. 46, § 19 (town clerk's record relative to a birth, marriage, or death, shall be evidence of the facts recorded; certificate thereof, by himself or assistant, admissible); 1810, Milford *v.* Worcester, 7 Mass. 48, 56, *semble* (recorded certificate of marriage as required by statute, admissible); 1813, Com. *v.* Norcross, 9 Mass. 493 (town record of marriages, admitted under statute); 1814, Ellis *v.* Ellis, 11 Mass. 92 (certificate of marriage not sufficient on charge of adultery; on the principle of § 2085, *post*); 1818, Com. *v.* Littlejohn, 15 Mass. 163 (obscure; similar to the preceding case); 1848, Com. *v.* Morris, 1 Cush. 391 (adultery; a "certificate, purporting to be a marriage certificate made by a clergyman of another State," excluded because not authenticated); 1918, Re Derinza, 229 Mass. 435, 118 N. E. 942 (death of an alien employee; purporting copies of certificates of marriage in Italy, not received on the facts; the opinion critically points out the several defects, but proceeds "it is not necessary to decide just what formalities would have been required to render them competent evidence"; this was an unsound and reprehensible attitude; first, because scientifically the court could not possibly have criticized the offer without having some definite standard by which to criticize, and this standard could have been revealed instead of being kept secret; secondly, sound judicial administration permits and requires a Supreme Court to instruct the bar how to practice correctly and not merely to penalize them for an error; this would-be Jovian aloofness "we are not called upon now to decide," etc., is misguided, for even Jove himself descended in time of need from Olympus to interfere actively among men); 1922, Taylor *v.* Whittier, — Mass. —, 134 N. E. 346 (probate of a will; a birth certificate not described, admitted);
Michigan: Comp. L. 1915, § 5607 (register or certificate of death, authorized by law, admissible); § 11375 (county clerk's record of marriage, or minister's or justice's lawful certificate of marriage, admissible); § 5621 (State secretary's certified copy of record of birth, to be evidence "of the facts therein stated"); § 11738 (St. 1915, "affidavits as to the birth, marriage, death, name, residence, identity, and relationship of parties named in deeds, wills, mortgages, and other instruments affecting real estate," recorded with the register of deeds, admissible in all proceedings affecting such real estate); § 12530 ("the original certificates and records of marriage made by the minister, justice, or other person authorized to solemnize marriages," admissible, also the county clerk's certified copy, as "presumptive evidence of the fact of such marriage"); § 12531 (county clerk's record or certified copy of license to marry, admissible); St. 1921, No. 170, p. 349 (powers of State secretary as to giving certificates of birth, etc., transferred to the State commissioner of health); 1858, People *v.* Lambert, 5 Mich. 364 (excluding a marriage certificate made by a clergyman in New Jersey); 1875, Hutchins *v.* Kimmell, 31 Mich. 126, 129 (entry in a register of marriage in a Lutheran church in Germany, admitted); 1882, People *v.* Broughton, 49 Mich. 339, 13 N. W. 621 ("a recorded marriage certificate," admitted to prove marriage); 1886, Durfee *v.* Abbott, 61 Mich. 471, 475, 28 N. W. 521 (records of baptism of a German Lutheran church in Detroit, admitted; objection being not properly taken); 1887, Hunt *v.* Chosen Friends, 64 Mich. 671, 31 N. W. 576 (sworn copy of entry in a parish record of a Catholic church in Ontario, admitted to prove baptism; quoted *supra*); 1894, Tessman *v.* United Friends, 103 Mich. 185, 188, 61 N. W. 261 (certificate of baptism and certificate of marriage, from Prussia, signed by the parish priest, and certifying the facts "upon the basis of the registry"; the register or "the actual contents," if proved by copy, said to be admissible, but the certificate of contents excluded, on the principle of § 1678, *post*); 1896, People *v.* Isham, 109 Mich. 72, 67 N. W. 819 (Baptist minister's certificate, admitted; explaining away People *v.* Lambert); 1896, People *v.* Imes, 110 Mich. 250, 68 N. W. 157 (domestic certificate admissible, but not a foreign one); 1897, Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506 (marriage certificate, and record, admitted under statute); 1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (certain certificates of

§ 1645. **Same: Certificates of Birth, Marriage, or Death.** For admitting certificates in general (*post*, § 1674) no implied authority of office seems

death and cause of death, admitted under Comp. L. § 4617, *supra*); 1920, Boyce *v.* McKenna, 211 Mich. 204, 178 N. W. 701 (annulment; record of Catholic marriage in Ireland, admitted by certified copy);
Minnesota: Gen. St. 1913, § 8458 (certificates and records of marriage, made as prescribed by law, admissible to prove marriage); § 8431 (official record of death of a joint tenant or person on whose life any title is limited, to be evidence of "the death of such person and the termination of such joint tenancy," or other estate, when recorded by certified copy in the county registry of deeds); § 4661 (vital statistics; State or local registrar's certified copy of record of "any birth or death recorded under the provisions of this Act" to be evidence of "the facts therein stated");
Mississippi: Code 1906, § 1966, Hem. § 1626 (certificate of marriage, "signed and transmitted to the circuit clerk of the proper county by the person, officer, or clerk of the religious society celebrating the same," admissible); § 1954, Hem. § 1614 (foreign registers; quoted *post*, § 1680); § 3246, Hem. § 2553 (exemplification of marriage certificate recorded by clerk issuing license, to be "evidence of the marriage"); St. 1912, c. 149, p. 158, Mar. 11, § 5, Hem. § 4872 (vital statistics; State registrar's certified copy of record of birth, sickness, or death, to be evidence of "the facts therein stated");
Missouri: Rev. St. 1919, § 5352 ("When by the ordinance or custom of any religious society or congregation in this State a register is required to be kept of marriages, births, baptisms, deaths, or interments, such register shall be admitted as evidence"); § 5392 (recorders' books of marriages kept according to law, admissible); § 5393 (recorded marriage contracts, admissible); § 5816 (vital statistics; State registrar's certified copy of record of "any birth or death registered under the provisions of this article" to be evidence of "the facts therein stated"); § 7307 (certificate of marriage by the person solemnizing, stating names, residence, and date, admissible to prove "the facts therein stated"); § 10614 (lost marriage record; recorded affidavits of eye witnesses may be admitted); § 10617 (celebrant's recorded certificate of marriage, made to take the place of a destroyed marriage record, admissible); 1852, Childress *v.* Cutter, 16 Mo. 24, 31, 46 (ordinary church-register of marriages in Louisiana, not kept by law, excluded); 1871, Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521 (register of baptism kept by church rule in a Catholic church in New York excluded, because in this country "all church registers are unauthentic and are not regarded as public documents"; the Missouri statute held not to apply to foreign registers); 1905, Collins *v.* German-Amer. M. L. Ass'n, 112 Mo. App. 209, 86 S. W. 891 (certain Roman Catholic registers in Ireland, deposed to be admissible by Irish law, received; Childress *v.* Cutter and Morrissey *v.* W. F. Co. are presumably but not expressly overruled; the opinion makes an extraordinarily confusing mixture of the Exceptions for pedigree statements, shop-books, and public documents, and is calculated to discourage any further scientific study of the Hearsay rule in this State); 1915, State *v.* Hamilton, 263 Mo. 294, 172 S. W. 593 (Missouri Baptist Orphan's Home register of births, kept by ordinance of the society, admitted under Rev. St. 1909, § 6297, R. S. 1899, § 3101, *supra*; the extent of either the hopeless ignorance or effrontery of counsel nowadays on points of Evidence may be judged from the circumstance that the brief in this case, contending that the admission was erroneous, cited Childress *v.* Cutter and Morrissey *v.* Ferry Co., *supra*, in the face of the above statute);
Montana: Rev. C. 1921, § 5720 ("the original certificate of marriage," as prescribed in the Code, and the district court clerk's record or his certified copy, to be "presumptive evidence of such marriage"); 1914, State *v.* Vinn, 50 Mont. 27, 144 Pac. 773 (statutory rape; county school census, required by law to be kept, admitted to prove the age of the girl);
Nebraska: Rev. St. 1922, § 1504 ("certificate and record of marriage made by the minister, officer, or person, as prescribed in this chapter," admissible; probate judge's record of marriages, admissible); § 1562 (county judge's record of Indian agent's record of Indian marriages, admissible);
Nevada: Rev. L. 1912, § 2340 (county clerk's certificate and record of marriage, made as prescribed in statute, admissible to prove marriage); § 2350 ("original certificate and record" made by person solemnizing and recorded, and the county recorder's record thereof or his certified copy, to be presumptive evidence); § 2971 (vital statistics; secretary of the State board of health's certified copy of the record of birth or death, to be evidence "of the facts therein stated");
New Hampshire: Pub. St. 1891, c. 173, § 10, c. 174, § 14 (town-clerk's record of birth, marriage, or death, admissible); c. 174, § 14 (duly officiating person's certificate of marriage, admissible); 1838, State *v.* Wallace, 9 N. H. 515 (town-clerk's record of marriage, admitted; "the Legislature, in requiring marriages to be recorded by the town-clerk, intended the record should be evidence of the fact");
New Jersey: Comp. St. 1910, Evidence §§ 28, 29 (return of death, marriage, or birth, by a "physician, clergyman, or other person," according to law, admissible); Gen. St. 1896,

to have been recognized at common law; certificates differing remarkably in this respect from registers. It might therefore be assumed that, in the

Birth D. & V. S. § 18 (records of marriages, births, and deaths, kept heretofore and prior to St. 1888, Feb. 15, by the Secretary of State, made admissible "to prove the facts therein contained"; as also a copy certified by the medical superintendent of the State bureau of vital statistics); Birth D. & V. S. § 10 (certified copy of certificate of birth or death, by medical superintendent of State bureau of vital statistics, to be admissible "to prove the facts therein contained"); Marriages, § 15, St. 1912, c. 199, p. 306, § 15 (vital statistics; certified copy by medical superintendent of State bureau of vital statistics, of original "certificate of marriage, marriage license, and consent to the marriage of minors," to be evidence "of the facts therein contained"); Labor § 19 (violation of child labor laws; copy of baptismal record, certified by custodian, admissible, on certain conditions); St. 1920, Apr. 6, c. 99, § 29 (State registrar of vital statistics; his certified copy of record of "a birth or death," to be 'prima facie' evidence); 1896, Royal Society of Good Fellows *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061, *semble* (Irish parish-register excluded, because not shown to be kept by law; opinion not clear as to the principle adopted); 1902, Hancock *v.* Supreme Council, 67 N. J. L. 614, 52 Atl. 301 (entry of baptism in a Catholic parish-register of Ireland, admitted); 1907, Sparks *v.* Ross, 72 N. J. Eq. 762, 65 Atl. 977 (a certain marriage record from a county clerk's office; its standing doubted on the facts); 1918, Schaffer *v.* Krestoonikow, 88 N. J. Eq. 523, 103 Atl. 913 (a purporting parish record of baptism from Russia, under U. S. consular attestation from Odessa, and with testimony from a Russian lawyer attached to the Russian consulate in New York rejected, on various grounds as to the insufficiency of proof of custodianship of record and insufficiency of authentication; the full terms of the document and the opinion must be consulted for details; the opinion is one of those that sadden the practical mind with obstructive logical niceties; if our law of Evidence, after a century of development in precedent and statute, really could provide no better rule of proof than this, it would deserve to be discarded);

New Mexico: Annot. St. 1915, § 2186 ("all church records," proved genuine as ancient documents under the rule of § 2137, *post*, receivable to show date of birth, baptism, marriage, or death);

New York: Cons. L. 1909, Domestic Rel. § 23 (record of marriage, "including the license and certificate," provable by county clerk's certified copy); Penal § 817 (age of child; "a copy of the record of baptism of any child in any parish register, or register kept in a church, or by a clergyman thereof, or a certificate of baptism duly authenticated by the person in charge of such register, or who administered said baptism, and also a transcript of the record of birth recorded in any bureau of vital statistics or board of health, duly authenticated by its secretary or under its seal, and the entries made in a family Bible, shall also be competent evidence upon the question of the age"); C. P. A. 1920, § 372 (minister's or magistrate's certificate of marriage within the State, or municipal clerk's entry of marriage, admissible); St. 1913, c. 619 (amending Consol. L. c. 45, Public Health, by inserting a new § 391; State commissioner of health's certified copy of record of birth or death, to be evidence "of the facts therein stated"); 1818, Jackson *v.* Boneham, 15 Johns. 226 (town records of births, etc., admitted); 1825, Jackson *v.* King, 5 Cow. 238, 241 (church register of baptisms, etc., admitted); 1918, People *v.* Todoro, 224 N. Y. 129, 120 N. E. 135 (rape under age; a purporting transcript of official record of birth from Italy, excluded, on the pettiest technical grounds); 1921, Grills *v.* Sherman-Stalter Co., Sup. App. Div. 186 N. Y. Suppl. 810 (employee's dependents; certain birth-certificate, etc., from Italy, held not sufficiently authenticated under C. C. P. §§ 952, 953, 956; unsound);

North Carolina: Con. St. 1919, § 7111 (record of birth or death, under State registration system; copy "properly certified by the State registrar, admissible as evidence "of the facts stated therein"); 1819, Jacock *v.* Gilliams, 3 Murph. 52 (register of births, etc., kept by law, admitted); 1891, State *v.* Davis, 109 N. C. 780, 783, 14 S. E. 55 (justice's license and certificate, admitted); 1897, State *v.* Melton, 120 N. C. 591, 26 S. E. 933 (county record-book of marriages, with filed justice's certificate, admitted);

North Dakota: Comp. L. 1913, § 4367 (record books of marriage licenses and certificates, kept by county judge, admissible); § 454 (vital statistics; State registrar's certified copy of record of a birth or death, to be evidence "of the facts therein stated");

Ohio: Gen. Code Ann. 1921, § 231 (record of birth or death in office of State registrar of vital statistics, by certified copy, to be evidence of "the facts therein stated"); 1827, Richmond *v.* Patterson, 3 Oh. 370 (town record of marriages, etc., kept by law, admissible); 1867, Stanglein *v.* State, 17 Oh. St. 453, 463 (record of foreign marriages, not shown to be kept by law, excluded);

Oklahoma: Comp. St. 1921, § 646 (record of "marriages, births, baptisms, deaths, or interments," required "by ordinance or custom of any religious society or congregation in this Territory" to be kept, admissible); § 7498 (certified copy by county judge, under official

absence of an express statutory duty to give a certificate of marriage, the certificate of the celebrant of a marriage, even though he were an

signature and seal, of marriage record kept by him "shall be received as evidence");
Oregon: Laws 1920, § 8507 (vital statistics; certified copy of record of any birth or death, by State registrar or county clerk, to be evidence of "the facts therein stated"); 1898, State *v.* Isenhart, 32 Or. 170, 52 Pac. 569 (certificate required by law, but not expressly made evidence, admissible);
Pennsylvania: St. 1700, Dig. 1920, § 10349, Evidence (registry kept by any religious society, of marriage, birth, or death within the province, receivable); St. 1837, Mar. 31, § 20, Dig. § 10351, Evidence (registry of burials of any religious society or corporate town in places out of the United States, 'prima facie' evidence of the death and the time of interment of the person); St. 1838, Mar. 17, § 5, Dig. §§ 10353, 10354, Evidence (registry of baptism or marriage by a domestic bishop, receivable as if made by the clergyman of the church); St. 1885, June 23, § 6, Dig. § 14560 (certified copy of record of marriage license and certificate by clerk of orphans' court under court seal, admissible); St. 1915, June 7, § 21, Dig. § 9005 (State registrar of vital statistics takes over all records formerly required to be kept by boards of health etc.; his certified copy of "the record of a birth, death, or marriage," to be 'prima facie' evidence of "the facts therein stated"); 1759, Hyam *v.* Edwards, 1 Dall. 2 (birth-and-death register of Quakers in England, received to show pedigree); 1814, Stoever *v.* Whitman, 6 Binn. 416 (registry of German Reformed Congregation at Easton, Pa., admitted to prove death, under St. 1700; the Court saying, "This act is in conformity to the principles of the common law"); 1823, Kingston *v.* Lesley, 10 S. & R. 383, 387 (parish-register of marriages, etc., kept by the rector, from the Barbadoes, admitted); 1843, Clark *v.* Trinity Church, 5 W. & S. 600 (minister's record of baptisms, admissible under statute); 1875, American Life Ins. Co. *v.* Rosenagle, 77 Pa. 507, 515 (register of births, etc., kept according to law by a parson in Germany, received); 1884, Sitler *v.* Gehr, 105 Pa. 577, 600 (register of domestic Evangelical Lutheran church, admitted to show death and burial); 1901, Yung's Estate, 199 Pa. 35, 48 Atl. 692 ("a certificate of inheritance," by the judge of a court in the Grand Duchy of Oppenheim, admitted; approving Hyam *v.* Edwards);
Philippine Isl. Civ. C. §§ 53–55 (register of civil status; like P. R. Rev. St. & C. §§ 3389, 3390, quoted *ante*, § 1336); to the following citations should be added those collected *ante*, § 1336 (conclusiveness of registers); 1906, U. S. *v.* Orosa, 7 P. I. 247, 250 (bigamy; canonical certificates of marriage recorded in parochial books prior to Dec. 18, 1899, the date of Gen. Orders No. 68 concerning marriage, are public official books; certified copy by the parish priest as custodian is admissible); 1908, U. S. *v.* Arceo, 11 P. I. 530, 536 (bigamy; similar certificates admitted, to prove a marriage in 1897); 1909, U. S. *v.* Ibanez, 13 P. I. 686 (bigamy; similar certificates admitted to prove a marriage in 1893); 1912, Adriano *v.* De Jesus, 23 P. I. 350 (baptismal certificates of Bulucan, issued "during the former sovereignty," admissible); 1915, U. S. *v.* Evangelista, 29 P. I. 215 (bigamy; church registrars of birth, marriage and death, since Gen. O. 68 and Act No. 190, are private writings, and must be evidenced as such under C. C. P. § 324, quoted *ante*, § 1290);
Porto Rico: Rev. St. & C. 1911, §§ 3223–3225 (quoted *post*, § 2085); §§ 3389, 3390 (register of civil status; quoted *ante*, § 1336); the judicial decisions are placed *ante*, § 1336, where the question of the conclusiveness of the register of civil status is considered;
Rhode Island: Gen. L. 1919, c. 121, § 16 (municipal clerk's record of marriage, birth, or death, admissible); 1902, Rhode Island H. T. Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873 (English marriage certificate and birth register, admitted);
South Carolina: Civ. C. 1922, § 5747 (marriage certificate, or a copy, signed by celebrant, and certified by the clerk of court or judge of probate, to be evidence "of the contract of marriage between the parties therein named");
South Dakota: Rev. C. 1919, § 9913 (certified copies of "any certificate or record" in the office of the State superintendent of vital statistics, to be evidence); § 127 (clerk of court's "entry in the marriage register, or a duly certified copy thereof," to be evidence "of the marriage and of the facts therein contained"); 1910, State *v.* Walsh, 25 S. D. 30, 125 N. W. 295 (original certificate required by law, admitted, although Civ. C. § 55 mentions only the record or a copy as admissible; the opinion does not discuss the principle);
Tennessee: Shannon's Code 1916, § 3118*a*38 (vital statistics; State registrar's certified copy of record of birth or death shall be evidence "of the facts therein stated"); 1846, Rice *v.* State, 7 Humph. 14 (county court marriage license and return, admitted under statute); 1904, Murray *v.* Supreme Hive, 112 Tenn. 664, 80 S. W. 827 (records of a board of health, admitted to show age);
Texas: Rev. P. C. 1911, § 491 (adultery; marriage may be proved by the "production of the original marriage license and return thereon, or a certified copy thereof"); 1846, Smith *v.* Smith, 1 Tex. 621, 625 (record-certificate from Missouri, not admitted without a showing as to its legal sanction in that State); 1907, Burton *v.* State, 51 Tex. Cr. 196, 101 S. W. 226 (bigamy; rule of § 2085, *post*, applied

ecclesiastical officer, would be inadmissible. Such seems to have been the common law.

But in order to interpret the rulings aright, the distinction between a certificate proper and certain other things must be kept in mind. (1) A *bishop's certificate* of marriage or divorce is sometimes mentioned in the older books. This, however, was not regarded as a form of evidence, but as judgment under another mode of trial. The ecclesiastical officers in former times had jurisdiction to try matters matrimonial and testamentary (*post*, § 2250);

to a recorded marriage certificate); 1918, Ford *v.* State, 82 Tex. Cr. 639, 200 S. W. 841 (assault to rape under age; "register of the birth and baptism of the girl in St. Joseph's church in Oklahoma," admitted);
Utah: Comp. L. 1917, § 5058 (certified copy of the State registrar's "record of a birth or death" shall be 'prima facie' evidence "of the facts therein stated"); 1912, State *v.* Springer, 40 Utah 471, 121 Pac. 976 (adultery; certified copy of the marriage record, admissible, without noting any of the above distinctions);
Vermont: Gen. L. 1917, § 3798 (marriage record made by person required at time of marriage to make and keep record; copy certified by him or by town or county clerk or State secretary if custodian, admissible); St. 1919, Mar. 27, No. 72 ("record of a birth, death, or marriage in another State or foreign country," provable by certified copy under oath by legal custodian, reciting that "the laws of such State or foreign country require such birth, death, or marriage to be recorded"); 1878, State *v.* Colby, 51 Vt. 291, 295 (town clerk's record, not made in accordance with the statute's terms, excluded; original marriage "certificate," returned by the minister to the town clerk, *semble*, admissible, if duly authenticated); 1879, State *v.* Potter, 52 Vt. 33, 38 (town clerk's record, admitted as properly made);
Virginia: Code 1919, § 5098 (books of clerk of county and corporation court, registering marriages, births, and deaths, admissible to prove "the facts therein set forth"); § 1580 (State registrar of vital statistics; certified copy of record of "any birth or death," to be evidence "of the facts therein stated"); § 6207 (registers of birth and marriage without the U. S.; quoted *post*, § 1676); 1838, Moore *v.* Com., 9 Leigh 639, 642 (county court's records of marriage returns, admitted under statute);
Washington: R. & B. Code 1909, § 5442 (vital statistics; State registrar's certified copy of record of birth or death, to be evidence "of the facts therein certified"); § 2153 ("A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person" for incest, adultery, or bigamy);
West Virginia: Code 1914, c. 63, § 27 (county court clerk's books of registry of marriages, births, and deaths, to be "'prima facie' evidence of the facts therein set forth in all cases"); c. 130, § 21 ("register of births and marriages in any place out of the U. S.," provable by certified copy, authenticated as in § 1680, *post*); St. 1921, c. 137, § 20 (State registrar of vital statistics; his certified copy of record of a birth or death to be 'prima facie' evidence of "the facts therein stated"); 1887, Blair *v.* Sayre, 29 W. Va. 608, 2 S. E. 97 (ejectment; county clerk's certified copies of a record of marriage and a record of births in West Virginia, admitted under the statute);
Wisconsin: Stats. 1919, § 4160 (record of marriage, birth, or death, kept in the office of the register of deeds or of the Secretary of State, pursuant to statute, admissible; "any church, parish, or baptismal record, and any record of a physician or a person authorized to solemnize marriages, in which record are preserved the facts relating to any birth, marriage, or death, including the names of the persons, dates, places, and other material facts," are admissible to prove such facts; "but such record must be produced from its proper custody," with the lawful custodian's oath of genuineness); § 4172 ("official certificates of births, marriages, or deaths, issued in foreign countries in which such births, marriages, or deaths have occurred, purporting to be founded on books of record, and authenticated by the signature of any United States minister, secretary of legation, or other diplomatic officer, or by a consul of the United States accredited to or appointed for the foreign country," are admissible to prove the facts stated); § 4073 (compulsory education: provision for the use of baptismal or birth certificate and school enrollment, as evidence of a child's age in certain cases); 1902, Sandberg *v.* State, 113 Wis. 578, 89 N. W. 505 (Stats. § 4160, applied);
Wyoming: Comp. St. 1920, § 4970 ("original certificate and record of marriage," made as prescribed, "and the record thereof," or a certified copy, admissible to prove "the fact of such marriage").

For the use of *certificates of marriage* at common law, see the next section.

For the question whether a certificate or a register is *essential* in certain criminal cases, see *post*, § 2085.

For the statutory use of recorded *affidavits* by witnesses to a marriage, see *post*, § 1710.

and it was not infrequent, when an issue involving marriage arose in a common-law court, to accept the bishop's lawful finding, as to the fact of marriage, in the form of a "certificate." This was not evidence to the jury, but was a finding under a mode of trial independent of jury trial; and trial by certificate is enumerated in the books, down to the end of the 1700s, as one of the several modes of trial.[1] This early use, then, of the bishop's certificate of marriage does not afford any precedent for the use of an ordinary clergyman's certificate. (2) The word "certificate" was probably sometimes used to signify merely a *certified copy*, by the ecclesiastical custodian, of an entry in the marriage register. This, however, merely presents in effect the marriage register as the evidence, the original being exempted from production on general principles (*ante*, § 1218). No new question as to certificates proper is raised. (3) Where a secular register of marriages is kept, it is usually based in part upon returns made to the *municipal officer* by the actual celebrant; his return (sometimes, but less properly, called "certificate") is filed or recorded with the registrar, and a copy of the record is furnished to the parties. Here again, the use of the recorded original, or of a certified copy of the record, involves merely the use of a register authorized by law, and raises no new question. In some of the decisions and statutes the word "certificate" is clearly applied to this registered document or entry; and its possible use in others renders their significance uncertain.[2]

The new question is raised only when the document offered in evidence is an *original separate paper, given by the celebrant* into the custody of the parties themselves, and certifying the performance of the ceremony by him. This, as already suggested, would on general principles at common law not be admissible, since no duty to give it can be implied from the office and no early statute in England ever created such a duty. In *England*, the later decisions seem to admit such certificates,[3] but it is likely that the term was used in one or the other of the last two meanings above noted. In

§ 1645. [1] See a further explanation *ante*, § 1336.

[2] Such rulings are placed *ante*, § 1644.

[3] 1620, Alsop *v.* Bowtrell, Cro. Jac. 541 (legitimacy; "in this case the marriage betwixt them being at Utrecht beyond seas, and certified under the seal of the minister there, and of the said town, and that they cohabited for two years together as man and wife, was a sufficient proof that they were married"); 1744, Willes, C. J., in Omichund *v.* Barker, Willes 538, 549 (disapproves in part of Alsop *v.* Bowtrell; "to admit the certificate of the minister of the fact of the marriage at a place where there is no bishop" might be allowable, but not to admit "the certificate of their cohabiting together"; *i. e.* to admit the certificate only as to the act of official duty as done by the celebrant); 1773, Anon., Lofft 328 ("Certificate of marriage not evidence, unless it be shown as a copy from the parish register"); 1849, Piers *v.* Piers, 2 H. L. C. 331, 335, 362 (certificate of marriage by a clergyman of the established church, admitted without question); 1853, Stockbridge *v.* Quicke, 3 C. & K. 305 (certificate by a clergyman of the established church in Ireland, admitted); 1864, Sichel *v.* Lambert, 15 C. B. N. S. 781 (certificate of marriage in a Catholic chapel in London, admitted, but apparently not as evidence of the ceremony); 1885, Glenister *v.* Harding, L. R. 29 Ch. D. 985, 988 (marriage certificate, and baptismal certificate, apparently by the parish rector, held admissible); 1899, Westmacott *v.* Westmacott, Prob. 183 (certificate of marriage from the India Office, received); 1900, Cooper-King *v.* Cooper-King, Prob. 65 (certificate of marriage from the Registrar-General at Hong-Kong, admitted).

the *United States*, there is little common-law authority, and that not harmonious.[4]

No doubt such certificates, or their equivalent, ought to be furnished, for convenient use in evidence by the parties to a marriage, especially in this our country of numerous jurisdictions and migratory population. A certificate given directly by the celebrant is in the lapse of time difficult for honest persons to authenticate and easy for dishonest ones to fabricate; a certified copy from the permanent municipal register is for both these reasons the only satisfactory form of evidence suitable to be taken into possession by the parties. But in view of the hardship involved to innocent parties, and in spite of the risk of occasional falsification, it seems wiser to adopt a liberal principle, and to recognize the admissibility of certificates, in the strict sense of the term. Statutes in a few jurisdictions have sanctioned their use, either by creating a duty to give them or by expressly making them admissible.[5]

A certificate of marriage, however (in the strict sense), may nevertheless sometimes be available, not under the present Hearsay exception, but by virtue of *other rules* of Evidence:

(1) If it has been signed or used by the adverse party, it may be receivable against him as an *admission*.[6] (2) On a principle of circumstantial evidence (*ante*, § 268), the *conduct* of persons comporting themselves as husband and wife is always admissible as evidence of their marriage by consent. Among other acts available in this way, the possession of a marriage certificate, purporting to declare them married, may amount to holding themselves out as married, and may therefore, with the other conduct-evidence, be used in that aspect. This seems to be what is meant in a few decisions which declare marriage certificates, especially when coming from the possession of one of the parties to the alleged marriage, receivable as *"corroborative" evidence*.[7]

[4] The cases have been for convenience placed *ante*, § 1644, n. 6.

[5] These statutes have been for convenience placed *ante*, § 1644, n. 6. Statutes providing for *military and naval officers'* certificates of *death in service* are placed *post*, § 1675 *a*.

[6] *Eng.* 1911, Bellis' Case, 6 Cr. App. 283 (rape under age; "a birth certificate" admitted); *U. S.* 1909, People *v.* Le Doux, 155 Cal. 535, 102 Pac. 517 (said *obiter* that on a charge of bigamy, a duly certified copy of a county record of marriage in Arizona, together with the minister's certificate of indorsement on the original license, would be inadmissible without other evidence of the minister's authority and of his execution of the license and certificate; unsound; but here the defendant's affidavit applying for the license was held enough, the bigamy not being essential in the trial for murder); 1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; certificate of defendant's marriage in Germany, formerly exhibited by him as genuine, admitted in evidence against him); 1859, Hill *v.* Hill, 32 Pa. 511 (domestic marriage certificate, held not admissible "by itself," but received here because the husband, opponent's intestate, had once read it as his certificate); and cases cited *ante*, § 1073.

[7] *Eng.* 1824 (?), Dallas, C. J., in Beer *v.* Ward, unreported, but quoted in Hubback on Succession, 258 ("A certificate of a marriage, if proved to have been kept in the custody of a person whom it affects and produced from proper custody, may be read as collateral proof"); *Can.* 1845, Doe *v.* McWilliams, 2 U. C. Q. B. 77, 80 (justice's certificate, admitted "as corroborative," being an official's declaration which he was "specially authorized" to make); *United States:* 1886, Camden *v.* Belgrade, 78 Me. 204, 211, 3 Atl. 652 (certificate in the possession of a party to the marriage, admissible); 1880, Gaines *v.* Green P. I. M. Co., 32 N. J. Eq. 86, 95 (certificate, produced by the woman, mother of the plaintiff, and proved by the celebrant's oath, admitted as "corroborative of her testimony"); 1894, State *v.* Behrman, 114 N. C. 797, 807, 19 S. E. 220 (marriage certificate of a Russian rabbi, held admissible as "corroborative, not as substantive evidence";

This phrase is in itself meaningless, as affording a ground for admission; but the principle just noted serves apparently to support these rulings, and is unquestionably a legitimate ground for admission.

Certain other principles affecting the use of marriage and death certificates need to be discriminated: (1) Whether proof of the *official character* of the celebrant and of the genuineness of the *signature* is necessary, is a question of Authentication, dealt with elsewhere [8] (*post*, § 2161). (2) Whether the *identity of names* is sufficient evidence of the identity of the persons or needs to be reënforced by other evidence, is a question of the presumption elsewhere considered (*post*, § 2529). (3) Whether a certificate of marriage is *indispensable* in certain criminal cases is a question of the required quantity of evidence (*post*, § 2082). (4) Whether a certificate of marriage may be used in a *criminal case*, in violation of the rule entitling the accused to be confronted with witnesses, has already been considered (*ante*, § 1398). (5) Whether a *physician's certificate of death* is admissible may raise a question of privilege (*post*, § 2385*a*).

§ 1646. **Same: Personal Knowledge is required in such Registers (Age, Cause of Death, etc.).** The question whether personal knowledge (*ante*, § 1635) is essential on the part of the officer making the record is a difficult one, as to principle, precedent, and policy alike. It arises usually with reference to the uses of entries of baptism as evidence of the date of birth, but it may be raised also for other kinds of facts. The argument for excluding the use of entries except for facts necessarily within the entrant's personal knowledge has been stated as follows:

1834, DENMAN, L. C. J., in *Doe* v. *Wollaston*, 1 Moo. & R. 389: "The clergyman must be present . . . and this fact of the time [of the marriage] is within his own knowledge. In the case of the registry of baptism, the time of the birth must generally be taken by the clergyman from other people. . . . The registry of the marriage being made evidence, I think it is so for the purpose of proving all the facts there stated necessarily within the knowledge of the party making the entry."

The argument for receiving such entries as evidence of all facts required to be recorded has been thus stated:

1850, PATTESON, J., in *Doe* v. *France*, 15 Q. B. 758 (admitting entries of death, in a church-register, appearing to have been copied from a workhouse-register by a clerk at 3d. a thousand): "Must we not take it to be the act of the incumbent, who, however he got his information, had satisfied himself of the fact before he sanctioned the entry?"; WIGHTMAN, J.: "Surely the Court must give credit to a public officer for having taken proper precautions to secure accuracy in the registration."

the opinion confuses half a dozen principles); 1898, State *v.* Isenhart, 32 Or. 170, 52 Pac. 569 ('res gestæ' phrase, applied to a marriage certificate as evidence of marriage); 1903, Dailey *v.* Frey, 206 Pa. 227, 55 Atl. 962 (certificate of marriage "procured from the custody of the plaintiff's father and claimed by him as the certificate of his own marriage," admitted, "though not in itself evidence").

[8] Some cases involving this principle will also be found in § 1644, n. 6; it is not always possible to determine just what principle controls in the decision.

(1) As to precedent, it can only be said that no final settlement was ever reached at common law in England; and, even under the statute expressly making the registers admissible to prove the data of birth (*ante*, § 1644), there have been conflicting rulings.[1] In the United States, the same lack of harmony is found in the decisions; it can hardly be said even that the weight of authority definitely accepts either view.[2]

§ 1646. [1] 1737, May *v.* May, 2 Stra. 1073 (on the production of the parish register, in an issue of legitimacy, "the defendants asked him [the clerk] if any notice was taken of bastards; and he said their method was to add 'B. B.' which stood for 'base born'; and then they offered the day-book, from whence the other entry was posted, in which 'B. B.' was inserted"; but the Court, by two judges to one, thought the day-book was not admissible like the register); 1821, Wihen *v.* Law, 3 Stark. 63 (register of christening, not admitted to show the date of birth, since the entrant "had no authority to make inquiry concerning the time of birth, or to make any entry concerning it in the register"; though if it had been made by the mother's direction, it might have been read to corroborate her); 1826, R. *v.* Petherton, 5 B. & C. 508, 510 (register of baptism, not evidence of the place of birth, unless with evidence of the extreme infancy of child, or other evidence); 1828, Morris *v.* Davies, cited in 1 Moo. & Rob. 271, Gaselee, J. (the following entry admitted: "Evan Williams, a base child, was baptized 11th of January, 1793," with a note as to the supposed father); 1828, Doe *v.* Bray, 8 B. & C. 815 (Bayley, J., rejecting an entry, by a later incumbent, of a baptism by his predecessor: "He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk"); 1829, R. *v.* Clapham, 4 C. & P. 29 (entry of baptism is not evidence of age); 1883, Cope *v.* Cope, 1 Moo. & Rob. 269, Alderson, J. (the following baptismal entry admitted: "1794, Dec. 7, Willis, illegitimate son of Elizabeth Cope"); 1834, Doe *v.* Wollaston, 1 Moo. & Rob. 389 (quoted *supra*); 1834, Burghart *v.* Angerstein, 6 C. & P. 690, 696 (register of baptism, not admitted to show the date of birth); 1850, Doe *v.* France, 15 Q. B. 758 (quoted *supra*); 1870, In re Wintle, L. R. 9 Eq. 373 (though the registrar was required to make entry of the date of birth, the entry was held admissible only to show the fact that the child was alive at the date of registration); 1873, R. *v.* Weaver, L. R. 2 C. C. R. 85 (official register of births, received to show the exact age); 1885, Glenister *v.* Harding, L. R. 29 Ch. D. 985, 988 (baptismal certificate, admitted to show the date of birth as entered, partly because the issue was of pedigree; following Morris *v.* Davies, Cope *v.* Cope); 1886, Londonderry Case, 4 O'M. & H. 96 (certificate of birth of an illegitimate child, admitted to show the date of birth); 1904, Goodrich's Estate, Prob. 138 (cited *ante*, § 1644, n. 1); 1918, Bird *v.* Keep, C. A., 2 K. B. 692 (cause of workman's death; entry in the register of deaths, under St. 6 & 7 Wm. IV, quoted *ante*, § 1644, held not evidence of the cause of death); 1918, Brierly *v.* Brierly and Williams, Prob. 257 (divorce for adultery; to prove the adulterous birth of a child, the register of birth was admitted, signed by the mother, showing the mother's name given but the father's name left blank; In re Wintle, *supra*, disapproved; such a rule would "impair and restrict the utility of the Statutes").

[2] *Federal:* 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 182, 189 (baptismal entry as follows: "1837, July 30. G. T., son of T. B. C. and E. T., his wife, born 7th of September, 1836," not admitted as evidence of the child being lawful, "without further evidence"); *California:* 1920, Robinson *v.* Western States G. & E. Co., 184 Cal. 401, 194 Pac. 39 (State registrar's certified copy of medical certificate, under St. 1907, p. 300, § 15, admitted to evidence the cause and not merely the fact of death); *Connecticut:* 1902, Murray *v.* Supreme Lodge, 74 Conn. 715, 52 Atl. 722 (city registrar's record of marriage and of birth, admitted to show the age of the wife and the age of the mother respectively, these facts being a required part of the registrar's duty to ascertain and record); 1919, Hellman *v.* Karp, 93 Conn. 317, 105 Atl. 678 (bastardy; physician's certificate of birth, made under authority of law, admitted to evidence paternity); *Illinois:* 1901, Howard *v.* Illinois T. & S. Bank, 189 Ill. 568, 59 N. E. 1106 (physician's return of birth, not receivable to prove the child to be the second of that mother; "the return is not evidence of matters of mere hearsay gathered up by the physician, of which he knows nothing"); *Indiana:* 1910, Brotherhood of Painters *v.* Barton, 46 Ind. App. 160, 92 N. E. 64 (in an action on a fraternal benefit policy, to show the cause of death, the record of the board of health of a city, based on the physician's report required by law to be filed, was held inadmissible, two judges diss.); *Louisiana:* 1896, Justus' Succession, 48 La. An. 1096, 20 So. 680 (entries in an official parish register of Germany, containing an entire family tree, admitted, because recorded "in conformity with the rules of the registering church"); *Maryland:* 1894, Metropolitan L. I. Co. *v.* Anderson, 79 Md. 375, 378, 29 Atl. 606 (city register of deaths, not admissible to show the cause of death); *Massachusetts:* 1898, Com. *v.*

(2) As to principle, it would seem that where the registrant has authority to record only the performance of a ceremony, his record would be admissible to prove only what he has done; thus, an entry of baptism would not be receivable to prove the date of birth. On the other hand, where the reg-

Phillips, 170 Mass. 433, 49 N. E. 632 (certificate of birth, admitted under statute to show age); 1922, Broadbent's case, — Mass. —, 134 N. E. 632 (death of an employee; medical examiner's certificate of cause of death, admissible under Gen. L. 1920, c. 46, § 19, cited *ante*, § 1644); *Michigan:* 1886, Durfee *v.* Abbott, 61 Mich. 471, 475, 28 N. W. 521 (baptismal record is not evidence of age, though receivable for such weight as it deserves); 1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (physician's official certificates of death, admitted to show cause of death); 1915, Gilchrist *v.* Mystic Workers, 188 Mich. 466 N. W. (physician's official death certificate, assigning abortion as the cause, and adding "said to have been performed by Dr. ——" excluded as to the last clause only); *Minnesota:* Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541 (certificate of baptism, not received to prove infancy); *Missouri:* 1922, Simpson *v.* Wells, — Mo. —, 237 S. W. 520 (death by wrongful act; certificate by a physician as deputy coroner, held admissible to show cause of death, under Rev. St. 1919, § 5802, being Rev. St. 1909, § 6670; distinguishing R. S. 1919, § 5803, R. S. 1909, § 6671, as applied in Schmidt *v.* Supreme Council, 207 S. W. 824); *New Jersey:* 1896, Royal Society of Good Fellows *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061 (parish register of baptisms, not admitted to show the date of birth; ignoring the equal availability of the baptism-date, in this case, to determine age); 1899, State *v.* Snover, 63 N. J. L. 382, 43 Atl. 1059 (rape under age of consent; to show the woman's age, a clergyman's baptismal certificate stating the date of birth was not admitted); 1901, Hickey *v.* Morrissey, — N. J. Eq. —, 50 Atl. 182 (register not receivable to show the precise date of birth, unless perhaps the date of birth mentioned in the record is proved to have been inserted on the statement of the father and mother); *Oregon:* 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 ("Official registers are competent evidence of the facts properly recorded therein, although they relate to matters not within the personal knowledge of the officer making them"); *Pennsylvania:* 1843, Clark *v.* Trinity Church, 5 W. & S. 266, 269 (church register, not admitted to prove the date of birth); 1884, Sitler *v.* Gehr, 105 Pa. 577, 600 (ordinary church-register held "competent to show the death and burial of these ladies, but what the pastor put down in the book as to their parentage and the time and place of their birth, was incompetent, for the plain reason that it was no part of his duty to make such entries"); *Porto Rico:* 1906, Aguayo *v.* Garcia, 11 P. R. 263, 270 (heirship; certificates of baptism and of marriage, held not evidence of the "filiation or civil status of the person baptized or married" as stated therein); 1912, Rodriguez *v.* Rodriguez, 18 P. R. 478 (like Aguayo *v.* Garcia); 1913, Figueroa *v.* Diaz, 19 P. R. 683, 690 (similar); 1913, Gonzalez *v.* Lopez, 19 P. R. 1056 (similar); *South Carolina:* 1921, Williams *v.* Metropolitan Life Ins. Co., 116 S. C. 277, 108 S. E. 110 (under St. 1914, a medical certificate of death, by a physician in attendance from Nov. 18 to Nov. 30, was held inadmissible as to the duration of the illness, in so far as it covered a period prior to Nov. 18; unsound); *Utah:* 1921, Bozicevich *v.* Kenilworth Merc. Co., — Utah —, 199 Pac. 406 (a physician's certificate of death, admitted to evidence cause of death, under Comp. L. 1917, § 5045; careful opinion by Frick, J.); *Vermont:* St. 1902, No. 44 (no public record of births, etc., shall be competent evidence "to prove any fact stated therein, except the fact of birth, marriage, or death"); 1902, McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438 (town-clerk's record of physician's death certificate, admitted to show the cause of death, this fact being required by law to be entered); 1904, McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985 (assault; the same certificate as in McKinstry *v.* Collins, 74 Vt., *supra*, not admitted to show the cause of death; St. 1902, *supra*, having intervened between the two trials); *Washington:* 1916, Armstrong *v.* Modern Woodman, 93 Wash. 352, 160 Pac. 946 (misrepresentations as to age of insured; Missouri record of marriage made by the county recorder, and proved by certified copy, admitted to evidence age, the Missouri statute making it the duty of the recorder to state that the husband was over 21 years of age); *West Virginia:* 1887, Blair *v.* Sayre, 29 W. Va. 608, 2 S. E. 97 (county clerk's record of births, admitted to prove the date of birth of a minor; his record of marriage licenses, admitted to show the age of the wife, since the statute made it "the duty of every clerk . . . to ascertain . . . their respective ages"); *Wisconsin:* 1875 Herman *v.* Mason, 37 Wis. 273 (church register, not admitted to show the date of birth); 1889, Lavin *v.* Mutual Aid Soc'y, 74 Wis. 349, 43 N. W. 143 (action for a death benefit; a Prussian certificate of baptism, not received to show the date of birth under a statute making certificates of birth admissible; but the ruling singularly ignores the availability of the baptism date, for in this case it was only necessary to show the person to have been alive at the time named).

istrant — as is usually the case for secular official registers — is authorized to record the fact itself of family life, and not merely a ceremony, the entry would on principle be evidence of the fact recorded.

(3) So far as policy and practical safety are concerned, it is at first sight unsatisfactory to accept an entry as evidence of a fact not occurring within the personal knowledge of the entrant. At the same time, there are reconciling considerations. In the first place, there is in the vast majority of instances no controversy at the time and no motive to deceive the official; his record is, on the whole, of sufficient trustworthiness to be at least worth receiving in evidence. In the next place, the secular registers must in any case be founded on the testimony of some one else; and a discrimination between entries founded on the reports of physicians, midwives, undertakers, and ministers, and entries founded on the reports of parents or other family members, would be out of the question. Finally, in strictness, the registrars do not have personal knowledge of even the most fundamental facts, of which their entries are now accepted without cavil; for example, how can a minister always say with personal knowledge that the persons married by him were M and N, or how can a registrar usually have personal knowledge that the child registered was actually born to S, or was a boy or a girl? If we are to insist with pedantic strictness upon the entrant's personal knowledge, it will be found that the registers will cease to be of much practical service for any purpose.

On the whole, then, it is sound policy to receive all such registers as evidence (*a*) first, of the facts *required by law* to be recorded, and (*b*) next, if no law specifically provides for the contents of the register in question, of the fundamental facts *customarily* entered in such registers directly on the faith of other persons having personal knowledge, — namely, in birth or baptism registers, of name, sex, parentage, and date of birth; in marriage registers, of name, age, residence, and date of ceremony; and in death of burial registers, of name, sex, age, residence, date of death, and cause of death. Under the modern Vital Statistics acts, numerous varieties of facts are required to be reported and entered. It is sensible to admit all such entries for what they may be worth; in the occasional controverted cases, other evidence is usually available. A main purpose of the system would be defeated if the records were not liberally available in litigation.[3]

(4) In the use of *death* certificates, other rules of Evidence may also be involved. (*a*) Distinguish the question whether a *contract* to accept a particular kind of evidence is conclusive (*ante*, § 7*a*). (*b*) Distinguish the question whether the physician's certificate furnished with *proofs of death* under an insurance policy amounts to an admission by the beneficiary (*ante*, § 1073). (*c*) Distinguish the question whether physicians' *certificates of death*, made admissible by the present group of statutes, are nevertheless liable to

[3] See the admirable opinion of Frick, J., —, 199 Pac. 406, cited *supra*, note 2. in Bozicevich *v.* Kenilworth Merc. Co., — Utah

exclusion on claim of *privilege for communications* to a physician (*post*, § 2385*a*).

§ 1647. **Registers of Land-Title; Shipping Registers; Timber-Marks and Stock-Brands.** (1) The law might conceivably authorize an administrative officer to investigate a *title to property* and to record the results of his investigation, and the authority thus given might suffice to admit his record as evidence of the title. This, however, the common law has not done. There are judicial investigations and findings, in specific litigations, by judicial officers appointed for the purpose; but their findings stand on the footing of the report of a master in chancery, and are merely stages in a judgment upon the litigation in hand. They are not evidence, but are preliminary forms of a judgment; and the conclusiveness of a judgment rests on other principles (*ante*, § 1347).

In several jurisdictions, however, a rational system of *registration of land-title* has been introduced from Australia. But these registers, again, are not evidence; they are either judgments, or are the very documents of title, or operate by a rule of prescription. The title (in a sale, for example) is constituted by the combined act of the transferor, the transferee, and the official; and the register cannot be disputed. To refer to the register is not to use evidence, but to offer some constitutive act of title. The theory of these registers is elsewhere briefly considered (*ante*, §§ 1225, 1239, *post*, § 2456). They have no significance under the present exception.

There are, however, two sorts of registers, in vogue in many jurisdictions, which purport to be in some respects registers of title, without being in any sense the constitutive and indisputable acts of title. These are registers of ships and registers of stock-brands and timber-marks.

(2) A *register of ships* is usually a register purporting to record for each ship the kind of vessel, the nationality, the tonnage, the master, the names and the shares of the owners, and sundry other items, and based upon a sworn statement as to these facts by a person declaring himself to be one of the owners. This register is of chief use for administrative and police purposes; but the attempt has often been made to employ it for evidential purposes also. The question thus usually presented is whether the official register, stating the ownership of the vessel, is admissible as evidence of the *ownership*. The judicial reasoning on this question is illustrated in the following passages; and in considering them, it should be borne in mind that the registrar makes no investigation as to the title, and merely records the sworn statement of a person claiming to be an owner:

1809, MANSFIELD, C. J., in *Fraser* v. *Hopkins*, 2 Taunt. 5: "To suppose the effect of the Act to be such as is contended, would be to impute madness to the Legislature. It supposes that, without proof of any bill of sale to the defendants, or any act done by them, or any connection shown between them and the officer, a letter written by a custom-house officer, and an entry made in London in consequence of that letter, will make the defendants liable to all the world as owners of the vessel. The entry is evidence of the registra-

tion; it is not evidence of the transaction of sale. I never yet knew an instance where the act of any one man could charge another unconnected with him."

1854, BLACK, C. J., in *Lincoln* v. *Wright*, 23 Pa. 76, 81: "A vessel may be sold . . . and the register be left unchanged; for these reasons a certificate of the register is no evidence in favor of the person therein named as owner, nor in actions between other parties. It will not establish an insurable interest in the registered owner as against an underwriter, nor will it disprove such interest in the assured where the policy has been taken for the benefit of other persons. Neither would it be any defence whatever, in an action for supplies against one for whose profit the ship is navigated, to show that she is registered in another name. But all this does not prevent us from saying that a man's declaration on oath is some evidence *against him* of the fact therein asserted."

It would seem, on principle, that the solution of the four chief situations presented is as follows:[1] (*a*) Where the register is offered *by* a person *claiming to be owner*, either the one whose sworn statement was recorded or one

§ 1647. [1] The decisions are as follows; they are not harmonious:

ENGLAND: 1802, Bucher *v.* Jarratt, 3 B. & P. 143 (the shipping register admitted to prove the existence of the certificate of registry); 1809, Stokes *v.* Carne, 3 Camp. 339 (N. P.; action for goods supplied to the ship; register admitted to prove defendant's ownership, where defendant had not given notice in pleading that he denied it); 1809, Fraser *v.* Hopkins, 2 Taunt. 5 (C. P.; action for goods furnished the ship; register not admitted to show a transfer to the defendants); 1811, Tinkler *v.* Walpole, 14 East 226 (K. B.; action for goods sold; same ruling, "notwithstanding the practice may have prevailed for a long time to receive ship's registers as evidence, without more, of the property being in the persons therein named"); 1812, Pirie *v.* Anderson, 4 Taunt. 652 (C. P.; action on a policy; plaintiff not allowed to prove ownership by the register; Gibbs, J., said that it had been "a thousand times received," but merely to save time); 1812, M'Iver *v.* Humble, 16 East 169 (K. B.; action for goods sold; register admitted, but not as evidence of ownership); 1812, Flower *v.* Young, 3 Camp. 240 (register not evidence to show owners); 1813, Smith *v.* Fuge, 3 Camp. 456, *semble* (same); 1814, Teed *v.* Martin, 4 Camp. 90 (same); these rulings are now apparently superseded by the Merchant Shipping Act; St. 1854, 17 & 18 Vict. c. 104, § 107 (shipping register, and certificate of registry, stating the owners, master, etc., is to be "'prima facie' proof of all matters" contained in it).

CANADA: *N. Br.* Consol. St. 1903, c. 127, § 39 (British ship register or certificate is admissible to prove the facts recited); 1916, Boddington *v.* Donaldson Line, 31 D. L. R. 520 N. B. (injury to ship's employee; certified copy of the ship's registry, held admissible to prove ownership under Eng. Merchant Shipping Act 1894, c. 60, §§ 64, 695, and also under Can. Evid. Act, § 39); *Newf.* Consol. St. 1916, c. 91, § 8 (like N. Br. Consol. St. c. 127, § 39; *N. Sc.* Rev. St. 1900. c. 163, § 15 (like N. Br. Consol. St. c. 127, § 39); *P. E. I.* St. 1889, § 26 (like N. Br. Consol. St. c. 127, § 39); *Yukon:* St. 1904, c. 5 (like N. Br. Consol. St. c. 127, § 39).

UNITED STATES: *Ala.* 1833, Jones *v.* Pitcher, 3 Stew. & P. 135, 145, 152 (action for negligent carriage; register not admitted to prove ownership, even against the person in whose name the registered affidavit of ownership ran); *Cal.* 1899, Moynihan *v.* Drobaz, 124 Cal. 212, 56 Pac. 1026 (registry not admitted to show ownership); *Haw.* 1855, Post *v.* Schooner Lady Jane, 1 Haw. 162 (admissible, but of little weight); *Ill.* 1887, Merchants' Nav. Co. *v.* Amsden 25 Ill. App. 307 (action for personal injury; defendant's ownership evidenced by shipping-register entry in the customs department); *La.* 1859, Sampson *v.* Noble, 14 La. An. 347 (certified copy, by a deputy collector, of the vessel's enrolment and bill of sale, admitted); *Mass.* 1829, Bixby *v.* Ins. Co., 8 Pick. 86, 88 (it "might be evidence" in an action contested by the apparent seller's creditors); *Mo.* Rev. St. 1919, § 5395 (certified copy of enrolment of a steamboat in the custom house or office of the customs surveyor and inspector, admissible to prove ownership "as against the persons described as owners of such steamboat in such enrolment"); *N. H.* 1833, Hacker *v.* Young, 6 N. H. 95 (copy of record of enrolment of a vessel, evidence of the defendant's admission on oath of ownership); *N. Y.* 1817, Sharp *v.* Ins. Co., 14 Johns. 201 (action to recover premium: register not admitted for plaintiff to show him not to be owner); 1817, Coolidge *v.* Ins. Co., 14 Johns. 308, 314 (register is "good evidence of the facts it sets forth"); 1818, Leonard *v.* Huntington 15 Johns. 298, 302 (action for work done on the ship; register said not to "determine the ownership"); *Pa.* 1854, Lincoln *v.* Wright, 23 Pa. 76 (action for goods sold, etc.; register admitted, where defendant's taking the oath of ownership was proved; quoted *supra*).

therein stated to be another owner, it is obvious that the register is of little more weight than the claimant's own testimony, because it is merely either his own statement out of court or that of his agent. The registered publicity of the claim, to be sure, counts for something; but this seems hardly sufficient. In this case, it is generally agreed, the register is inadmissible. (*b*) Where the register is offered *against* a person *not making the sworn statement*, to prove that he is not the owner — as in the case of an alleged assignment by the opponent — the result will be the same; for the register is merely evidence that somebody else claims to have bought from the opponent. This and the preceding situation will usually in effect arise on the same state of facts. (*c*) Where the register is offered *against* a person *named in the sworn statement* as one of the owners, to charge him with liability as owner — for example, for goods supplied — the result should be no different; because the register is evidence of no more than that somebody else stated the opponent to be an owner. This conclusion also is generally agreed upon by the Courts. (*d*) Where the register is offered *against* the *very person* purporting to have *made the sworn statement* as an owner, the register evidences in effect his admission that he was owner, provided only the genuineness of the sworn statement be assumed. Yet, since the registrar appears not to be charged with the duty of ascertaining (by notary's certificate or otherwise) the identity of the person presenting the statement, it seems necessary that other evidence of the opponent's identity (or, what is the same thing, of the genuineness of the affidavit) should be furnished. This conclusion also is accepted by most Courts.

No doubt it is unfortunate that a document so much relied upon as the shipping register should not be available as a convenient mode of proving ownership. But the proper remedy for this is an improved statutory system of registration. No doubt, also, that the publicity given by registration, even under the present system, is in practice a great safeguard, so that the registered ownership is in most instances a fact not open to real dispute; and this may be the reason why the modern British statute, returning to the common understanding and practice before the 1800s, expressly makes it admissible in evidence. But while the rule may be unnecessarily strict and technical, it is not improbable that a more liberal rule — so long as the looseness of the registration system continues — would be taken advantage of for fraudulent purposes.

Some other uses of the register, as affecting ownership, must be distinguished, since they involve no question of evidence. The effect by way of *estoppel* of a registration as sole owner [2] concerns a question of substantive law. The *conclusiveness* of the registry for purposes of administrative law is a matter of that law. The use of the registry to prove *nationality* [3] is appar-

[2] 1817, Weston *v.* Penniman, 1 Mason 306 (action for money had and received; defendant claimed a credit for money spent on behalf of a ship jointly owned; effect of defendant's registration as sole owner, considered).

[3] 1893, St. Clair *v.* U. S., 154 U. S. 134, 151, 14 Sup. 1002 (certificate of registry, admissible to show nationality of vessel).

ently not a question of evidence, or at any rate not a different one; because nationality signifies either the fact of American registration, which is to be gathered merely from the existence and tenor of the entry, or the ownership by American citizens, which involves merely the same evidential question as that above examined. The liability of the registered owner for the acts of the ship's employees raises sometimes, but in appearance only, a question of evidence.[4]

(3) In a number of jurisdictions where the wealth consists largely of cattle and of timber, a system of *registration* of *stock-brands* and *timber-marks* is provided for by statute; the method being usually to record in a public office the marks and brands appropriated by the different owners and to vest the registrar with authority to receive only patterns of a certain description, to refuse duplicates, and to sanction the use of the registered mark. It is clear that under such statutes (as often expressly provided) the register sufficiently evidences the *right* of a certain person to *use a given mark*.[5] But the question often arises judicially, and the statutes sometimes deal also with it, whether the presence of such a registered mark on a log or an animal is admissible to show that the registered appropriator of that mark has *title* to the log or the animal found bearing it.[6] This, however, is not a question of the admissibility of the register; for the register-entries take no cognizance of specific animals or logs. The type of mark, as the subject of a right to use it, is shown by the register to be M's; but whether M or any one else actually placed such a mark on the log or the animal cannot possibly be evidenced by the register. The question is really one of circumstantial evidence, *i.e.* whether the presence of that mark is evidence of the fact that M placed it on the log or the animal, and, next, whether the placing of it by M indicates that M was the owner; the only real difficulty being with this last step of the inference. This question has already been examined (*ante*, § 150).

§ 1648. **Registers of Conveyances; General Principle; Mode of providing Proof of Genuineness, or Execution.** No officer at common law had an implied authority of office to record deeds of conveyance; so that the question of the extent of an implied authority (the chief difficulty in many of the foregoing instances) does not here arise. But statutes have in every jurisdiction given

[4] That is, there is a question of substantive law whether ownership is equivalent to or is 'prima facie' evidence of liability as employer for the acts of the ship's employees; if it is, then in effect the registration is equally evidential, wherever by statute it is evidence of ownership. In many shipping cases, however, in which this question of owner's liability as employer is involved, the opinions occasionally speak of the register as evidence of that liability; this is merely an elliptical form of speech. A leading case illustrating this usage is Hibbs *v.* Ross, L. R. 1 Q. B. 534.

[5] The statutes are collected *ante*, § 150. Some statutes merely declare the register admissible, without declaring for what purpose, *e. g.:* Ill. Rev. St. 1874, c. 88, § 3 (county clerk's record of stock brands and marks, admissible). See also the statutes for certified copies, cited *post*, §§ 1674, 1680.

[6] Occasionally also the same question arises for other property used by recorded license: 1814, Strother *v.* Willan, 4 Camp. 24 (an official book of licenses of stage-coaches, kept under a statute, not admitted to show ownership of a coach); Wis. Stats. 1919, § 1747*a*–1 (certified copy, by register of deeds or Secretary of State, of registered trademark, to be evidence of ownership of the mark). Compare the statutes collected *post*, § 1680.

express authority to certain officers to record deeds of conveyance (and sometimes other classes of deeds) presented to them by private persons for the purpose; and the question presented is, Whether, assuming that the non-production of the original is sufficiently accounted for (*ante*, § 1224), this *official record* (or a copy) is admissible as evidence of the *deed*, *i. e. of its contents and its execution*.

1. If the question had been merely of the deed's *contents*, no difficulty would probably have been felt; for the authority to record 'verbatim' the terms of the deed might easily have been construed as sufficient, under the general principle (*ante*, § 1639) to render the record admissible, being a record kept under an express official duty.

2. The real obstacle came from the consideration already discussed (*ante*, § 1635) that, as regards the *execution* of the deed by the purporting grantor, the registrar would ordinarily have no personal knowledge whatever. He would sufficiently enter, as of his own knowledge, the terms of the writing presented to him; not even his testimony on the stand could be any stronger evidence than his contemporary transcription of the document lying before his eyes. But how could he know that it was in fact executed, as it purported to be, by J. S., and, therefore, how could his entry to that effect be admissible? Could the statutory authority to record, even when expressly given, suffice to admit his entry, not merely of the document's terms as seen by him, but of a fact which he did not see and apparently had no means of knowing?

So far as any general principle affected the situation, it would prescribe merely this (as already noted in § 1635), viz. that the statutory authority to record would not suffice to admit the record to prove a matter occurring without the officer's personal knowledge, unless the *statute also directed* or implied that the officer *should be furnished with the means of knowing, or should make some investigation of the facts, and should record only after taking such means of adequately informing himself*.

3. It is in harmony with this general principle that the Courts dealt with the admissibility of the record of a deed. Where the statute had provided the registrar with the means of informing himself, before registration, of the authenticity of the deed, this was regarded as a sufficient authority to admit the record, though not made on personal knowledge, to prove the execution; and where the statute had failed to provide such a means and to impose such a duty (as usually with chattel-mortgages), this was regarded as a fatal objection. The express authority to record was universally regarded as intended by the Legislature to furnish, not merely a notice of claim of title, but also a means of evidencing the deed, and the inclination was therefore to receive the record; the only obstacle felt was as to the propriety of receiving the registrar's entry of a fact (viz. execution of the deed) not personally known to him; and this obstacle disappeared where the statute authorized and required a means of sufficiently informing the official on this point.

In the legislation of the newer jurisdictions, and in the newer legislation of some of the older ones, the statutes expressly declare the record admissible, and thus the question is there no longer a judicial one. But the theory upon which the Courts treated the earlier statutes has usually served as the foundation of the newer legislation. In the following passages various phrasings of it are found:

Circa 1658, Sir MATTHEW HALE, L. C. J., in his "Treatise showing how useful, safe, reasonable, and beneficial the Inrolling and Registering all Conveyances of Lands may be to the Inhabitants of this Kingdom," printed in "Two Tracts," [1] p. 29: "If every man that brings a deed should have it inrolled without acknowledging it by him that made it, any forged deed may be inrolled, and men in a little while may lose their estates by the countenance that a forged deed shall receive by the being enrolled among the public records of the office."

1864, SAWYER, J., in *Landers* v. *Bolton*, 26 Cal. 393, 405 (repudiating the argument that a deed without acknowledgment is a nullity even between the parties): "The acknowledgment is only the mode provided by law for authenticating the act of the parties, so as to entitle the instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence. By sections 10, 11, 14, and other sections of the Act, the execution of the conveyance may be proved [to the officer] by the subscribing witnesses; and when the subscribing witnesses are dead or cannot be had, the end may be accomplished by proving the handwriting of the party and of the subscribing witnesses by other witnesses; and upon such proof the officer may make his certificate thereof, and the instrument thereafter becomes entitled to record and to be read in evidence without further proof; and this may be done years after the actual making of the deed, and even after the parties and witnesses to it are dead. . . . The question is in our opinion one of preliminary proof. If acknowledged or proved [to the officer] in pursuance of the statute, the instrument is admissible without further proof; if not, it must be proved [to the Court] according to the ordinary rules of law applicable to the subject."

1870, MCCAY, J., in *Eady* v. *Shivey*, 40 Ga. 684, 686: "Why should not the existence of a proper record be evidence of the existence and contents of a lost original? To go to record, a deed must be probated, either executed or acknowledged before a magistrate, or proven by the affidavit of one of the witnesses. The very object of the record is to preserve a copy of the deed to be used if the original is lost or destroyed; and it would largely lessen the uses of a record if it were necessary before it could be used to prove the existence of the original by other evidence. . . . Unless there be forgery or false swearing, nothing but a genuine existing deed can go upon the record properly, and the copy will show upon its face if the requirements of the statute have been complied with. We recognize fully the rule that the genuineness and existence of an original must be shown before the contents of it can be shown by secondary evidence. But in our judgment this is done by evidence that there is a duly executed record of what purported to be an original duly probated according to law."

1872, GRAY, J., in *Gragg* v. *Learned*, 109 Mass. 167: "[The reason for admission is that] our statutes allow no deed to be recorded until it has been acknowledged by the grantor or proved by subscribing witnesses before a magistrate."

§ 1648. [1] Cited *post*, § 1650.

4. The *mode of informing the registrar* (commonly termed "proving" or "probate"), as provided by the earlier statutes, was twofold, — either the *acknowledgment* of the grantor or the testimony of an *attesting witness*, each to be given *before the registrar* personally. It will be seen that by the former method — acknowledgment — the registrar does obtain a personal knowledge; for the acknowledgment is in truth, not merely an admission, but an adoption of the deed as his act; as an admission, it might be regarded as available only against himself and his privies,[2] but in its true aspect as an adoption, it is virtually a reëxecution of the deed;[3] and the registrar could testify to the execution from personal knowledge as well as if he had seen the signature written. By the other method — the attesting witness' oath — the registrar acts upon virtually the same kind of evidence that would have sufficed in court; so that the registrar's entry is after all based upon no mean quality of evidence. In most statutes, other sources of evidence, analogous to such as would have sufficed even in court (*ante*, § 1511) — for example, testimony to the signature of a deceased grantor or witness — are authorized for the registrar.

By another type of statute, common in the newer jurisdictions, and based in part upon the inconvenience of travelling long distances to make acknowledgment or proof to the registrar in person, the proof or acknowledgment is authorized to be made before *some other officer* — usually a *notary* or a *magistrate;* and this is the general rule for deeds executed out of the jurisdiction. But the principle is here no different; the registrar's functions are merely (as it were) subdivided. The registrar does not himself take the proof or acknowledgment; but he cannot record until it has been taken by some one; and as long as a means is provided for satisfying the registrar that such proof or acknowledgment has been made to a proper officer, it is immaterial that it is not made to the registrar. Hence the statutory machinery which provides for the authentication by seal, or the like, of the certificate of proof or acknowledgment by the notary or magistrate. The two officers speak together in the record; the registrar's function has been delegated, but this delegation is merely a convenient modern expedient for providing in the register-book an official testimony, based on personal knowledge or on lawful evidence, to the execution of the deed.

So the sum and object of these provisions, which occupy so much space in the statutes, is the building up, in the register-book, of a trustworthy official statement, based upon personal knowledge or its equivalent, that *the deed purporting to be executed by J. S. was in fact executed by him.*

It will be seen, in the rulings to be cited in the ensuing sections, that the

[2] This was the attitude taken in some of the English rulings.

[3] 1882, Woods, J., in Nye *v.* Lowry, 82 Ind. 316, 320: "The signature of a grantor in a deed, written by another at his request, or though written without his knowledge, if adopted by him as his own, has the same validity as if written by his own hand; indeed, within the meaning of the law, it becomes his proper handwriting, and the deed so signed is of the same validity as if written by his own hand."

steady inclination of the Courts (when not controlled by express statute) is to admit the register, as evidence of execution, whenever some statutory means is provided for informing the recording officer, and to reject it, when no such means is provided. It is this general principle which serves alike as the key to the admissibility of registers of deeds and to the inadmissibility of shipping registers (*ante*, § 1647), of registers of patent assignments (*post*, § 1657), and of records of chattel-mortgages (*post*, § 1651). In some form or other, it must be invoked in any efficient system of evidencing the execution of documents by official records.

5. It is impossible, in this place, to examine the voluminous details of the statutes providing for acknowledgment and probate before registrars, as provided in the different jurisdictions for different classes of documents. The subject is after all one of substantive law; for the primary object of the registration system is to provide notice of claims, and to validate titles with reference to the recording of the muniments of title; and the provisions concerning acknowledgment and proof raise primarily the question whether a deed has been lawfully recorded. The inquiry here concerns the subject of evidence offered in court, and not the matter of "proof" before a registrar or a notary. It is enough to have noted here that the general principle upon which Courts have proceeded is that the registrar's entry, to be admissible, must have been founded on adequate sources of knowledge, specified by the administrative law and authorized to be employed by him.

§ 1649. **Same: Register admissible only to prove Deeds lawfully Recorded.** The registrar's entry is admissible only because he had authority to enter certain things (*ante*, § 1632), and this authority (as already noted) he here derives entirely from statute. The statute specifies the kind of document that may be recorded, the time for recording it, and (if acknowledged or proved before another officer) the various certificates, seals, and the like, which it must bear when presented to him for record. So far as the registrar records a document not fulfilling the statutory description, he acts without authority. Accordingly, the register or record of a *document not authorized by statute is not receivable as evidence of its execution:*

1813, OWSLEY, J., in *Eastland* v. *Jordan*, 3 Bibb 186, 187: "It is clear the clerk had no authority to admit the deed to record unless it had been acknowledged by the party or proven by two witnesses at least. He having therefore certified its admission to record upon the oath of one witness, it is evident he exceeded his authority, and no advantage can be derived from its being recorded. The deed could not therefore have been used as evidence unless [other] proof had been made of its due execution."

1821, MILLS, J., in *Womack* v. *Hughes*, Litt. Sel. C. 291, 294: "The Acts directing the mode of recording deeds do not direct that they shall thereafter be given in evidence in any court on the trial of an issue without any other proof than the 'ex parte' authentication which entitles it to a place on its own record; nor is there any statutory provision which so directs, within the recollection of the Court. But the common-law principle relative to enrolled deeds has been uniformly applied by this Court to deeds recorded according

to our statutes. It is not, however, every placing a deed upon record which makes it a recorded deed. The statutes usually point out the officer or Court before whom the deed is to be acknowledged, what the acknowledgment shall consist of, and how and to whom it shall be certified, and they are equally positive as to the time in which the different acts shall be done. Within these periods the recording officers have authority to record the instrument; afterwards, such authority ceases."

1860, HANDY, J., in *Lock* v. *Mayne*, 39 Miss. 157, 164: "The object of statutes authorizing a deed to be acknowledged or proved is, not to establish the instrument as the deed of that party for all purposes, but to entitle it to be recorded. If that object is carried out by having it recorded, the deed is thereby so solemnized as to make the record original evidence without further proof of its execution upon an issue of 'non est factum.' But if not recorded, it is not clothed with that solemnity, the purpose of the acknowledgment not having been consummated; and it stands as matter *in pais*, and must be proved according to the general rules of evidence."

Whether the deed has been in every respect lawfully recorded depends upon the provisions of the administrative law prescribing the recorder's duties, — a subject beyond the present purview. The principle, as expounded in the above passages, is everywhere unquestioned, and is constantly illustrated in its application to various details (*post*, § 1651).

With this survey of the general principle, there come now to be considered, first, the state of the law in the various jurisdictions, and, next, sundry minor questions involving the use of deed-registers.

§ 1650. **Same : History of the Law in England.** No general system of registration of deeds was ever adopted in England down to the end of the 1800s.[1] But statutes of a narrow scope had existed for several centuries. These statutes, seven in substance, covered, first, all deeds in the ancient form of bargain and sale, and, next, all deeds whatever for the counties of York

§ 1650. [1] Under the Commonwealth, it is true, this reform, with many others, had been proposed and nearly achieved; indeed, these proposed reforms, long afterwards effected, would have gained nearly two hundred years for England in many parts of the law (as noted *post*, § 2036, n. 20). But the Restoration of Charles II repudiated their results or blocked their beginnings. The following bill was based on the deliberations of Whitlocke, Lisle, and Lane: 1658 (*?*), Draught of an Act for a County Register; printed in "Two Tracts on the Benefit of Registering Deeds," 1756 (all deeds of certain sorts are to be registered, after being acknowledged before a justice of the peace, who "shall either know the party so acknowledging or be informed by credible witnesses that such party is the same mentioned in the deed"; and "every deed or bond indorsed, registered, and attested by the stamp of the registry, shall and may be given in evidence upon all occasions, as any deed enrolled in a court of record, without further proof"; and if the original is "lost or mislaid, so as the same cannot be produced," then "a copy of the same deed or bond so registered" may be used "as if the said deed or bond were produced under the hand and seal of the party that acknowledged the same"). The debates on this proposal are mentioned in Oldmixon's History of England, II, 409; see also Sir Matthew Hale's Treatise, quoted *ante*, § 1648; and Mr. Robinson's "Anticipations under the Commonwealth of Changes in the Law" (Juridical Society Papers, III, 567), now printed in Vol. I of Select Essays on Anglo-American Legal History, 1907).

One of the reasons for the long opposition to a registration system in England is noticed elsewhere (*post*, § 2219).

On the Continent, the relatively early existence of a system of municipal registration of deeds was due to special historical influences; compare Schroeder, Deutsche Rechtsgeschichte, 1902, 4th ed., p. 702; Bresslau, Handbuch der Urkundenlehre, 1889, I, pp. 551–555; Stobbe, Handbuch des deutschen Privatrechts, 3d ed., § 67; Aubert, Grundboegernes Histori i Norge, Danmark, og tildels Tyskland, in Zeitschr. f. Savignystiftung, XIV, 1; Brissaud, History of French Private Law, 1912, § 502 (Continental Legal History Series, vol. III).

and Middlesex and certain Crown lands. In some of them a means of probate by witnesses before the registrar was provided for, and in some of these the grantor's acknowledgment was also sanctioned; in two alone (the North Riding of York and Crown lands) was it expressly declared that the registry copy should be admissible to prove (apparently) the deed's execution, and this only where the original was accidentally destroyed.[2] There was therefore ample opportunity for the judicial development of a principle to test the admissibility of such registers as evidence of the recorded deed's execution.

But the rulings unfortunately present only a perplexing conflict. Up to the middle of the 1700s, it may be gathered that the enrolment (or registry) of a deed belonging to the class authorized or required to be enrolled was regarded as admissible. But it was otherwise for deeds enrolled (as was not uncommon, for example, for safe custody in a court) without statutory authority; although, even for these last, the enrolment was receivable as against the party enrolling, because it virtually contained his admission.

[2] 1535–36, St. 27 H. VIII, c. 16 (no estate, etc., to take effect by bargain and sale, unless in writing and enrolled; "to thentent that every partie that hath to do therewith may resort and see theffecte and tenour of every suche writing so enrolled"); 1703, St. 2 & 3 Anne, c. 4 (West Riding of York; a "memorial" of deeds and wills of land to be registered; the memorial to be "put into writing" under the hand and seal of a grantor or a grantee, and an attesting witness to prove the "signing and seal of the said memorial and the execution of the deed or conveyance mentioned in said memorial" before the register; the deed, conveyance, or will to be produced to the register and indorsed by his certificate, which is to be "evidence of such respective registryes"); 1706, St. 5 & 6 Anne, c. 18 (same district; statute extended to bargains and sales acknowledged by the bargainor before the register and indorsed and enrolled by him; all such deeds so indorsed, and all copies of the enrolment, to be "as good and sufficient evidence" as any enrolled at Westminster); 1707, St. 6 Anne, c. 35 (East Riding of York; foregoing statutes extended to this district); 1709, St. 7 Anne, c. 20, § 1 (Middlesex; any deed or will may be put into a "memorial" and registered, if an attesting witness prove an oath before the register or a Master the execution of the deed and of the memorial, or, if a will, of the memorial; the memorial for a deed to contain the principal items of it, and to be executed by a party or representative, and attested, etc., and for a will, by an heir, etc.; the deed or will itself to be produced to the register at the time of recording, who is to indorse upon it a certificate of recording, "which certificates shall be taken and allowed as evidence of such respective registries in all courts of record"); 1711, St. 10 Anne, c. 18 ("for supplying a failure in pleading or deriving a title" under bargain and sale according to St. 27 H. VIII, *supra*, "where the original indentures of bargain and sale, to be shewed forth and produced, are wanting, which often happens," especially where part of the land has gone to different persons, it is enacted that whenever such deed is pleaded with profert, it shall be sufficient to produce "a copy of the inrollment of such bargain and sale; and such copy, examined with the inrollment, and signed by a proper officer having the custody of such inrollment, and proved upon oath to be a true copy, so examined and signed, shall be of the same force and effect" as the profert of the deed itself); 1734–35, St. 8 Geo. II, c. 6 (provisions of the above York statutes extended to the North Riding thereof; with the addition that the person signing the memorial may make proof by acknowledgment of the deed before the register; by §§ 22, 23, any deed, etc., after a specified date may be enrolled in full and proved by a witness and indorsed as in case of a memorial, and then copies signed by the register and attested by two witnesses shall be "good and sufficient evidence" of such deed, etc. "destroyed by fire or other accident"); 1821, St. 2 Geo. IV, c. 52, § 8 (Crown lands; leases, etc., are to be enrolled, with the same effect as if in a court of record at Westminster); 1832, St. 2 W. IV, c. 1, § 26 (enrolment of Crown possessions; the memorandum of the Keeper of the Records shall be "sufficient proof of the deed, etc., having been duly executed, etc.," by the purporting parties).

No attempt is here made to present the provisions of the modern English acts for registration of title (culminating in St. 1897, 60 & 61 Vict. c. 65).

This much is fairly to be inferred from the somewhat obscure rulings;[3] and it is clearly laid down, in accordance with strict principle, by Chief Baron Gilbert, writing in the early 1700s:

Ante 1726, GILBERT, C. B., Evidence, 24, 97: "Where the deed needs enrolment, there the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deeds by enrolment is also empowered to take care of the fairness and legality of such deeds. . . . But where a deed needs no enrolment, there, though it be enrolled, the 'inspeximus' of such enrolment is no evidence; because since the officer hath no authority to enrol them, such enrolment cannot make them public acts."

It will be noticed that, in the foregoing passage, the author, intent on stating his general principle, omitted to note that the enrolment even of a deed not required to be enrolled might still be admissible against the enrolling party as embodying his own admission of execution. Forty years later, Mr. Buller (afterwards Justice), having apparently in mind this passage of Chief Baron Gilbert's, wrote, in his Trials at Nisi Prius (which is indeed based largely on the other writer's text[4]) as follows:

1763, BULLER, J., Trials at Nisi Prius, 255: "It has been said that a deed of bargain and sale enrolled may be given in evidence without proving the execution of it, because the deed by law does need enrolment, and therefore the enrolment shall be evidence of the lawful execution; but that where a deed needs no enrolment, there, though such deed be enrolled, the execution of it must be proved, because since the officer is not intrusted by the law to enroll such deed, the enrolment will be no evidence of the execution. . . . However, the law may well be doubted. . . . [It seems] absurd to say that a release, which has been enrolled upon the acknowledgment of the releasor, should not be admitted in evidence against him, without being proved to be executed, because [*i. e.* for the alleged

[3] 1441, Anon., Y. B. 19 H. VI, pl. 11 (Newton: "For the enrolment of a deed is for no other purpose than that the party whose deed it is cannot deny the deed after enrolment; for if I enrol my deeds of record, and I lose them, I shall not have advantage of the record"; which was conceded by the whole Court); 1613, Read *v.* Hide, 3 Co. Inst. 173 (discharge of tithes offered to be proved by an exemplification, under the great seal, of a copy of the Pope's bull of discharge in a volume of monastery records; "by the opinion of the whole Court, . . . neither deed, charter, or other writing, either sealed or without seal, ought to be exemplified under the great seal or any other seal in court of record," and "therefore where this statute [of forgery, 5 Eliz. c. 14, not extending to exemplifications] or any other statute or book speaks of an exemplification . . . of a deed, etc., it must be intended of a deed inrolled . . . which is of record"); 1661, Eden *v.* Chalkill, 1 Keb. 117 (enrolled deed other than one of bargain and sale not provable by enrolment-copy "because it was needless," *i. e.* not required by law); 1667, Kirby *v.* Gibs, 2 Keb. 294 (an 'inspeximus' of a lease, excluded, "being a private deed and may be forged"; otherwise of a record); 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 595 (deed enrolled, proved by examined copy); 1694, Smart *v.* Williams, Comb. 247 (a deed of bargain and sale acknowledged by the bargainor and enrolled was given in evidence without any proof of the bargainor's sealing and delivery; admitted, "for the acknowledgment of the party in a court of record, or before a master extraordinary in the country (as this was), is good evidence of it being sealed and delivered; . . . it is the acknowledgment which gives it credit"); 1697, Taylor *v.* Jones, 1 Ld. Raym. 746 (a deed declaring the uses of a fine; enrolled copy sufficient, "because inrolment was at common law, and that for some purpose"); 1702, Holcroft *v.* Smith, 2 Freeman 259 ("A difference was taken where the estate passeth be the inrollment," in which case the enrolled deed "is an evidence"; but otherwise where it is only enrolled "for safe custody," in which case it is receivable only against the party and his privies); 1707, Combs *v.* Dowell, 2 Vern. 591 (a deed declaring the uses of a fine, and enrolled "for safe custody," allowed).

[4] For an account of the composition of that book, see Thayer, Preliminary Treatise on Evidence, 471.

reason that] such release does not need enrolment; and in fact such deeds have often been admitted."

Now the truth seems to be that "the law" which Mr. Justice Buller here thought "may well be doubted" was not Chief Baron Gilbert's general statement as to the admissibility of enrolments required by law, but his failure to make the qualification that even an enrolment *not* required by law was admissible to prove the deed as against the particular person acknowledging it. The context, when properly read, fairly indicates this to be Mr. Justice Buller's meaning; and it thus stands in harmony, not only with the tenor of previous rulings, but also with Chief Baron Gilbert's rule, for which it merely points out the correction of an obvious omission. Nevertheless, the language of Mr. Justice Buller's exposition was capable of a misunderstanding; and he seems to have been misread in later times as asserting that "the law" of Chief Baron Gilbert's main proposition "may well be doubted," *i. e.* as doubting whether the enrolment of a deed legally required to be enrolled may be given in evidence "without proving the execution of it." Buller's book was much in vogue in the next fifty years; and it is probably something more than a mere coincidence that doubts arose in that period as to the correctness of the sound principle so clearly laid down by his predecessor. At any rate, by the beginning of the 1800s the rulings bear increasingly against that proposition.[5]

By the end of the first half of the 1800s the opinion seems clearly to prevail in England that it is not the law; as the following passages indicate:

1824, Mr. *Thomas Starkie*, Evidence, 412: "It would be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged them, without proof of the execution of the deeds; . . . and although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle that it is not probable it would now be acted upon."

1847, *Doe* v. *Clifford*, 2 C. & K. 448, 452; a copy of the registry-memorial of a Mid-

[5] 1803, Hobhouse *v.* Hamilton, 1 Sch. & Lefr. 207 (attested copy of recorded memorial of lost deed of assignment of judgment, not admitted to prove contents, the original memorial being required; but admitted to prove the fact of assignment, because the record was conclusive under St. 9 Geo. II, c. 5; Redesdale, L. C., "compared it to the case of enrolment of a deed, the office copy of which is evidence against the party, because the statute makes it evidence; and in that case if a person not the attorney of the party acknowledges a deed in his name, and it is enroled on that acknowledgment, the enrolment binds"); 1809, Mansfield, C. J., in Fraser *v.* Hopkins, 2 Taunt. 5, 6 (rejecting a ship's register to prove ownership: "In all cases of enrolments, the deed itself, and not the enrolment, is evidence);" 1811, Baikie *v.* Chandless, 3 Camp. 17 (enrolled annuity; copy examined with the enrolment, admitted; Ellenborough, L. C. J.: "The act of Parliament requires the memorial carried in to be inrolled correctly, and I must presume that those concerned do their duty under the act. The inrolment is a sort of statuteable record"); 1811, Tinkler *v.* Walpole, 14 East 226, 231 (ship's register not admitted to show ownership; Ellenborough, L. C. J., remarking that "the case of inrolments stands upon a particular statute," viz. 10 Anne); 1812, Gibbs, J., in Pirie *v.* Anderson, 4 Taunt. 652, 656 (referring to a ship's register: "It resembles the case of enrolling a deed; a person cannot by enrolling it prove that he has a good title"); 1825, Jenkins *v.* Biddulph, Ry. & Mo. 339 (an enrolment under a statute 2 Geo. IV, c. 52, § 8, making such enrolments "as good and available" as if enrolled in a court of records, etc., held not to dispense with proof); 1838, Collins *v.* Maule, 8 C. & P. 502 (examined copy of a Middlesex registry of deed, objected to because "not evidence of the deed as against third persons," in the absence of statutory sanction; admitted by Tindal, C. J., with some hesitation).

dlesex deed was offered, the original deed being unavailable; Mr. *Knowles* (opposing): "The Stat. 7 Anne, c. 20, does not, by any express enactment, make these memorials evidence," ALDERSON, B.: "Then the memorial is only evidence against the persons who register the deed and persons claiming under them. . . . If there is no clause in the act of Parliament making the memorial evidence, . . . then the memorial amounts to this: 'A. B. states the contents of a deed which he has executed,'" and is evidential against himself only.

Mr. Starkie's statement as to the understanding of the profession in his time seems to represent accurately the final attitude of the English courts on this subject. But his concession that "an opinion once prevailed" to the contrary seems equally correct, in the light of the evidence just considered. An interesting corroboration of this appears in the circumstance that the earliest American rulings (representing the understanding and practice brought over from England) harmonize with this view, and reproduce, in dealing with our early registration systems, the very principle so lucidly laid down by Chief Baron Gilbert.[6] The language of these earliest rulings, moreover, indicates that the result is reached in a natural manner, through custom and professional tradition, and not as a matter of original reasoning. The principle of Chief Baron Gilbert was to our early judges an inherited common-law principle, and is constantly thus referred to in their opinions.[7]

The orthodox principle, then, of the common law on this subject is to be found carried out in the earlier English practice and the subsequent American practice; it is in the English doctrine of the 1800s that a break occurs in its continuity.

§ 1651. **Same: State of the Law in the United States and Canada.** The history of the registry-system in the colonies and the original States is an interesting subject.[1] In every jurisdiction where the inquiry came before the Courts,[2] the conclusion was reached that the register was admissible on common-law principles as evidence of the execution and contents of the recorded deed.[3] In only a few of the earlier States was this result expressly provided for by statute. But as time went on, and other States were formed, express statutory declarations became common; and now in virtually every jurisdiction [4] such provisions exist.

[6] Compare the passage of Gilbert, *supra*, with the quotations *ante*, §§ 1648, 1649.

[7] See, for example, Womack *v.* Hughes, quoted *ante*, § 1649, Knox *v.* Silloway, Barbour *v.* Watts, in § 1651, *post*, under Maine and Kentucky, and the quotations given under § 1224, *ante*, where the rule about producing the original is dealt with; see also the early cases in South Carolina and Virginia, cited in § 1225, *ante*.

§ 1651. [1] The earliest act judicially cited seems to be that of South Carolina in 1698 (1 Bay 37). John Locke's charter of 1669, for the Carolinas, had contained such a provision. But it is known that a registration system was also a feature of the law of the colonies of Plymouth, Virginia, and Maryland, before the end of the 1600s. These probably all had their origin in the public discussion of the subject under the Cromwellian Commonwealth. But it is noticeable that Royalist and Puritan colonies alike adopted the expedient. See Professor Joseph H. Beale's article on the Origin of the System of Recording Deeds in America (Green Bag, 1907, XIX, 335).

[2] Except California, Louisiana, Michigan, and Missouri.

[3] Though in many courts only when the original deed was shown unavailable; the history of that other rule is briefly examined *ante*, §§ 1224, 1225.

[4] There remain only Connecticut, Maryland (domestic deeds), Massachusetts, and apparently Virginia.

For judicial rulings, then, the field is now restricted chiefly to two classes of questions, — the kind of document thus provable, and the regularity of the recording under the statutory requirements. The general principles (*ante*, §§ 1648 and 1649) serve still as the foundation of decision for cases not expressly covered by statute; but the mass of decisions are concerned with the details of registration-requirements, and are therefore without the present purview, both as dealing with substantive law and as concerning the verbal interpretation of local statutes. It is enough here to note the terms of the statutes that declare a rule of evidence and the decisions illustrating the general principle.[5]

[5] In the following list are placed, first, the statutes, and, next, the decisions; but a detailed examination of the statutory history is here impossible, so that it must be understood that many of the decisions antedate the statutes or at least the statutes in their present form, and only in special instances can the relation of statute and ruling be noted.

In this list the *rulings* given without detailed notes of their terms signify rulings declaring the register (or a certified copy; see § 1655) *admissible provided the instrument is lawfully recorded or inadmissible because the instrument is not lawfully recorded;* and no attempt is made to note the particular irregularity (defective acknowledgment, wrong county, period for record expired, etc.) causing exclusion, for here the countless details of local statute and substantive law are involved; except that a ruling affecting a *class of documents* (*e. g. chattel mortgages*) is so noted, when it involves the general principle (*ante*, § 1648) requiring the record to be based on a system of acknowledgment or proof. In almost all the instances the evidence admitted is a *certified copy* of the register, but this involves the same principle (as explained *post*, § 1655).

The *statutory* provisions are here summarized without noting their terms as to *accounting for non-production of the original;* on this point they are summarized *ante*, § 1225. Moreover, general statutes declaring the record admissible are alone noted, omitting minor statutes declaring *documents of certain kinds or of certain districts* entitled to record or *curing defects of record* under earlier laws. Statutes sanctioning the use of records reestablished in place of *lost records* are noted *post*, § 1682. Statutes authorizing the recording of *abstracts of title* ("burnt record" acts) are dealt with *post*, § 1705. Statutes authorizing the use of copies of a *registered title* are placed here, but their principle is explained *ante*, §§ 1239, 1647. Statutes allowing the execution of the *original deed* to be proved by the *certificate of acknowledgment* appended are dealt with *post*, § 1676.

CANADA: *Dominion:* R. S. 1906, c. 145, Evid. Act § 27 (similar to Ont. R. S. c. 76, §§ 33, 34); § 28 (reasonable notice, not less than ten days, required before using such copies); 1910, Musgrave *v.* Anglin, 43 Can. Sup. 484 (certified copy of will by Quebec notary; stated more fully *post*, § 1681).

Alberta: St. 1906, c. 24, § 17 (land-title registry; the registrar's exemplification or certified copy of "any instruments affecting lands which are deposited, filed, or registered in his office" is admissible "in the same manner and with the same effects as if the original was produced"); St. 1910, 2d sess., Evidence Act, c. 3, §§ 36, 37 (like Ont. Rev. St. c. 76, §§ 33, 34); ib. c. 3, §§ 48, 49 (instrument deposited, kept, or registered with the registrar or deputy registrar of land-titles, provable by certified copy under seal; except that "where a public officer produces upon subpoena an original document, it shall not be deposited in court unless otherwise ordered," but a copy certified by the producing officer shall be filed).

British Columbia: Rev. St. 1911, c. 78, § 38 (like Dom. Evid. Act § 27); § 39 (like ib. § 28); § 45 (for certified copies of registered instruments, ten days' notice at least must be given to the opponent, and the certified copy shall then suffice unless the opponent within four days after receipt gives notice of intention to dispute the original's validity); c. 127, § 145 (registrar's certified copy of any recorded instrument, except a will, admissible "without further proof"); c. 78, § 44 (certified or exemplified copy, under seal of the registrar, of any instrument deposited or registered in a land-office or registry of a county or the Supreme Court is admissible as evidence "of the original," without proof of the registrar's signature or seal); c. 127, § 9 (registrar's certified transcript of all instruments, etc. "made for the purpose of the establishment of district offices" of land registry admissible); c. 127, § 147 (quoted *ante*, § 1225, n. 1); St. 1914, 4 Geo. V, c. 26, § 2 (amending Rev. St. 1911, c. 78, § 50, by substituting "twenty-five" for "ten"); 1899, Pavier *v.* Snow, 7 Br. C. 81 (certain certificates, etc., admitted under R. S. 1897, c. 135, § 98, without notice).

Manitoba: Rev. St. 1914, c. 171, § 169, Real Property Act (a certified copy, by the district registrar under official seal, of a certificate of land title or any instrument deposited

or registered in such office, is admissible to prove "due execution of the original," and "without proof of the signature or seal" of office of the district registrar); Registry Act, c. 172, § 50 (registrar's certificate of registration of an instrument shall be evidence of the registration "and due execution of the instrument," without proof of the signature of the registrar); § 51 (registrar's certified copy of a registered instrument, with the exception of crown grants and other specified instruments, shall be evidence "of the contents of and of the execution of the original instrument"); § 76 (registrar's certified copy under seal of an instrument duly registered shall be evidence "of the facts and matters therein stated, without proof of the registrar's signature or seal"); § 77 (registrar's certified copy under seal of an instrument duly registered shall be receivable "without proof of the due execution of the original, as 'prima facie' evidence of the original instrument and the due registration," without proof of the registrar's signature or office); c. 17, § 19 (clerk's certified copy under court seal of bill of sale or mortgage of chattels is to be evidence of the registration only); c. 65, § 18 (Quebec notarial instruments; like Dom. Evid. Act, § 27); § 22 (like ib. § 28).

New Brunswick: Consol. St. 1903, c. 127, § 33 (Crown grants made before the erection of the Province, provable "as hereinbefore provided"; compare § 1680, *post*); c. 127, § 71 (registrar's certified copy of a filed bill of sale is to be evidence of the filing and the time thereof); c. 127, § 48 (a deed or will registered in the sheriff-court books of Scotland is provable by certified copy of the custodian under the sheriff's seal, if accompanied by affidavit of comparison with the original and of the genuineness of the seal); c. 127, § 69 (notice of sale under mortgage, provable by certified copy; cited *ante*, § 1225); c. 151, § 57, St. 1920, c. 6, § 57 (all certified copies by the registrar of instruments duly registered "shall be allowed"); c. 127, § 63 (registered instruments, other than wills, are provable by certified copy; cited *ante*, § 1225); c. 127, § 70 (instruments filed under the bills of sale act of 1893 are provable by certified copy; quoted *ante*, § 1225); c. 127, § 32 (plan or record of survey on file in the Crown Lands office, provable by surveyor-general's or deputy's certified copy, without proof of official character or seal); c. 127, § 62 (any decree etc. qualified for registry and registered under the Registry Act, and any certified copy by the registrar, is admissible); 1844, Smith *v.* Millidge, 2 Kerr 408, 413; 1857, Doe *v.* Rideout, 3 All. 502; 1892, Doe *v.* McLean, 31 N. Br. 474 (requirement of notice construed).

Newfoundland: Consol. St. 1916, c. 91, § 22 (a duly registered "deed or document" may be proved by the registry or a "certified copy thereof by the registrar, without further proof"); St. 1921, 12 Geo. V, c. 21, § 27 (certificate of title after proceedings to quiet title; certified copy of record, admissible).

Northwest Territories: Consol. Ord. 1898, c. 43, § 30, c. 44, § 9 (execution and contents of mortgages and sales of chattels are provable by the registration-clerk's certified copy).

Nova Scotia: Rev. St. 1900, c. 163, § 20 (crown grants; duplicate original provable by certified copy of the commissioner of crown lands; books of registry provable by certified copy of the registrar of deeds; special provisions for plans not annexed); § 21 ("any deed, or any document from the books of registry," is provable by the registrar's certified copy); § 23 (for copies under § 21, ten days' notice and a schedule of documents must be given, unless the Court dispenses); § 24 ("every bill of sale or other document, filed in any registry of deeds, may be proved" by certified copy of the registrar of deeds); § 25 (the registration is provable by the registrar's indorsement on the deed or copy); § 27 (Quebec notarial instruments; substantially like Dom. Evid. Act, § 27, omitting the proviso); 1905, Bartlett *v.* Nova Scotia S. Co., 37 N. Sc. 259, 264 (certified copies of a plan found in the Crown land-office, not admitted, under Rev. St. 1900, c. 163, § 20; the Court's hostility to the statute, "of which I confess I knew nothing until the present argument," is so strong that its ruling is not to be wondered at); St. 1910, 10 Edw. VII, c. 28 (amending Rev. St. 1900, c. 163, § 27, by requiring ten days' notice of the intention to use such a document, if a will or a deed, unless the judge dispenses); 1905, McDonald *v.* McDonald, 38 N. Sc. 261, 278, 290 (the execution of the original deed need not otherwise be proved when a certified copy of the registry is offered under the Evidence Act, Rev. St. 1900, c. 163, § 21).

Ontario: Rev. St. 1914, c. 76, §§ 33, 34 (a "notarial act or instrument" in Quebec, filed, enrolled, or enregistered, is provable by certified copy of the notary possessing the original; but it may be "rebutted or set aside" by proof that the document is one not lawfully to be taken or filed by a notary, or that it is not a true copy, etc.); § 46 (an "instrument or memorial" is provable by exemplification or certified copy under the hand and seal of office of the registrar, etc. in whose office the same is registered, etc.); § 47 (certain notice required for such copies; cited *ante*, § 1225); c. 122, § 2 (contracts for sale of land; quoted *ante*, § 1225); c. 123, § 126 (registered titles); c. 125, § 37 (chattel mortgage or bill of sale filed; a certified copy by the clerk under seal of Court shall be evidence that the instrument was received and filed).

Prince Edward Island: St. 1889, § 42 (duly registered deed or mortgage is provable by the registrar's certified copy, as "evidence of the contents of the original"); § 44 (public lands commissioners' duplicate deed, deposited in his office, is provable by a certified copy under seal by him or the assistant, as evi-

dence "of the due execution and of the contents of the original"); § 45 (registered plan, provable like a deed); § 46 (Surrogate's registered license to sell real estate, provable by the Surrogate's certified copy under seal); § 49 (filed bill of sale or mortgage of chattels is provable by certified copy of the custodian under seal of the Supreme Court, as "evidence of the contents" and the filing).

Saskatchewan: Rev. St. 1920, c. 67, § 20 (land-titles; like Alb. St. 1906, c. 24, § 17); c. 44, Evidence Act, § 21 (any instrument filed or registered in a land registration district, provable by the registrar's certified copy); c. 44, § 18 (Quebec notarial act; 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 copies shall be "'prima facie' evidence of the execution of the original instrument," and of the date, etc.); c. 30, § 11 (grants, etc., quoted *post*, § 1680); ib. §§ 19, 20 (provisions for proof of copies of town-site allotments, Crown grants, etc.; compare N. Sc. Rev. St. 1900, c. 163, § 20); ib. § 21 ("A copy of any deed, or any document on file in the land-titles' office, certified under the hand of the registrar, or proved to be a true copy taken therefrom, shall be taken in evidence in place of the original"); ib. § 23 (similar to N. Sc. Rev. St. 1900, c. 163, § 23, but requiring only five days' notice); ib. § 24 (similar to N. Sc. Rev. St. 1900, c. 163, § 24, for the Gold Commissioner's office); ib. § 25 (similar to N. Sc. Rev. St. 1900, c. 163, § 25); ib. § 26 (similar to N. Sc. Rev. St. 1900, c. 163, § 25, for the Gold Commissioner's office).

UNITED STATES: *Federal:* Code. § 9060 (U. S. internal revenue collector's record of sale of land, provable by certified copy, to be evidence "of the truth of the facts therein stated"); 1802, Edmondson *v.* Lovell, 1 Cr. C. C. 103; 1809, M'Keen *v.* Delancy, 5 Cr. 22; 1816, Sharpless *v.* Knowles, 2 Cr. C. C. 128; 1826, Peltz *v.* Clarke, 2 Cr. C. C. 703; 1830, Beall *v.* Dick, 4 Cr. C. C. 18; 1830, Carver *v.* Jackson, 4 Pet. 1, 81 (for New York law); 1835, Winn *v.* Patterson, 9 Pet. 663, 677; 1850, New York Dry Dock *v.* Hicks, 5 McLean 111, 112; 1858, Thomas *v.* Lawson, 21 How. 331, 338 (for Arkansas); 1865, Secrist *v.* Green, 3 Wall. 744 (for Illinois and New York); 1869, Carpenter *v.* Dexter, 8 Wall. 513, 530 (same); 1897, Union P. R. Co. *v.* Reed, 25 C. C. A. 389, 80 Fed. 234 (power of attorney to convey Nebraska land; record-copy does not dispense with other proof apart from statute; this seems to ignore the preceding rulings; see especially Winn *v.* Patterson).

Alabama: Code 1907, § 3374 (certified copy of a duly recorded "conveyance of property," admissible); § 3395 (similar, 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"); § 4001 ("If the original is found to have been recorded, and it does not appear whether it was done on proper probate, the court shall presume, until the contrary appears, that the same was done on proper probate"); St. 1911, No. 52, p. 31, Feb. 20, § 2 (certified transcript of recorded corporate conveyance, admissible; unless the corporation is in possession and forgery is pleaded); 1832, Mitchell *v.* Mitchell, 3 Stew. & P. 81, 83; 1834, Tatum *v.* Young, 1 Port. 298, 310; 1839, Swift *v.* Fitzhugh, 9 Port. 39, 57; 1839, Smoot *v.* Fitzhugh, 9 Port. 72, 75; 1874, Keller *v.* Moore, 51 Ala. 340; 1878, Sharpe *v.* Orme, 61 Ala. 263; 1879, Hart *v.* Ross, 64 Ala. 96, 97; 1880, Baucum *v.* George, 65 Ala. 259, 267; 1880, Boykin *v.* Smith, 65 Ala. 294, 300; 1881, Dugger *v.* Collins, 69 Ala. 324, 328; 1881, Coker *v.* Ferguson, 70 Ala. 284, 287; 1884, Roney *v.* Moss, 76 Ala. 491; 1885, England *v.* Hatch, 80 Ala. 247, 249; 1886, Tranum *v.* Wilkinson, 81 Ala. 408, 1 So. 201, *semble;* 1889, Patterson *v.* Jones, 89 Ala. 388, 8 So. 77 (statute held to apply to conveyances of personal property also); 1890, Caldwell *v.* Pollak, 91 Ala. 353, 359, 8 So. 546; 1890, Robinson *v.* Cahalan, 91 Ala. 479, 481, 8 So. 415 (mortgage; certified copy admitted as "self-proving"); 1894, Jinwright *v.* Nelson, 105 Ala. 399, 401, 17 So. 91 (statute held to apply to conveyances by corporations); 1895, Postal Tel. Cable Co. *v.* Brantley, 107 Ala. 683, 18 So. 320; 1897, Jones *v.* State, 113 Ala. 95, 21 So. 229; 1898, Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1, *semble* (record of mortgage, admissible); 1899, Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928; 1904, Norris *v.* Billingsley, — Ala. —, 37 So. 564; 1915, Burnett *v.* Roman, 192 Ala. 188, 68 So. 353 (Code § 3374 applied to admit a certified copy of a deed recorded in a county other than the locus of the land).

Alaska: Comp. L. 1913, §§ 525, 532, 534 (substantially like Or. Laws 1920, §§ 9876, 9892, 9894); § 542 (like ib. § 9909); § 497 (married woman's recorded list of personalty, provable by certified copy); § 555 (conveyances of personalty; commissioner's certified copy, admissible, but only to prove the filing); § 747 (mortgage of personalty; recorder's certified copy, admissible "without further proof of the execution of the original").

Arizona: Rev. St. 1913, § 1743 ("Every instrument" permitted or required to be recorded with the county recorder and "lawfully proved or acknowledged," is provable by the record or a duly certified copy); § 4128 (county recorder's certified copy of chattel mortgage, to be evidence of filing, "but of no other fact").

Arkansas: Dig. 1919, § 1531 (record, or recorder's certified transcript, of deed or other instrument affecting real estate, duly recorded, is admissible, the original being lost, etc.);

§ 1535 (deeds of administrators, etc., provable by recorder's certified copy underseal); § 7385 (chattel mortgages; recorder's certified copy, admissible); 1838, Brown *v.* Hicks, 1 Ark. 233, 243 (bill of sale); 1843, Brock *v.* Saxton, 5 Ark. 708 (same); 1853, Dixon *v.* Thatcher, 14 Ark. 141, 146; 1856, McNeill *v.* Arnold, 17 Ark. 154, 169; 1856, Trammell *v.* Thurmond, 17 Ark. 206, 215; 1886, Apel *v.* Kelsey, 47 Ark. 413, 420, 2 S. W. 102.

California: Here the rulings had originally refused to recognize the register as evidence: C. C. P. 1872, § 1919 ("A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record"); § 1951 as amended by St. 1889, no. 45 ("every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code" may be read "without further proof"; "also, the original record of such conveyancy or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, as the original instrument, without further proof"); Civ. C. 1872, § 1207 (certified copy of defective instrument affecting real property recorded before Jan. 1, 1915, admissible; but if recorded within 15 years before trial, the original instrument must first be shown genuine); St. 1915, p. 1932, Nov. 3, No. 1049, in Deering's Gen. Laws, §§ 27, 41, 48, 52 (land title registration; quoted *ante*, § 1225); 1853, Powell *v.* Hendrick, 3 Cal. 427, 430 (recorded agreement, copy and original offered, not evidence of execution); 1862, Touchard *v.* Keyes, 21 Cal. 202, 210 (county recorder's certified copy of Alcalde's deed-records legally put in his charge, receivable; Norton, J., diss., because the Alcalde's records were not made upon any requirement of previous proof of execution); 1862, Clark *v.* Troy, 20 Cal. 219, 223 (deed duly proved and recorded, received without further proof; the recording statute held to apply to deeds theretofore made); 1863, Tustin *v.* Faught, 23 Cal. 237, 239, *semble* (deed duly proved before a notary, etc., received); 1864, Landers *v.* Bolton, 26 Cal. 393, 405 (general principle laid down, that a deed duly proved and recorded may be offered without further proof; see quotation *supra*); 1865, McMinn *v.* O'Connor, 27 Cal. 238, 244 (certified copy of a deed duly recorded, receivable without otherwise proving execution); 1869, Anderson *v.* Fisk, 36 Cal. 625, 635 (certified copy of a recorded deed made prior to statute, receivable, though not acknowledged or proved, the statute treating such deeds as entitled to record and to the evidential benefits thereof); 1869, Garwood *v.* Hastings, 38 Cal. 216, 219 (like Touchard *v.* Keyes; Sprague, J., diss.); 1869, Mayo *v.* Mazeaux, 38 Cal. 442, 449 (general principle declared, as in McMinn *v.* O'Connor); 1872, Moss *v.* Atkinson, 44 Cal. 3, 17 (same); 1874, Jones *v.* Marks, 47 Cal. 242, 248 (same); 1884, Anthony *v.* Chapman, 65 Cal. 73, 76, 2 Pac. 889 (same); 1897, Davis *v.* Impr. Co., 118 Cal. 45, 50 Pac. 7 (same).

Colorado: Comp. St. 1921, § 4901 (for a recorded instrument not duly acknowledged or proved, a certified copy may be "proved or acknowledged" with like effect as the original); § 4903 (a duly recorded instrument may be proved by the record thereof, "whether an original record of any mining district, or a copy thereof deposited in the recorder's office of any county" under the law, "or a record of such recorder's office," "or a transcript from any such record certified by the recorder of the proper county"); § 8741 (recorder's certified copy of "all papers filed" and of records, admissible); § 5052 (certificate of sale by trustee under trust deed, provable by certified copy); § 1374 (recorded sale of automobile; State secretary's certified copy admissible "to prove title"); § 4905 (deeds defectively recorded, to serve as notice, but not to be admissible in evidence unless otherwise proved); § 4907 (instruments affecting real estate in this State, acknowledged or proved before a notary public in a U. S. State or Territory, admissible; also a certified copy of the record); § 5094 (recorded chattel mortgage, provable by certified copy); 1874, Sullivan *v.* Hense, 2 Colo. 424, 431.

Columbia (District): Code 1919, § 1071 (a certified copy, by the keeper of the record, under official seal, of "the record of any deed or other instrument in writing, not of a testamentary character," duly recorded by law, admissible to prove "the existence and contents" and "that it was executed as it purports to have been"); § 519 ("the record or a copy thereof of any deed recorded," but defective and cured by certain sections, is admissible).

Connecticut: Gen. St. 1918, § 1306 (certified copy of a recorded tax-collector's deed, admissible); § 311 (town clerk's or his assistant's certified copy of recorded deeds, to be conclusive evidence of the fact of record); § 319 (town-clerk's certified copy of recorded survey-map, admissible); 1806, Wells *v.* Tryon, 3 Day 490 (copy of record, receivable; here the document was defectively copied); 1808, Talcott *v.* Goodwin, 3 Day 264, 267; 1814, Cunningham *v.* Tracy, 1 Conn. 252; 1847, Kelsey *v.* Hanmer, 18 Conn. 311, 318 ("in all cases where a party is authorized to read in evidence a copy of a deed from the public records"); 1902, Colchester Sav. Bank *v.* Brown, 75 Conn. 69, 52 Atl. 316 (admissible for a deed to a third person; compare the citations *ante*, §§ 1224, 1225).

Delaware: Rev. St. 1915, § 1388 (county deed-recorder's record, or certified copy, of any instrument authorized by law to be recorded, admissible); § 3215 (record or office copy thereof, admissible to prove a duly recorded deed); §§ 3202, 3203 (recorded deeds of trustees for married persons, provable by

certified copy); §§ 3213, 3214 (certain defectively acknowledged but recorded deeds, provable by certified copy); § 3238 (recorded deed by foreign corporation of land in Delaware, provable by certified copy); St. 1917, Apr. 25, c. 235 (validating recorded deeds dated before Jan. 1, 1915); 1835, Roach *v.* Martin, 1 Harringt. 548 (certain old deeds thus provable, even though in strictness not properly recorded); 1837, Porter *v.* Buckingham, 2 Harringt. 197.

Florida: Here the subject has been even placed in the Constitution, by one of those whims which prove that democratic government can be just as misguided and inapt as autocratic government: Art. XVI, § 21 ("A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as 'prima facie' evidence thereof, and of its due execution, with like effect as the original duly proved; provided the original" is duly accounted for etc.); Rev. G. S. 1919, § 1036 (suits on official bonds, etc.; quoted *post*, § 1680); § 2724 (State land conveyances, etc. provable by State commissioner of agriculture's certificate); § 2720 (to "a deed, conveyance, paper, or instrument of writing," lawfully filed or recorded in public office of this State or a county, provable by the custodian's certified copy under official seal, or if none, under private seal); 1896, Parker *v.* Cleaveland, 37 Fla. 39, 19 So. 344.

Georgia: Rev. C. 1910, §§ 5798, 5806 (record in a public office is provable by certified copy); § 4210 (a "registered deed shall be admitted in evidence . . . without further proof," unless the maker or heir or opponent makes affidavit that it is a forgery, whereon an issue of genuineness shall be tried); § 4212 (if the original is lost, "a copy from the registry" is admissible); 1851, Beverly *v.* Burke, 9 Ga. 440, 443, 445; 1853, Jones *v.* Morgan, 13 Ga. 515, 522; 1858, Watson *v.* Tindall, 24 Ga. 494, 502; 1858, Poulet *v.* Johnson, 25 Ga. 403, 409; 1860, Oliver *v.* Persons, 30 Ga. 391, 398 (the mere fact of record, insufficient; proper probate must appear); 1860, Payne *v.* McKinney, 30 Ga. 83, 85; 1861, Gill *v.* Strozier, 32 Ga. 688, 694; 1870, Eady *v.* Shivey, 40 Ga. 684, 686; 1874, Highfield *v.* Phelps, 53 Ga. 59; 1876, Graham *v.* Campbell, 56 Ga. 258, 260; 1876, Gardner *v.* Grannis, 57 Ga. 539, 554; 1877, Eaton *v.* Freeman, 58 Ga. 129; 1877, Hearn *v.* Smith, 59 Ga. 703; 1879, Eaton *v.* Freeman, 63 Ga. 535, 538; 1882, Chapman *v.* Floyd, 68 Ga. 455, 458; 1893, First Nat'l Bank *v.* Cody, 93 Ga. 127, 143, 19 S. E. 831; 1894, Bagley *v.* Kennedy, 94 Ga. 651, 20 S. E. 105; 1898, Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; 1900, Garbutt L. Co. *v.* Gress L. Co., 111 Ga. 821, 35 S. E. 686; 1902, Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; 1902, Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003; 1902, Anderson *v.* Leverette, 116 Ga. 732, 42 S. E. 1026 (recorded bills of conditional sale of personalty, admitted on the same conditions as mortgages); in the following rulings it is held that, under the statutory proviso, there must be other evidence of execution, if the statutory affidavit alleging forgery is made; 1867, Doe *v.* Stevens, 36 Ga. 463, 472; 1869, Hanks *v.* Phillips, 39 Ga. 550, 552 (the proponent must then prove it "as on other papers not required by law to be registered"); 1870, Eady *v.* Shivey, 40 Ga. 684, 687; 1877, Hill *v.* Nisbet, 58 Ga. 586, 589; 1887, Holland *v.* Carter, 79 Ga. 139, 3 S. E. 690; 1898, Anderson *v.* Cuthbert, 103 Ga. 767, 30 S. E. 244 (but the statute does not exclude evidence denying a deed's genuineness even though no affidavit is made); 1902, Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; 1904, Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; 1905, Flint R. L. Co. *v.* Smith, 122 Ga. 5, 49 S. E. 745 (power of attorney); 1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918; 1909, Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. 317 (ancient deed, recently recorded and no affidavit of forgery filed; admitted and burden of proof expounded); 1916, Haithcock *v.* Sargent, 145 Ga. 84, 88 S. E. 550.

Hawaii: Rev. L. 1915, § 3117 ("The record of an instrument duly recorded, or a transcript thereof duly certified," may be admitted, if the opponent shows that proof for record was made "upon the oath of an interested or incompetent person, neither such instrument nor the record thereof shall be received in evidence until established by other competent proof"); §§ 3100–3102 (recorded conveyances out of the Territory but within the U. S.; may be acknowledged before any officer there authorized to do so, with a certificate of the Secretary of State under State seal, or of clerk of a court of record under court seal, attesting the officer's authority, as here prescribed in detail; provisions for acknowledgment of conveyances in foreign countries).

Idaho: Comp. St. 1919, § 7953 (like Cal. C. C. P. § 1919); § 7969 (like Cal. C. C. P. § 1951, omitting "the original record").

Illinois: Rev. St. 1874, c. 30, § 20, as amended by St. 1903, May 28, p. 118 (for deeds, etc., without the State and within the United States or any Territory or Dependency or the District of Columbia, an acknowledgment or proof may be made "in conformity with the laws of the State, Territory, Dependency, or District where it is made"; and "if any clerk of a court of record within such State, Territory, Dependency, or District shall under his hand and the seal of such court certify" to the conformity of the acknowledgment, or the conformity shall appear by the laws thereof, "such instrument, or a duly proved and certified copy of the record of such deed, mortgage, or other instrument relating to real estate, heretofore or hereafter made and recorded in the proper county, may be read in evidence as in other cases of such certified copies.

Fourth: All deeds or other instruments or copies of the record thereof duly certified or proven which have been heretofore acknowledged or proven before either of the courts or officers. . . may be read in evidence without further proof of their execution, with the same effect as if this act had been in force at the date of such acknowledgment or proof"); § 21 (instruments affecting land, executed and acknowledged or proved before a justice out of the county of the land, but recorded in the county of the land, shall be treated as legally recorded notwithstanding the lack of a proper certificate of the justice's office; provided that the record "shall not be read in evidence unless the certificate of the proper county clerk under his official seal is produced, or other competent evidence introduced," of the justice's office at the date of acknowledgment); § 31 (recorded deeds, etc., not duly acknowledged or proven "shall not be read as evidence, unless their execution be proved in a manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof"); § 35 (record or a certified copy by the recorder of an instrument concerning land, lawfully recorded, to be admissible, "without further proof thereof"); § 36 (same, where proof of loss, etc., is made by the party's affidavit); c. 95, § 5 (same for duly recorded chattel mortgages); c. 109, §§ 2, 11 (same for duly recorded plats of subdivisions); St. 1897, May 1, § 39 (registrar of title's certified copy under seal of an original certificate of a registered title, and the owner's duplicate certificate, to be admissible); § 58 (certified copy admissible in place of a lost duplicate original certificate of title); St. 1907, May 28, p. 376, § 5 (recorded claim for horse-shoer, provable by recorder's certified copy or the certified original); St. 1921, June 30 (recorded surveyor's plat; certified copies may be used like deeds); St. 1921, July 13, § 5 (chattel mortgages; certified copy by the county recorder of deeds admissible "upon the same conditions as copies of deeds and conveyances of land so certified"); 1840, McConnel *v.* Johnson, 3 Ill. 522; 1844, Graves *v.* Bruen, 68 Ill. 167, 172 (certified copy not sufficient for an auditor's patent to public land; the registry acts not applying); 1864, McCormick *v.* Evans, 33 Ill. 327; 1864, Holbrook *v.* Nichol, 36 Ill. 161, 167; 1886, Lake *v.* Brown, 116 Ill. 83, 89, 4 N. E. 773.

Indiana: Burns' Ann. St. 1914, § 478 (copies of record of "deeds and other instruments," provable by keeper's attestation under official seal, and, if no seal exists, certified by clerk of court of county under official seal); § 3987 (record not evidence unless a certificate of acknowledgment or proof is recorded); § 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); § 3988 (conveyances 20 years old and recorded in the wrong county, etc., provable by certified copy); 1838, Bowser *v.* Warren, 4 Blackf. 522, 527 (record copy sufficient, whenever the original need not be produced); 1839, Dixon *v.* Doe, 5 Blackf. 107 (record of a deed to other than the offeror (see *ante*, § 1225) admissible without otherwise proving execution); 1839, Rucker *v.* McNeely, 5 Blackf. 123 (record admitted after proof of loss); 1842, Rawley *v.* Doe, 6 Blackf. 141, 144 (proof of execution of recorded land-patent not necessary); 1842, Foresman *v.* Marsh, 6 Blackf. 285 (general principle of Bowser *v.* Warren repeated); 1843, McNeely *v.* Rucker, 6 Blackf. 391 (like Rucker *v.* McNeely); 1847, Stephenson *v.* Doe, 8 Blackf. 508, 512 (like Rawley *v.* Doe); 1858, Tenant *v.* Rumfield, 11 Ind. 130 (chattel mortgage; general principle affirmed); 1860, Lyon *v.* Perry, 14 Ind. 515; 1865, Allen *v.* Vincennes, 25 Ind. 531; 1877, Westerman *v.* Foster, 57 Ind. 408, 410; 1878, Steeple *v.* Downing, 60 Ind. 478, 495 (justice's office); 1878, Gossett *v.* Tolen, 61 Ind. 388, 391 (betterment assessment); 1883, Benefiel *v.* Aughe, 93 Ind. 401, 405; 1891, Adams *v.* Buhler, 131 Ind. 66, 30 N. E. 883 (mechanic's lien notice); 1895, Krom *v.* Vermilion, 143 Ind. 75, 41 N. E. 539 (mortgage); 1907, New Jersey I. & I. R. Co. *v.* Tutt, 168 Ind. 205, 80 N. E. 420 (whether a 24-inch tile would suffice for a ditch, allowed).

Iowa: Code 1897, § 4630, Comp. Code, § 7337 ("any instrument" recorded in a public office by authority of law is provable by record "or a duly authenticated copy thereof"); § 7343 (so also for copies of entries in a book of "copies of original entries"); § 7348 (land-office receiver's duplicate receipt is proof of title except against holder of actual patent); 1887, Carter *v.* Davidson, 73 Ia. 45, 49, 34 N. W. 603.

Kansas: Gen. St. 1915, § 7273 (any paper required or authorized to be filed or recorded in "any public office" is provable by the legal custodian's certified copy under official seal, or by record); §§ 2078–83, 1901 (record of a deed, etc., defectively executed or acknowledged or recorded at the time of this act is to be admissible, when the original is lost, etc.); G. S. 1915, § 2077, G. S. 1868, c. 22, § 27 ("Every instrument in writing, conveying or affecting real estate," provable by copy "duly certified by the register of deeds" where recorded, on proof of loss etc.; similar instruments recorded for ten years in other States and affecting land in this State, provable by copy "duly authenticated by the proper custodians of the records"; G. S. 1915, § 2084, St. 1905, c. 324, § 1 (defectively acknowledged or recorded instruments, on record for 10 years, provable by the record or a duly authenticated copy thereof); G. S. 1915, § 6791 (register of deeds' certified copy under official

seal of recorded patent of U. S. or Kansas land, admissible); ib. § 6792 (certified copy of U. S. patent to land, by "the proper officer having such records in custody," admissible); ib. § 6499 (register of deeds' certified copy of chattel mortgage, admissible, but only to show fact of filing); 1911, Van Hall *v.* Rea, 85 Kan. 675, 118 Pac. 693 (a U. S. government receiver's receipt for public land, recorded but not acknowledged, admitted under the curative act of 1905).

Kentucky: Stats. 1915, § 1638 (an instrument duly registered out of the U. S. is provable by the keeper's attested copy certified under official seal by a U. S. consul, charge, or minister); § 519 ("certified copies of all instruments legally recorded" are admissible); § 519 *a* (certain defectively recorded deeds, provable by certified copy); 1813, Eastland *v.* Jordan, 3 Bibb 186, 187 (here excluded for defect of probate); 1814, Wells *v.* Wilson, 3 Bibb 264, 265 (admitted where recorded upon the acknowledgment of the opponent; other cases undetermined); 1815, Tebbs *v.* White, 4 Bibb 42 (admissible in "all cases where the original would be relevant"); 1818, Morgan *v.* Bealle, 1 A. K. Marsh. 310 (here excluded for defective probate); 1820, Barbour *v.* Watts, 2 A. K. Marsh. 290 ("the well-known common-law rule with regard to enrolled deeds attaches to them"); 1820, Hood *v.* Mathers, 2 A. K. Marsh. 553, 558; 1821, Womack *v.* Hughes, Litt. Sel. C. 292, 294 (see quotation *supra*, § 1649); 1821, McIntire *v.* Funk, Litt. Sel. C. 425, 427; 1823, Sharp *v.* Wickliffe, 3 Litt. 10, 12; 1823, Rees *v.* Lawless, 4 Litt. 218; 1824, Young *v.* Ringo, 1 T. B. Monr. 30; 1827, Hunt *v.* Owings, 4 T. B. Monr. 20 (the probate must be set out); 1830, Edwards *v.* Hanna, 5 J. J. M. 18, 26; 1835, Ross *v.* Clare, 3 Dana 189, 195; 1838, King *v.* Mims, 7 Dana 267, 269; 1853, Dickerson *v.* Talbot, 14 B. Monr. 60, 62, 69; 1854, Hedger *v.* Ward, 15 B. Monr. 106, 114; 1868, Patterson *v.* Hansel, 4 Bush 654, 656; 1899, Middlesborough W. Co. *v.* Neal, 105 Ky. 586, 49 S. W. 428.

Louisiana: The civil-law doctrine of "authentic acts" makes it difficult to consider the Louisiana cases from the point of view of common-law principles; the statutes, moreover, seem to lack systematic arrangement; Rev. Civ. C. 1920, § 2234 ("The 'authentic act,' as relates to contracts, is that which has been executed before a notary public," etc.); § 2235 ("An act which is not authentic . . . avails as a private writing, if it be signed by the parties"); § 2236 ("The authentic act is full proof of the agreement contained in it," as against the parties, unless proved a forgery); §§ 2251, 2253 (notaries, outside of New Orleans, are to deposit with the parish recorder "the original of all acts passed before them," after recording them in their own record-books; acts under private signature, for sale or exchange of realty, are to be acknowledged or proved before record by parish recorder); §§ 2255, 2257, 2260, 2261 (notaries in New Orleans are to register every deed affecting realty with the parish register; the register's certificate under seal is to be "received in courts of justice in evidence in the same manner as all other public acts"; private act, if recorded, may be acknowledged or proved if the parties wish); § 2267 (recorder's copies under official seal of "original acts deposited with them" are to be "legal evidences of their contents," if the act is an authentic one; duly certified copies of official bonds "shall always be admissible in evidence"); § 2268 (notaries' certified copies of original acts of which they are depositaries, "make proof of what is contained in the originals"); § 2269 ("When the original title or record is no longer in being, a copy is good proof . . . when it is certified as being conformable to the original by the notary who has received it or by one of his successors, or by any other public officer, with whom the record was deposited, and who had authority to give certified copies of it, provided the loss of the original be previously proved"); § 2270 ("When an original title, by authentic act, or by private signature duly acknowledged, has been recorded in any public office, by an officer duly authorized, either by the laws of this State or of the United States, to make such record, the copy of such record, duly authenticated, shall be received in evidence, on proving the loss of the original, or showing circumstances, supported by the oath of the party, to render such loss probable"); Ann. Rev. St. 1915, § 1455 (sheriff's deed, provable by certified copy by the clerk or deputy clerk of the court where recorded; and if the original has been "lost or mislaid" without being recorded, then "a copy of the same, certified as aforesaid, being recorded in said office," shall have the same effect as if original had been recorded; the affidavit of any person interested being sufficient to establish loss or mislaying and to entitle to record); § 3080 (recorder's copies under official seal of notaries' acts deposited with him are to be "legal evidence of the contents of the original acts"); C. Pr. 1900, § 142 (notaries are not bound to produce "the record of acts passed before them, of which authentic copies may be obtained, except when it is necessary to prove the genuineness of the signatures affixed to them"); § 698 (recording officer's certified copy of a recorded sheriff's deed, admissible; so also for a copy of a certified copy recorded in place of a lost or mislaid original); St. 1894, No. 117, § 3 (commissioners to acknowledge deeds in another State; certified copy is to "make proof" only to the extent of a copy of an "act under private signature"; but if the original is deposited with a Louisiana notary then the notary's certified copy thereof has the same effect as notary's copies in general); St. 1914, No. 68, p. 165 (any deed, contract, etc., "purporting to be attested by two or

more witnesses and accompanied by an affidavit of the grantor or vendor or by one of the witnesses," "shall be deemed . . . 'prima facie' and without further proof as being true and genuine"); St. 1918, July 10, No. 192 (provision for authenticating deeds, etc. before a military, or naval officer); St. 1918, July 11, No. 256 (similar, for other officials out of the State); 1826, Norwood *v.* Green, 5 Mart. N. S. 175 (excluded); 1830 Walden *v.* Grant, 8 Mart. N. S. 565, 569 (excluded, in the absence of express statutory authority); 1851, Duplesis *v.* Miller, 6 La. An. 683, Slidell and Preston, JJ., diss. (conveyances recorded in U. S. land-office are not documents that can be proved by the register's certified copy); 1859, Reynolds *v.* Stille, 14 La. An. 599 (same as Walden *v.* Grant); Grant's Succession, 14 La. An. 795 (same); compare also the cases cited *ante*, § 1225, and *post*, § 1676.

Maine: Rev. St. 1916, c. 87, § 131 (in actions affecting realty, attested copies of recorded deeds are admissible without proof of execution, when the offeror is not grantee nor heir nor "justifies as servant" thereof); this statute in effect merely enacts the rule of the earlier decisions; compare also the citations *ante*, § 1225; c. 87, § 132 (attested copies by register of deeds, of early deed records of specified counties copied into modern books, admissible); c. 14, § 38 (certain Indian deeds, recorded with Penobscot county, register of deeds, provable by copy attested by register of deeds or by Indian agent); c. 96, § 5 (recorded notice of mortgage foreclosure, provable by "the copy of such record"); c. 12, § 13 (register of deed's certificate shall state date of making, fact of comparison with original, and date of deed being filed for record, "but shall be only 'prima facie' evidence of the last fact"); § 19 (records of original proprietors of town or plantation, deposited with Maine Historical Society, and secretary's certified copy filed with register of deeds; the register's certified transcript admissible "with the same effect as though the original records were produced"); 1833, Knox *v.* Silloway, 1 Fairf. 201, 216 (admitted under a rule of Court; "this rule is in unison with immemorial usage in Massachusetts; the Courts of this State have uniformly observed it; and it is believed that a similar practice has long prevailed in most if not all the New England States; . . . it dispenses with proof of execution in all cases but one, namely, the case of a deed to the party himself"); 1834, Kent *v.* Weld, 2 Fairf. 459 (same; but this 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); 1851, White *v.* Dwinel, 33 Me. 320 (not applicable to an office copy of a deed to the ancestor under whom the plaintiff claims as heir); 1898, Flynn *v.* Sullivan, 91 Me. 355, 40 Atl. 136 (ruled applied); 1901, Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246 (same).

Maryland: Ann. Code 1914, Art. 35, § 42 (any instrument required, by the law of the State or country where executed, to be registered, and lawfully registered, is provable by the keeper's certified copy under seal of court or office); Art. 21, § 28 (instruments of contract for conveyance of real estate, provable by certified copy like deeds); Art. 35, § 56 (certified copy by land office commissioner of extract of a deed lost or destroyed, admissible); 1800, Gittings *v.* Hall, 1 H. & J. 14, 18, *semble*; 1801, Carroll *v.* Norwood, 1 H. & J. 167, 178, 184, *semble*; 1804, Cheney *v.* Watkins, 1 H. & J. 527, 532; 1823, Connelly *v.* Bowie, 6 H. & J. 141; 1824, Craufurd *v.* State, 6 H. & J. 231, 234 ("where an instrument of writing is required by law to be recorded, the enrollment of it is evidence of all circumstances necessary to give it validity"; here, of the delivery of a bond in the Orphan's Court); 1843, Mitchell *v.* Mitchell, 1 Gill 66, 81 (the due acknowledgment of an heir's record release, presumed); 1854, Barry *v.* Hoffman, 6 Md. 78, 87; 1854, Warner *v.* Hardy, 6 Md. 525, 537.

Massachusetts: Gen. L. 1920, c. 114, § 4 (clerk's or secretary's certified copy of cemetery conveyances recorded by the corporation, admitted); c. 185, § 54 (recorder's certified copy, under seal of court, of the original certificate of registered title, and the owner's duplicate certificate, admissible); § 111 (new duplicate certificate, issued in place of a lost one, shall be "regarded as the original duplicate for all the purposes of this chapter"); 1828, Eaton *v.* Campbell, 7 Pick. 10, 12; 1829, Hathaway *v.* Spooner, 9 id. 23, 25 ("the very registry proves the execution, for the deed cannot be effectually registered without an acknowledgment before a magistrate"); 1834, Ward *v.* Fuller, 15 id. 185, 187; 1848, Stetson *v.* Gulliver, 2 Cush. 494, 498 (bond not required, nor perhaps competent to be recorded; office copy by the register allowed where the opponent had refused to produce the original, but *semble* not where the offeror relies simply on the deed being presumed out of his control; the reason is not clearly explained, but seems to rest on a theory that in the latter case the registrar's copies are "original evidence," and hence applicable only to lawfully recorded documents); 1863, Thacher *v.* Phinney, 7 All. 146, 149, *semble*; 1870, Samuel *v.* Borrowscale, 104 Mass. 207, 209; 1872, Gragg *v.* Learned, 109 Mass. 167 (sufficient, if "not made to either party to the action, or presumed to be in the custody of either").

Michigan: Comp. L. 1915, §§ 11696, 11697, 12508, 11727, 11728, 11741, 11775, 11778, 12517, 11783, 12509, 410 ("conveyances and other instruments" lawfully registered are provable by register's certified copy; certain defective ones are validated); § 11993 (filed chattel

mortgage, with affidavits, etc., is provable as to the fact of filing by the municipal clerk's certified copy, but as to no other fact, *i. e.* execution); § 14864 (municipal clerk's certified copy of filed notice of horse-shoeing lien, admissible only to prove the fact of filing); 1849, Ives *v.* Kimball, 1 Mich. 308, 310; 1862, Hall *v.* Redson, 10 Mich. 21, 24 (record is evidence of execution by such persons only as execute properly); 1863, Brown *v.* Cady, 10 Mich. 535, 538 (record not receivable apart from statutory authorization); 1866, Farmers' & M. Bank *v.* Bronson, 14 Mich. 361, 369 (same); 1870, Raynor *v.* Lee, 20 Mich. 384, 386; 1871, Shotwell *v.* Harrison, 22 Mich. 410, 423; 1871, Morse *v.* Hewett, 28 Mich. 481, 487, 488; 1877, Grand Rapids *v.* Hastings, 36 Mich. 122; 1877, Bills *v.* Keesler, 36 Mich. 69; 1878, Wilt *v.* Cutler, 38 Mich. 189, 192 (a record-copy may be used in any court of the State); 1882, Taylor *v.* Youngs, 48 Mich. 268, 12 N. W. 208 (defects of record may be cured before trial, so far as use in evidence is concerned); 1885, Toledo & A. A. R. Co. *v.* Johnson, 55 Mich. 456, 458, 21 N. W. 888 (certified copy of a deed assigning a contract, not admissible to prove the fact of assignment under the circumstances); 1888, Sheldon *v.* Merrill, 69 Mich. 156, 37 N.W. 66 (certified copy of a mortgage filed with a town clerk, not evidence of execution); 1891, Butler *v.* R. Co., 85 Mich. 246, 258, 48 N.W. 659 (lost land patent; "Scranton Abstract" received to prove it).

Minnesota: Gen. St. 1913, § 8456 (record or a transcript, certified by the register, of instruments authorized to be recorded, and duly acknowledged or proved, admissible); §§ 2312, 6848 (certain curative acts, making admissible certified copies of instruments otherwise not entitled to record or defectively recorded); §§ 6903, 6907 (registration of title; similar to the Illinois act *supra;* provision made for certified copies of the certificate of title, of deeds, etc., filed with the registrar, etc.); §§ 6845, 6846, 6847 (legalizing the record of prior recorded deeds defective in various specified ways, and making record admissible in evidence); St. 1917, c. 200, § 2 (same); St. 1919, Apr. 15, c. 266 (certificates of discharge from U. S. army or navy, provable by certified copy of record by county register of deeds); 1864, Lund *v.* Rice, 9 Minn. 230 (excluding the record of a copy from a defectively recorded deed in another State); 1866, Wilder *v.* St. Paul, 9 Minn. 192, 211 (applying the statute admitting deeds defectively acknowledged); 1867, Lowry *v.* Harris, 9 Minn. 255, 267, 269; 1871, Mankato *v.* Meagher, 17 Minn. 265, 271; 1886, Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54; 1886, Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659 (chattel mortgage); 1901, Van Dervort *v.* Northwestern F. Co., 85 Minn. 25, 88 N. W. 2 (same).

Mississippi: Code 1906, § 1954, Hem. § 1614 ("copies of the record of all instruments in writing which by the laws of any foreign country may be admitted to record upon acknowledgment or proof thereof" are admissible if certified under official seal by the "officer having custody of the record," and "authenticated by the certificate of any public minister, secretary of legation, or consul of the United States"); § 1955, Hem. § 1615 (same, for instruments "required or permitted to be recorded" in the U. S., a State or Territory, or the District of Columbia, first certificate sufficing); § 1956, Hem. § 1616 (same, for instruments "required or permitted to be recorded" in this State, and making the original record also admissible); § 1957 (conveyance under justice's judgment; quoted *post*, § 1681); 1848, Thomas *v.* Bank, 9 Sm. & M. 201; 1858, Harper *v.* Tapley, 35 Miss. 506, 510; 1858, Cogan *v.* Frisby, 36 Miss. 178, 183 (gift of chattels); 1860, Davis *v.* Herndon, 39 Miss. 484, 505; 1873, Lockhart *v.* Camfield, 48 Miss. 471, 488.

Missouri: Here the decisions originally refused to use the register as evidence: Rev. St. 1919, § 405 (deeds of guardians and curators, when acknowledged for record, receivable "without further proof"; § 1665 (certified copy of recorded sheriff's deed, admissible); § 1979 (certified copy of decree in action to perfect land-title, recorded with county recorder or register, admissible); § 2208 ("every instrument in writing, conveying or affecting real estate," duly acknowledged or proved and recorded, provable by recorder's certified copy under official seal, when original is lost, etc.); § 2210 (such a record not to be read "until established by other competent proof," if the opponent makes it appear that the proof was taken "upon the oath of an incompetent witness"); § 2216 (certified copy of a duly recorded instrument executed out of the State but within the U. S., conveying military bounty land in this State, provable by certified copy, when the original is lost, etc.); § 5357 (records of the French or Spanish government, and deeds before their officers, etc., provable by certified copy by the recorder of land-titles); § 5358 (conveyance, etc., among the archives of the French or Spanish government, filed and recorded with the county recorder, and the records of such government there deposited, provable by recorder's certified copy); § 5359 (certified copy of the record of such instruments, admissible where the original is shown lost, etc.); § 5366 (deed recorded more than 20 years, though not duly acknowledged, etc., and afterwards proved on trial, a copy being preserved in bill of exceptions and transcript filed in certain courts, is provable, if lost or destroyed, by a certified copy by the clerk of the proper court); § 5369 (certified copy of a record, made one year before this law's taking effect, of a deed, will, etc., not duly acknowledged or proved, to be admissible only when

the execution of the original is duly proved, "except where such record shall have been made 30 years or more prior to the time of offering it in evidence"); § 5393 (certified copy, under the recorder's official seal, of a marriage contract duly acknowledged or proved and recorded, admissible when the original is lost, etc.); § 9285 (county recorder's certified copy of a recorded plat, admissible); 1823, Chouteau *v.* Chevalier, 1 Mo. 343 (copy of marriage-contract in Spanish archives, excluded for insufficient certification); 1829, Philipson *v.* Bates, 2 Mo. 116 (apart from statute, the record is inadmissible); 1829, Strother *v.* Christy, 2 Mo. 148 (same, for a statute not expressly making certified copies admissible); 1837, Miller *v.* Wells, 5 Mo. 6, 10 (apart from statute, the acknowledgment and record are not sufficient); 1838, Newman *v.* Studley, 5 Mo. 291, 295 (certified copy of a recorded sheriff's deed; undecided, under the law of 1835); 1842, Moss *v.* Anderson, 7 Mo. 337, 340 (certified copy admitted, though evidence of identity may be required under the act of 1825); 1844, Roussin *v.* Parks, 8 Mo. 529, 537, 546 (recorder's certificate of authenticity of a deed found among Spanish archives, admitted under the statute); 1855, Charlotte *v.* Chouteau, 21 Mo. 590 (statute as to Spanish archives, applied); 1855, Aubuchon *v.* Murphy, 23 Mo. 115, 123 (Act of 1845; a deed not recorded within one year; evidence of identity required, under § 18); 1859, Garnier *v.* Berry, 28 Mo. 438, 449 (Act of 1845; § 58 applied; § 16 applied); 1862, Gwynn *v.* Frazier, 33 Mo. 89, 91 (deed recorded within one year); 1872, Briggs *v.* Henderson, 49 Mo. 531, 534; 1872, Crispen *v.* Hannavan, 50 Mo. 415, 417 (military bounty land); 1872, Ryder *v.* Fash, 50 Mo. 476 (same); 1872, Callaway *v.* Fash, 50 Mo. 420, 422; 1873, Yankee *v.* Thompson, 51 Mo. 241, 244; 1883, Hoskinson *v.* Adkins, 77 Mo. 735, 539; 1893, Hunt *v.* Selleck, 118 Mo. 588, 593.

Montana: Rev. C. 1921, § 10569 (like Cal. C. C. P. § 1919); § 10598 (like Cal. C. C. P. § 1951, as amended by St. 1889, adding, after "Civil Code," "and every instrument authorized by law to be filed or recorded in the county clerk's office"); § 6932 (duly certified copies of certain defectively recorded "instruments affecting real property," admissible); § 8284 (chattel mortgages acknowledged and recorded; county clerk's certified copy admissible, "without further proof of the execution"); § 7104 (declaration of claimant of water appropriated for irrigation; record to be taken as evidence "of the statements therein contained").

Nebraska: Rev. St. 1922, § 5609 (duly recorded deed, provable by record or certified copy); §§ 5654, 5657, 5660 (validating the evidential effect of defectively recorded deeds executed in this or another State or by corporations); 1896, Thams *v.* Sharp, 49 Nebr. 237, 68 N. W. 474.

Nevada: Rev. L. 1912, § 1044 (a "conveyance, or other instrument conveying or affecting real estate," duly recorded, is provable by the record or the recorder's certified transcript under official seal "without further proof"); § 1094 (duly certified copies of instruments already recorded before 1862, Dec. 17, but not lawfully, admissible when proof is made that the originals "were genuine instruments, and were in truth executed by the grantor or grantors therein named"); § 1046 (if it is shown that the proof for record was taken "upon the oath of an incompetent witness," the record is not receivable "until established by other competent proof"); §§ 1100, 1636, 2424, 2429, 2432, 2467, 2473, 2475 (mining; sundry contracts, claims, transfers, etc., provable by certified copy); § 3789 (county recorder's certified copy of assignment or payment of mortgage, admissible); § 5414 (recorded conveyances of realty; like Cal. C. C. P. § 1951).

New Hampshire: Pub. St. 1891, c. 224, § 23 (certified copy, by the proper officer, of any document required to be recorded in a public office, admissible); compare the rulings cited *ante*, § 1225; 1831, Southerin *v.* Mendum, 5 N. H. 420, 428, *semble;* 1833, Montgomery *v.* Dorion, 6 N. H. 250, 252; 1835, Montgomery *v.* Dorion, 7 N. H. 475, 483; 1840, Pollard *v.* Melvin, 10 N. H. 554, 557 (sufficient "only in a chain of title, where due proof has first been made of the execution of the last conveyance"; 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 N. H. 399, 404 (same); 1845, Andrews *v.* Davison, 17 N. H. 413, 415 (same); 1848, Cram *v.* Ingalls, 18 N. H. 613, 617, *semble* (same); 1850, Forsaith *v.* Clark, 21 N. H. 409, 421 ("Ordinarily the admission of an office-copy admits all that appears upon it, — execution, acknowledgment, and record"; here, it was taken to cover the authority of the magistrate taking the acknowledgment in another State, the document being old; yet "the deed directly to [the offeror] himself must be proved"); 1859, Farrar *v.* Fessenden, 39 N. H. 268, 276 (general principle affirmed); 1861, Wendell *v.* Abbott, 43 N. H. 68, 73 (same); 1879, Smith *v.* Cushman, 59 N. H. 27 (same); it does not appear what the effect is of the statute upon these decisions.

New Jersey: Comp. St. 1910, Conveyances, §§ 55, 56, 57*c* (record or certified copy of a duly recorded conveyance, admissible, to be as "available in law as if the original . . . were then and there produced and proved" unless opponent demands original); § 57 (record or certified copy of a deed not recorded till ten years after date, not to be admissible unless original is destroyed, lost, or taken away); § 70 (railroad or canal lease, provable by the Secretary of State's record or certified copy); §§ 64, 68, 117, 123, 124, 127, 133 (vali-

dating certain acknowledgments); St. 1889, p. 421, § 5 (recorded conditional sales of personalty, provable like deeds); Mortgages, §§ 18, 33 (same for mortgages of lands or chattels); Fences, § 17 (same for fence-agreement); Judgments, § 19 (same for assignment of judgment); Leasehold Estate, § 8 (same for leasehold deeds); Evidence, § 27 (a document recorded in a foreign State is provable by copy exemplified according to the U. S. law, if the record is admissible in that State); Conveyances, § 6 (exemplification of "any deeds or writings relating to estates real or personal" within N. J. "proved and certified under the city seal of London or Edinburgh . . . or of Dublin . . . or under the great seal of any British colony in America prior to July 4, 1776, and any of the public books of records or registers of the province of N. J. or of either of the divisions thereof, prior to that date," admissible "as if the originals were then and there produced and proved"); 1826, Fox *v.* Lambson, 8 N. J. L. 275, 279 (copy of a duly recorded certificate of manumission, not received to show execution of the certificate, because the record-law provided for no means of evidencing genuineness before the recording; "an entry by a clerk in a book in his office of an instrument not previously acknowledged or proved or otherwise authenticated, and which therefore does not bear with it the slightest proof of genuineness," cannot be received); 1839, New Jersey R. & T. Co. *v.* Suydam, 17 N. J. L. 25, 59 (clerk's certified copy of a recorded deed, admissible, but not of recorded mortgage, because only an abstract is recorded and no copy of the acknowledgment, etc., is required).

New Mexico: Annot. St. 1915, § 2188 (abstract of title, as described in the quotation *post*, § 1705, to be received "in the same manner and to a like extent that the public records are now admitted"); § 4792 (record, or recorder's certified transcript, of a duly recorded "writing conveying or affecting real estate," admissible "without further proof"); § 567 (record, or (recorder's certified transcript under official seal, of a duly recorded chattel mortgage, admissible "without further proof"); § 570 recorder's certified copy of an affidavit, etc., of a mortgagee's interest, admissible to prove the fact of filing); § 1621 (recorded contract of sale, etc., of animals, provable by certified copy); § 1125 (new county to be equipped with transcription of records of transfer of property in that part of old county, and new county clerk's certified copy to be admissible).

New York: Cons. L. 1909, Lien § 237 (custodian's certified copy of chattel mortgage, to be evidence only of fact of filing); Real Property § 331 (foreign law or decree appointing to act for real property in the State, provable by certified copy or translation under the great seal, if recorded with the county register or clerk); C. P. A. 1920, § 384 ("1. A conveyance, acknowledged or proved, and certified, in the manner prescribed by law to entitle it to be recorded in the county where it is offered, is evidence without further proof thereof. 2. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance. 3. The certificate of the acknowledgment, or the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. 4. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received in evidence, until its execution is established by other competent proof"); § 392 ("A conveyance of real property, situated without the State, acknowledged or proved, and certified, in like manner as a deed to be recorded within the county wherein it is offered in evidence, is evidence, without further proof thereof, as it related to real property situated within the State. A conveyance of real property, situated within another State, or a Territory of the United States, which has been duly authenticated, according to the laws of that State or Territory, so as to be read in evidence in the courts thereof, is evidence in like manner"); C. P. A. 1920, § 402 (sale, etc., of a U. S. vessel, recorded in the U. S. customs' office after due proof, provable by collector's certified copy); § 393 (conveyance of realty in another U. S. State or Territory, recorded according to the law of such State, provable by exemplification of record under seal of the custodian, if the "original cannot be produced"); 1837, Morris *v.* Wadsworth, 17 Wend. 103, 112 (sufficient; here offered against the grantor acknowledging it); 1837, Van Cortlandt *v.* Tozer, 17 Wend. 338, 340 (a deed duly recorded according to the process prescribed by the Legislature may be proved genuine by certified copy; here the legality of the proceeding of record, with reference to the place, the officer, and the mode of proof to the officer, was in issue); 1859, Hunt *v.* Johnson, 19 N. Y. 279, 294 (construing the terms of the early statutes authorizing a recorded deed to be assumed genuine); 1888, Sudlow *v.* Warshing, 108 N. Y. 520, 522, 15 N. E. 532 (certified copy sufficient).

North Carolina: Con. St. 1919, §§ 1763, 1765, 3319 (registry or certified copy of instrument "required or allowed" to be recorded, admissible, providing that the original may on certain conditions be required); § 1777 (a deed by an inhabitant of another State or Territory, of domestic property, is provable if the original cannot be obtained, by copy certified either under Federal law or "by the proper officer of the said State or Territory"); § 3559 (county register of deed's record of certificate of survey, admissible); 1878,

Rollins *v.* Henry, 78 N. C. 342, 345, 349; 1882, Love *v.* Harbin, 87 N. C. 249, 253 (register's certified copy, held sufficient on the facts with reference to the probate of execution; a certified copy is admissible to prove execution of a lost deed, even where the execution is expressly put in issue by denial); 1900, Cochran *v.* Linville I. Co., 127 N. C. 386, 37 S. E. 496 (certified copy, dated 1859, and proved genuine, of a deed dated 1796, admitted); 1909, Thorp's Will, 150 N. C. 487, 64 S. E. 379 (record in Superior Court Book of Settlements of a discharge from an insane asylum, not authorized to be recorded, excluded).

North Dakota: Comp. L. 1913, § 2208 (county auditor's certified copy of tax deed record, admissible); § 5597 ("duly certified transcript" of the record of "all instruments entitled to record may be read in evidence without further proof thereof"); § 7916 (the record, or a "duly authenticated copy," of "every instrument conveying or affecting real property," when duly acknowledged or proved and certified, admissible).

Ohio: Gen. Code Ann. 1921, § 8524 (auditor's certified copy under official seal of the record of a lost or destroyed State deed, admissible to prove "the existence of such deed"); § 8540 (recorder's certified copy under official seal of a recorded power of attorney, admissible); §§ 8557, 8558 (recorder's certified copy under official seal of a recorded instrument, admissible); § 8822 (recorder's certified copy of a grant of way or easement to railroad, admissible); § 8533 (agreement for site of corner or line, between adjoining owners, provable by certified copy of record); § 8571 (chattel mortgages; certified copy, admissible, but with certain distinctions as to the effect of the evidence in different cases); 1824, Johnston *v.* Haines, 2 Oh. 279 (55); 1847, Webster *v.* Harris, 16 Oh. 490, 499; 1877, Warner *v.* R. Co., 31 Oh. St. 265, 270.

Oklahoma: Comp. St. 1921, § 638 ("all papers" lawfully recorded in "any public office," provable by legal custodian's certified copy under official seal); § 654 (record of "paper, document, or other instrument authorized to be recorded", admissible with "same effect as the original"); § 5267 (all instruments affecting real estate and duly recorded are provable by copies "certified from the records by the register of deeds"); St. 1919, c. 23, Mar. 12 (county clerk; certified copy of filed chattel mortgage, admissible "without further certification").

Oregon: Laws 1920, § 9876 (record, or county clerk's certified transcript, of duly recorded conveyance, admissible); § 9892 (powers of attorney and contracts for the sale of land); § 9894 (instruments heretofore acknowledged or proved in accordance with the laws of the State at the time "shall have the same force as evidence" as those conforming to the present law); § 9909 (deeds of sales defectively made by executors, etc.; the record, "duly certified by the county clerk, shall be evidence in all courts, and have the same effect as the original"); § 767 (like Cal. C. C. P. § 1919); § 9858 (deeds of land, duly executed in a foreign country, and recorded in this State in the proper county, are provable by certified copies of the county clerk); §§ 9900-9907, 9914, 9915, 9918, 9920, 9923, 9929 (certified copy of various kinds of deeds defectively executed or irregularly authorized, admissible); § 9926, as amended by St. 1921, Feb. 26, c. 230 (recorded deeds heretofore executed with defective acknowledgment, etc.); § 7640 (coowners of mines; certified copy of recorded notice of work, etc., admissible as in the case of deeds of realty).

Pennsylvania: St. 1715, May 28; § 5, Dig. 1920, § 8824 Deeds (certified copies, under seal, of deeds duly recorded, receivable); St. 1870, Jan. 26, § 1, Dig. 8792 (same for land in more than one county); St. 1853, Apr. 5, §§ 4, 5, Dig. §§ 8908, 8909 (mortgage of coal-mining rights; certified copy of a recorded instrument is evidence of contents and filing, but of nothing else; provisions obscure); St. 1854, Dec. 14, Dig. § 8795 (letters of attorney relating to personalty, duly made abroad before a U. S. officer or a notary, and here recorded, receivable, as also a certified copy, when the original is lost; also, affidavits before a proper officer, duly certified, in another domestic State); St. 1885, June 3, § 1, Dig. § 8797 (letters of attorney relating to personalty, duly recorded authenticable by exemplification); St. 1887, Apr. 28, § 8, Dig. § 8923 (certified copies of recorded mortgages, etc., of iron ore and other specified personalty, receivable); St. 1905, Apr. 22, § 6, Dig. § 8840 (same for sheriffs' deeds recorded with the Court of Common Pleas); St. 1834, Feb. 21, § 1, Dig. § 10310 Evidence (record or exemplifications of papers lawfully recorded, receivable); St. 1840, Apr. 11, § 4, Dig. § 10311 (certified copy, by the recorder of deeds, of a justice's bond, recorded, receivable); St. 1840, § 5, Dig. § 10312 (same, for commission of justice or alderman); St. 1844, Apr. 29, § 3, Dig. § 10315 (certain entries in the probate register's office, authenticated by his copy under seal); St. 1846, Mar. 14, § 1, Dig. § 8796 Deeds (records or duly 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 (same, for deeds of county commissioners); St. 1849, Apr. 9, § 14, Dig. § 8846 Deeds (same, for assignments of mortgages and attorney-powers authorizing satisfaction of mortgages); St. 1828, Apr. 15, etc., Dig. §§ 8797–8801 (copies under the recorders' seal of duly recorded written discharges of "any legacy or recognizance charged upon lands" in the State, receivable; also other specified releases to executors, etc.); St. 1705-1915, Dig. §§ 8738–8770 (various defectively re-

corded conveyances, validated, so as to be admissible in evidence); St. 1847, Mar. 9, § 1, Dig. 1920, § 8802 Deeds (recorded receipts for taxes on unseated lands, provable by duly certified copies); St. 1919, Apr. 4, § 1, Dig. § 8817 (deeds and patents to land from the Commonwealth; the records on certified copies, to be admissible wherever the original would be); St. 1872, Apr. 2, Dig. 1920, § 57, Adoption (recorded deed of adoption, provable by certified copy from county record of deeds); St. 1895, May 22, Dig. § 11236 (recorded deeds of growing timber, etc., provable by certified copy); 1759, Hyam *v.* Edwards, 1 Dall. 2 (copy of a deed proved and enrolled in England, received); 1810, Carkhuff *v.* Anderson, 3 Binn. 4, 7, 10 (under St. 1781, April 9, authorizing copies from the land-office); 1811, Vickroy *v.* McKnight, 4 Binn. 204, 208; 1821, Leazure *v.* Hillegas, 7 S. & R. 313, 318; 1828, Duffield *v.* Brindley, 1 Rawle 91, 95 (but here the deed was ancient); 1834, Hellman *v.* Hellman, 4 Rawle 440, 444 (release of a legacy, excluded); 1842, Brotherton *v.* Livingston, 3 W. & S. 334, 337 (certified copy is "enough to dispense with the common-law evidence of execution"); 1844, Fitler *v.* Shotwell, 7 W. & S. 14, 16 (same).

Philippine Isl.: Civ. C. §§ 1216–1224 (like P. R. Rev. St. & C. §§ 4290–4298); C. C. P. 1901, § 314 (like Cal. C. C. P. § 1919); § 331 (like Cal. C. C. P. § 1951); Act No. 496, Nov. 6, 1902, § 47 (land registration; "the original certificate in the registration book" or a duly certified copy under the signature of the clerk or the registrar of deeds, or the owner's duplicate certificate, to be admissible and conclusive); Admin. C. 1917, § 194 (a recorded instrument "affecting the title of unregistered land" is provable by "any certified copy of such record"); § 198 (recorded chattel mortgage or filed instrument is provable by a duly certified copy); 1908, Bagsa *v.* Nagramada, 11 P. I. 174 (notarial copy of a deed, not admissible since Act 136, c. 36, establishing the land registration system).

Porto Rico: Rev. St. & C. 1911, §§ 4290–4298 (public instruments); these provisions, quoted *ante*, § 1225, represent Spanish law; see the note *ante*, § 1225; the following represent Anglo-American rules adopted from the California Code of Civil Procedure: § 1416 (like Cal. C. C. P. § 1893); § 1438 (like ib. § 1919); § 1462 (like ib. § 1951).

South Carolina: St. 1731, Quit Rents, § 30 (grants in auditor-general's office, and grants and deeds duly proved before a justice and recorded; attested copies are "as good evidence" as the original); C. C. P. 1922, § 712 (certified copy, by the Secretary of State, of a grant and plat of land from this State, or a certified copy of a grant of land from the State of North Carolina, receivable conditionally); § 713 (certified copy of a recorded deed, receivable on the same conditions, and on ten days' notice); St. 1731, id. §§ 716, 717 (exemplifications of records attested under seal of a mayor, Governor, or notary of domestic or foreign State, receivable, but only conditionally for claims against residents of this State); 1795, Purvis *v.* Robinson, 1 Bay 493 (record copy, sufficient, provided the original is accounted for; compare the rulings cited *ante*, § 1225); 1853, Lamar *v.* Raysor, 7 Rich. 509, 514 (office copy of a recorded deed, sufficient, although the proof required for recording did not appear on its face; the deed here being old, and the purpose a collateral one); 1892, Stone *v.* Fitts, 38 S. C. 393, 397; 1895, Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305 (the fact of registration is evidence of execution, where the records have been burnt); 1897, State *v.* Crocker, 49 S. C. 242, 27 S. E. 49 (official record itself of a deed, admissible, if the deed is lost, as a common-law method, independent of the statutory provisions as to certified copies, and notice thereof in R. S. 1893, § 2361, Jones, J., diss.); 1905, Uzzell *v.* Horn, 71 S. C. 426, 51 S. E. 253 (State *v.* Crocker approved).

South Dakota: Rev. C. 1919, § 2724 (the record, or a certified copy, of "every instrument in writing which is acknowledged or witnessed and duly recorded or duly filed," is admissible "without further proof"); § 2725 (similar, for instruments affecting real property defectively recorded before Feb. 1, 1911); § 2679 (certified copy, by the register of deeds, of a recorded certificate of tax-sale, admissible); § 2892 (record, or certified copy, of affidavit of foreclosure sale, admissible); 1905, Bruce *v.* Wanzer, 20 S. D. 277, 105 N. W. 282 (certified copy of a duly recorded mortgage, admitted, under Rev. C. C. P. 1903, § 533).

Tennessee: Shannon's Code 1916, § 5573 ("duly certified copies" of all records, 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, by §§ 3778, 3786, 3793, 5575); § 3704 (register's certified copy of an acknowledgment of release of lien, receivable); § 3711 (copy of a registered copy of a deed of lands in different counties, receivable); § 3711*a*1 (similar to § 3711, for power of attorney); 1805, Miller *v.* Holt, 1 Overt. 111 (proper proof before the register must appear to have been made, in order that a copy may suffice); 1805, Craig *v.* Vance, 1 Overt. 182; 1807, Miller *v.* Holt, 1 Overt. 243; 1808, Frazier *v.* Basset, 1 Overt. 297, *semble;* 1809, Reed *v.* Dodson, 1 Overt. 395, 398, *semble;* 1823, Norflet *v.* Nelson, Peck 188 (North Carolina grant); 1825, Wilson *v.* Smith, 5 Yerg. 379, 407 (due probate of original presumed); 1832, McIver *v.* Robertson, 3 Yerg. 84 (a certified copy must show that the deed had been properly probated before registry); 1833, Batte *v.* Stone, 4 Yerg. 168; 1836, McIver *v.* Clay, 9 Yerg. 257, 259 (like McIver *v.* Robertson); 1840, Gaines *v.* Catron, 1 Humph. 514, 521 (same); 1844, Saunders *v.* Harris, 5

Humph. 345, *semble* (like McIver *v.* Clay; here the recording was in a State not requiring probate for recording); 1858, Brogan *v.* Savage, 5 Sneed 689, 692; 1899, Bond *v.* Montague, — Tenn. Ch. App. —, 54 S. W. 65.

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 under official seal of "the officer with whom the originals are now deposited"); § 3700 ("every instrument of writing" lawfully recorded with the clerk of a county court, after proof or acknowledgment according to the law at the time, and every instrument recorded for 10 years whether lawfully or not, is provable by a certified copy of the record, when filed with the papers of the suit three days before trial begun, and notice given to the opponent, unless the opponent within three days before trial files an affidavit of forgery); § 6856 (all instruments permitted by law to be registered, and recorded before Feb. 9, 1860, are provable by certified copy when the acknowledgment or proof was made before certain officers); § 3701 (early records of de facto counties prior to Jan. 1, 1882, provable by certified copy); § 3702 (similar, for specified counties); 1847, Craddock *v.* Merrill, 2 Tex. 494; 1857, Butler *v.* Dunagan, 19 Tex. 559, 565; 1878, Wiggins *v.* Fleishel, 50 Tex. 57, 62 (an original deed properly certified cannot be read without statutory notice, etc.); 1879, Texas Land Co. *v.* Williams, 51 Tex. 51, 58; 1881, McFaddin *v.* Preston, 54 Tex. 403, 407; 1885, Hancock *v.* Tram Lumber Co., 65 Tex. 225, 232; 1887, Shifflet *v.* Morelle, 68 Tex. 382, 388; 1888, Boydston *v.* Morris, 71 Tex. 697, 699, 4 S. W. 843 (certified copy not admissible to prove execution of chattel mortgage); 1888, Falls Land & C. Co. *v.* Chisholm, 71 Tex. 523, 527, 9 S. W. 479; 1890, Kimmarle *v.* R. Co., 76 Lex. 686, 693, 12 S. W. 698; 1895, Davidson *v.* Wallingford, 88 Tex. 619, 32 S. W. 1030; 1899, Heintz *v.* Thayer, 92 Tex. 658, 50 S. W. 929, 51 S. W. 640; 1907, Burton *v.* State, 51 Tex. Cr. 196, 101 S. W. 226 (bigamy; rule of Civ. St. 1895, § 2312, applied to a recorded marriage certificate).

In this State, as in Georgia, the filing of the statutory *affidavit of denial* under Stats. 1895, § 2312, Stats. 1911, § 3700, prevents the use of the registry copy: 1878, Gainer *v.* Cotton, 49 Tex. 101, 116 (statute applied).

In this State there is special learning about the authentication of *government land-office* documents; the statutes are given *ante*, § 1239, and the following decisions deal with the subject: 1848, Glasscock *v.* Com'r, 3 Tex. 51 (statutory certificate, by commissioners, of land-office certificates, etc.; mode of authentication determined); 1848, Bracken *v.* Wells, 3 Tex. 88 (similar); 1851, Herndon *v.* Casiano, 7 Tex. 322, 333, 337 (Spanish deed-copy, not properly in the land-office; copy probably inadmissible); 1852, York *v.* Gregg, 9 Tex. 85 (county court clerk's copy of Spanish land-documents, excluded); 1883, Holmes *v.* Anderson, 59 Tex. 481, 482 (certified copy of land-certificate on file in land-office, admissible; Short *v.* Wade, 25 Tex. 510, being of no force since the statutory changes); 1883, Burkett *v.* Scarborough, 25 Tex. 495, 498 (similar); 1883, Thomson *v.* Hines, 25 Tex. 525 (similar).

In this State, moreover, the proof of the early *Spanish land-titles* (*testimonio*, etc.) has peculiar rules, partly depending on Civ. Stats. § 3699, quoted *supra;* the following decisions, dealing with them, should be compared with those cited *ante*, § 1225: 1851, Paschal *v.* Perez, 7 Tex. 348 (leading case); 1851, Edwards *v.* James, 7 Tex. 372; 1864, Lambert *v.* Weir, 27 Tex. 359, 364; 1867, Hatchett *v.* Connor, 30 Tex. 104, 110; 1875, Wood *v.* Welder, 42 Tex. 396, 408; 1877, State *v.* Cardinas, 47 Tex. 250, 287; 1878, Gainer *v.* Cotton, 49 Tex. 101, 114; 1882, Storey *v.* Flanagan, 57 Tex. 649, 655.

Utah: Comp. L. 1917, § 7092 (like Cal. C. C. P. § 1919); § 7116 (substantially like id. § 1951); § 7117 (like id. § 1855); § 477 (recorder's certified copy of duly filed chattel mortgage, admissible "without further proof of the execution of the original").

Vermont: Gen. L. 1917, § 2742 (attested copy of a deed recorded with county clerk, receivable); § 2748 (certified copy of a recorded power of attorney for a deed, receivable); St. 1919, Mar. 27, No. 72 (recorded deeds and public records "in another State or foreign country," provable by certified copy; quoted *post*, § 1681); 1814, Pearl *v.* Howard, D. Chip. 173; 1827, Williams *v.* Wetherbee, 2 Aik. 329, 336; 1834, Hart *v.* Gage, 6 Vt. 170, 172 (copy by town-proprietors' clerk, excluded, in the absence of an authorizing statute); 1840, Bush *v.* Van Ness, 12 Vt. 83, 91 (certified copy of a power of attorney to convey, received, but not of a revocation not authorized to be recorded); 1842, Royalton *v.* R. & W. T. Co., 14 Vt. 311, 324 (town-clerk's record of a town-contract, not receivable to authenticate it); 1850, Williams *v.* Bass, 22 Vt. 353, 356 (the record of a deed is evidence of due execution, but "by this is to be understood a perfect record"; here, the seal being missing, the record afforded no such proof; for this point, compare the citations *post*, § 2108); 1851, Brown *v.* Edson, 23 Vt. 435, 446, 448 (legality of record "will depend upon the inquiry whether at the date of the registry there was any law justifying such registry"; here also applied to exclude a copy of a deed registered in the wrong county); 1852, Preston *v.* Robinson, 24 Vt. 583, 589 (the clerk's duty as register is to certify a copy of the record, not of the original deed; but a "copy of the deed" will be intended to mean a copy of the recorded deed); 1854, 1859, Townsend *v.* Downer, 27 Vt. 119, 125, 32 Vt. 183, 193; 1856, Colchester *v.* Culver, 29 Vt. 111, 113

§ 1652. **Same: Registry out of the Jurisdiction.** That an official statement authorized to be made is the statement of a *foreign officer* does not make

(Williams *v.* Bass approved; but here in a similar case the fact of a preceding contract to convey sufficed to admit, the deed being old); 1861, Pratt *v.* Battles, 34 Vt. 391, 397.

Virginia: Code 1919, § 6241 (no certified copy of any 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); § 6195 (copies of deeds imperfectly recorded under certain early statutes, receivable; these early statutes do not appear in the current revision); § 6207 (deeds executed without the U. S., quoted *post*, § 1676); 1794, Turner *v.* Strip, 1 Wash. 319, 322, *semble;* 1796, Lee *v.* Tapscott, 2 Wash. 276 (attested copy of land patent recorded in the county court, admitted; here being old and accompanied by possession; Lyons, J., diss.); 1797, Maxwell *v.* Light, 1 Call 117, 121, *semble;* 1804, Hord *v.* Dishman, 5 Call 279, 284; 1815, Rowletts *v.* Daniel, 4 Munf. 473, 482 (certified copy of a recorded deed dated 1765, received; no reasons given); 1821, Baker *v.* Preston, Gilmer 235, 284 (registry copy admissible; definite decision after ample argument); 1824, Ben *v.* Peete, 2 Rand. 539, 543 (certified copies of recorded deeds are "every day admitted without other evidence"; even if deeds are not lawfully recorded, copies are admissible against the maker by virtue of his acknowledgment, or against those claiming under him subsequently to the acknowledgment); 1835, Petermans *v.* Law, 6 Leigh 523, 526 (certified copy of North Carolina deed, defectively authenticated as to seal, etc., admitted under statute); 1845, Pollard *v.* Lively, 2 Gratt. 216, 218, 4 Gratt. 73, 80 (like Baker *v.* Preston); 1852, Hassler *v.* King, 9 Gratt. 115, 124; 1855, Fiott *v.* Com., 12 Gratt. 564, 570, 577 (office copy of a deed not duly authenticated before record, admissible, where the inquisition under which both claimed referred to the deed as recorded); 1880, Carter *v.* Robinett, 31 Gratt. 429, 432, 440 (power of attorney); 1897, Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

Washington: R. & B. Code 1909, § 1260 ("any deed, conveyance, bond, mortgage, or other writing," lawfully recorded or filed, is provable by copy duly certified by the official custodian under seal of office if any, and if none, then with his official certificate); § 8760 (county auditor's certified copy of an instrument duly acknowledged abroad and recorded here, admissible "to the same extent and with like effect"); 1905, Chrast *v.* O'Connor, 41 Wash. 360, 83 Pac. 238 (under the statute for deeds, the original's execution need not be otherwise evidenced than by the certified copy).

West Virginia: Code 1914, c. 73, §§ 7–11*a* (certified copy of a duly recorded deed, admissible, to prove execution, etc., *semble;* but of a recorded deed not properly acknowledged or proved, admissible to prove contents only, in case of loss); c. 130, § 4 (certain recorded deeds of Virginia, provable by copy); 1884, Peterson *v.* Ankrom, 25 W. Va. 56, 60; 1895, Clark *v.* Perdue, 40 W. Va. 300, 21 S. E. 735; 1908, Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384 (certified copy of record of contract not acknowledged, not admitted under Code 1899, c. 73, §§ 2, 3, Code 1906, §§ 3075, 3076).

Wisconsin: Stats. 1919, § 4156 ("every conveyance" executed and acknowledged or proved so as to be entitled to record, and every land-patent from the U. S. or this State, and the record of either in the registry of deeds, and every document "affecting land or the title thereto," kept lawfully with a register of deeds, is admissible "without further proof thereof"; "whenever any presumptive effect as evidence is given by law to any such patent, conveyance, or instrument, such record, as well as duly certified copies thereof, shall have the like effect"); § 4173 *a* (certified copy of a conveyance, admissible to prove title in a criminal case); § 2318 (certified copy of a chattel mortgage, admissible only to prove its filing); §§ 2215*a*-2220 *a* (curative acts for various kinds of defective conveyances); 1850, Davis *v.* Ruggles, 2 Pinney 477; 1864, Hinchcliff *v.* Hinman, 18 Wis. 130, 135; 1871, Smith *v.* Garden, 28 Wis. 685, 688; 1872, Evans *v.* Sprague, 30 Wis. 303, 305, *semble;* 1885, Herren *v.* Strong, 62 Wis. 223, 227, 22 N. W. 408.

Wyoming: Comp. St. 1920, § 4588 (the record of any instrument concerning any interest in land in this State, duly acknowledged or proved, or the register's certified transcript is admissible "with like effect as the original" on showing loss, etc.); § 1495 ("copies of all papers filed" in the office of the county clerk as register of deeds, and transcripts from his records, certified by him under seal of office, admissible); § 3097 (livestock brands; certified copy of assignment of brand or mark recorded with the State board of livestock commissioners, to be admissible "as is now provided for certified copies of instruments affecting real estate"); § 2116 (official survey or perambulation of town boundaries, provable by register of deed's certified copy); § 4378 (certified transcript of mining regulations filed with register of deeds, admissible); § 4603 (letters of attorney and contracts for sale of land, provable like conveyances); § 4664 (certified copies of certain defectively recorded conveyances, admissible); § 4689 (county clerk's certified copy of recorded chattel mortgage, admissible).

it any the less admissible (*ante*, § 1633, par. 2). The essential thing is the authority of the officer, and a foreign authority equally satisfies the principle. There is, in the United States, the additional consideration that under the Federal Constitution (Art. 4, § 1) and the Federal Revised Statutes (§ 906) the Courts of each State are required to give full faith and credit to the records of other States, and this may well be held to imply that recognition should be given (not merely as a matter of comity, but as a matter of legal right) to an official authority created by the laws of another State for its domestic recording officers.

It is generally conceded, then, that the *registry of a deed in another State* is admissible to prove its execution.[1] But several different attitudes may be taken:

(1) It may be held that the existence of a *registry-law* in the other State authorizing the record of deeds is sufficient, without more. That is, the Court merely transfers its point of view to the other forum and asks whether the law there has vested the registrar with powers of record, precisely as it would ask the same question for local registrars. This is the simple and orthodox view.

(2) It may be maintained that the foreign law, additionally, must not merely authorize registration, but must *expressly declare* the registry *admissible* in its own courts. This additional requirement is perhaps plausible; but it is inconsistent with the orthodox principle already expounded (*ante*, § 1648), and long recognized in almost every jurisdiction; for it is immaterial whether the foreign statute expressly makes it there admissible, or whether it is there received by judicial ruling, or even whether the rules of evidence there receive it at all; the sufficient thing is that the officer there has an express authority which if created by the domestic law would have been sufficient. It follows, however, under either of these first two views, that the statutory authority given by the foreign law must be duly observed, and a registration not thus lawfully made will of course be rejected, under the general principle (*ante*, § 1649).

(3) It may, again, be maintained (as a modification of both the preceding views) that if the foreign registration system, in a fundamental respect, *requires less than the domestic law*, the foreign register will not be recognized. For example, if under the foreign system no provision is made for informing the registrar, by acknowledgment or proof, as to the deed's execution, the willingness of the foreign State to accept such a register in evidence of execution should not be allowed to override a fundamental requirement of the domestic law in that respect. This limitation is one likely to find favor;[2] and yet it is difficult to reconcile it with the view that the recognition of

§ 1652. [1] The contrary has been held in Georgia: 1884, Baskin *v.* Vernon, 74 Ga. 371 (mortgage recorded in Alabama, without other evidence of execution, excluded); 1884, Papot *v.* R. Co., 74 Ga. 296, 310 (same for deed).

[2] *E. g.* in Saunders *v.* Harris, Tenn., cited *ante*, § 1651.

foreign registers depends upon the Federal Constitution; for the constitutional command is absolute.

(4) Finally, it may be also held (here as an enlargement of the first two rules above) that the foreign register is receivable if its formalities in the case in hand *satisfy the domestic law*, even though they do not satisfy the law of the place of registration.[3] This is in practice not harmful, though it seems unsound on principle.

All these views are represented in the precedents, which are comparatively few;[4] but in several jurisdictions the matter has been expressly dealt with by statute.[5] It should be added that the foreign statutory authority must of course be expressly evidenced, according to the various principles elsewhere discussed (*ante*, §§ 564, 690, 1271; *post*, § 1684).

Note, however, that on the French (not the Anglo-American) principle of *conflict of laws* (*ante*, § 5) the foreign record may be admissible irrespective of any of the above considerations.

§ 1653. **Same: Modes of Proof Available when Registration is Unauthorized.** Certain minor problems, depending upon the foregoing principles, have now to be considered.

(1) Suppose the *statute authorizes the recording*, but *does not provide for probate of execution* before the registrar, so that the register is inadmissible to prove execution (according to the principle of § 1648, *ante*); nevertheless, may not the register be used to show the *contents* of the deed, supposing that its execution is otherwise evidenced and that its non-production is accounted for? It would seem that it could; for the authority to record is an authority to make a copy in the register, and ought to suffice for that purpose at least. This seems to have been the result in England;[1] and

[3] 1857, Clardy *v.* Richardson, 24 Mo. 295, 297, *semble*.

[4] Besides the foregoing and ensuing cases, compare also the cases cited for notaries' certificates (*post*, § 1676); and cases cited *ante*, § 1633, n. 2 (nature of duty), and § 1644 (marriage-registers); 1897, Union P. R. Co. *v.* Reed, 25 C. C. A. 389, 80 Fed. 234 (power of attorney purporting to be acknowledged before a Missouri mayor, and recorded in Nebraska, but lacking a clerk's certificate, excluded); 1906, McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921 (certified copy of a recorded deed in Iowa admitted, the acknowledgment being defective by the law of Illinois but correct by the law of Iowa; point not noticed); 1853, Palmer *v.* Stevens, 11 Cush. Mass. 147, 151 (deed recorded in New York in 1802 before a mayor; a record copy allowed as proof of execution, though not shown to have been lawfully acknowledged and therefore lawfully recorded); 1905, Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955 (certified copy of a deed-record in North Dakota; held, that the statute of that State authorizing the record must be shown, and also "the effect given to certified copies as evidence in the Courts of that State"); 1848, State *v.* Engle, 21 N. J. L. 347, 364 (certified copy of power of attorney not duly recorded in New York, excluded); 1895, Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024 (exemplified copy of a mortgage duly recorded in New York under a statute making such copy admissible, held receivable in New Jersey under U. S. Rev. St. § 906, quoted *post*, § 1680, for giving faith to the records of other States; good opinion by Lippincott, J.).

See additionally the following cases cited under § 1651, *ante*: *Alabama:* Mitchell *v.* Mitchell, Tatum *v.* Young, Swift *v.* Fitzhugh, Smoot *v.* Fitzhugh, Keller *v.* Moore; *Arkansas:* Dixon *v.* Thatcher, McNeill *v.* Arnold; *Minnesota:* Lund *v.* Rice; *Pennsylvania:* Hyam *v.* Edwards; see also Garrigues *v.* Harris, Pa., cited *post*, § 2105, n. 4; *Virginia:* Peterman *v.* Laws.

[5] In Kansas, Kentucky, Maryland, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina; see these statutes cited *ante*, § 1651.

§ 1653. [1] See the citations in § 1650, *ante*, and also some of the American cases cited in § 1651, *e. g.* Powell *v.* Hendricks, Cal.

it has also been reached in many rulings (and sometimes by express statute) for record copies of ancient documents whose execution was sufficiently evidenced by their antiquity.[2]

(2) Suppose that the statute authorizes the recording, but that *owing to non-fulfilment of its requirements* the register is *not admissible to prove execution;* nevertheless, may the register not be received to evidence the *contents* of the deed, assuming that its execution can be otherwise proved and its non-production accounted for? This inquiry differs slightly from the preceding one; because in that case there was a clear authority to record a copy of the contents, while here the doubt may be raised whether the authority to record a copy is separable from the authority to record as to execution; *i. e.* does not the whole authority fall to the ground if the requirements as to execution are not complied with? It is an arguable question, and in the realm of the substantive law has been the subject of much difference of judicial opinion in its bearing on the problem whether an improper record of a deed will serve as sufficient legal notice to subsequent purchasers. The more practical view seems to be that the authority to record a copy is separable, and that the record is therefore receivable at least to prove contents.[3] By judicial ruling and express statute this result has been reached for record copies of ancient deeds;[4] but it is not likely to be accepted for ordinary deeds.[5]

(3) Suppose that the offeror of a duly recorded deed *produces the original,* as required by the general rule (*ante,* § 1178); may he not then use the *register* (or, what is the same thing, the registrar's certificate on the deed) as evidence of the deed's *execution?* If he could not, the law would place him in the absurd position of being required to bring witnesses for a deed in court but not to bring them for a deed not in court. If the registrar's official statement suffices in the one instance, it ought equally to suffice in the other. The argument to the contrary has proceeded mainly upon the faulty wording of the earlier group of statutes, which usually declared merely that the record (or a certified copy) could be used when the original deed was shown to be lost or otherwise unavailable, and the suggestion was that this statutory authority was confined to the specified case of a deed lost or the like. But the statutory proviso was in reality intended to sanction the rule requiring production of the original (*ante,* § 1224), and had no other limitations in view; so that, when that rule was satisfied, and the execution remained to be proved, the registrar's statutory authority to take probate of execution was still in full effect and could be availed of for that purpose, even though it was not needed for proving the deed's contents. This result was generally reached by judicial construction, and the modern statutes have often taken care to make express provision for it.[6]

[2] The subject is treated under that head, *post,* § 2143.

[3] See Fiott *v.* Com., Va., cited *ante,* § 1651.

[4] The cases are collected under that head, *post,* § 2143.

[5] The cases are collected *ante,* §§ 1225, 1226, where they are equally involved under that principle.

[6] The authorities are collected *post,* § 1667*a*, because it is on principle a question of the use

(4) Suppose the *register not admissible* because of requirements not fulfilled; nevertheless, proof of execution may be made in the ordinary way, — by calling the attesting witness, if that is the law under another rule (*ante*, § 1287), or by evidencing the genuineness of the signature, or by showing the document an ancient one, under another rule (*post*, § 2137), or by any other appropriate mode (as enumerated *post*, § 2131). The imperfection of the record may under the substantive law affect its validity, and may thus render it immaterial in the case and therefore forbid its proof by any mode; but this is the result of the substantive law. No rule of evidence forbids the offeror to fall back upon other sources of evidence simply because he is unable to avail himself of the mode additionally provided by the registration statutes.[7]

(5) Where the register thus fails to assist because not made according to statutory requirements, and the offeror must fall back on other evidence, may not the official *certificate of acknowledgment*, by a notary or magistrate, be *treated as an attestation*, so that, upon calling the officer as attesting witness or proving his signature if he is deceased or out of the jurisdiction, the execution is sufficiently evidenced, upon another principle (*ante*, §§ 1292, 1505, 1508)? That this mode can be used seems clear.[8] That any doubt was ever raised was probably due only to the failure to perceive that the imperfection of an acknowledgment with reference to the substantive law of registration has nothing to do with its sufficiency as an attestation under the rules of evidence.

(6) It was conceded in England that, even though the register was in general inadmissible to prove execution, nevertheless a registration based upon an *acknowledgment* made by the very *opponent in the case* would be receivable as embodying his *admission of the execution*.[9] This concession no longer has any practical bearing for the law in the United States, since the register is now everywhere admissible; except that a mode is thus suggested by which a deed may be proved when the registration was not made according to the statutory rules. If the register contains an entry of acknowledgment made, and (probably) if some further evidence of identity is offered (*post*, § 2529), then it would seem that the register-entry could be used as embodying an

of Certificates (on the deed) and not of Registers. The use of *certificates of notaries, etc.*, to prove an *unrecorded* deed is treated *post*, § 1676.

[7] 1849, Hutchinson *v.* Kelley, 10 Ark. 178, 181; see also the cases cited under § 1226, *ante*, where a similar question is involved and compare the doctrines of § 1679, par. (2), *post*, and § 1635, n. 4, *ante*.

[8] 1878, Sharpe *v.* Orme, 61 Ala. 263, 268 (Brickell, C. J.: "The acknowledgment and certificate in this case is merely a substitute for an attestation by a witness, the parties to the deed being able to write and having signed it. . . . The certificate of acknowledgment, operating as a substitute for the attestation of a witness, when it is shown that it is legally impossible for the party proposing to introduce the conveyance in evidence to produce the officer making it, by reason of his residence without the jurisdiction of the Court, may be proved by evidence of his handwriting, and when the evidence is given the conveyance may be read"); 1851, Borst *v.* Empie, 5 N. Y. 33, 37 (acknowledgment is not essential, except for purposes of record, etc.; and a deed imperfectly acknowledged may be proved in the common-law mode; here by treating the notarial officer as a subscribing witness).

[9] *Ante*, § 1650.

admission by the party-opponent making the acknowledgment.[10] Furthermore, whenever by any other rules of evidence (*ante*, §§ 1294–1298, *post*, § 2132) the *opponent's admission* suffices to evidence execution, then the irregularity of the registration is of course immaterial (for the reasons just suggested in par. 4). Finally, such an admission, when made expressly *with reference to the registry-entry in question*, will suffice to admit it without regard to the irregularity of the record and without other evidence of execution.[11]

(7) In a few other ways, the register of a deed not placed there according to law could be availed of for other purposes than to evidence execution. For example, the notorious presence on the record, or the manual possession of a certified copy, of a document purporting to vest a certain person with title may amount in effect, under another principle (*post*, § 1777), to a "verbal act," constituting a *claim of title* or color of title.[12] Again, where certain consequences in substantive law ensue from the *failure to have a deed recorded*, the condition of the register will be in issue for this purpose.[13] Such uses of the register have no bearing on its admissibility under the present Exception.

§ 1654. **Same: Register as Evidence of Other Matters Recorded.** The statutes authorizing registration give expressly to the registrar the authority to make the entry in certain terms. This entry is therefore (on the general principle of § 1639) admissible to prove whatever facts are thus authorized to be entered — that is, usually, the *time* [1] and the *fact* [2] of record; on these points the statute commonly makes the entry expressly admissible. The entry, conversely, is not admissible to prove facts which the registrar is not authorized to record or to ascertain.[3] In practice, the only controversy that has here arisen is as to the *conclusiveness* of the record, — a different principle (*ante*, §§ 1346, 1352). Whether the record is evidence of the deed's *delivery* is chiefly a question of the presumption as to delivery (*post*, § 2550).

[10] It might perhaps be objected that the registrar has no authority to make hearsay statements as to acknowledgments, except for the purpose provided in the statute; but this objection seems finical.

[11] Fiott *v.* Com., Va., cited *ante*, § 1651; 1892, Chicago M. & S. P. R. Co. *v.* McArthur 10 U. S. App. 546, 569, 3 C. C. A. 594, 53 Fed. 464 (defectively recorded plat, used as having been recognized in defendant's dealings as correct). But not for those deeds, *e. g.* of homestead by a married woman, for which an acknowledgment made at the time of execution is an essential formality of the act: 1914, Severtson *v.* Peoples, 28 N. D. 372, 148 N. W. 1054.

[12] 1828, Doe *v.* Roberts, 13 M. & W. 520, 531 (irregularly enrolled lease; examined copy of enrolment admissible to show an "act of ownership"); 1894, Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242; see analogous instances *post*, §§ 1777, 2132.

[13] 1885, Steiner *v.* Snow, 80 Ala. 45 (penalty for not recording satisfaction of mortgage; record produced).

§ **1654.** [1] It is also evidence of the time of the deed's receipt for registration: 1822, Sherman *v.* Goble, 4 Conn. 247, 256. Compare the cases as to *certificates of record*, *post*, § 1676.

[2] 1895, Thompson *v.* Anderson, 94 Ia. 554, 63 N. W. 355 (certificate of a recorder, indorsed on a mortgage, admissible if the law requires or authorizes the certificate to be made); 1881, Jakway *v.* Jenison, 46 Mich. 521, 522, 9 N. W. 836; 1894, Garneau *v.* Mill Co., 8 Wash. 467, 473, 36 Pac. 463 (lien-notice; the original bearing a certificate received).

[3] 1855, Charlotte *v.* Chouteau, 21 Mo. 590, 597 (a conveyance of a slave, authenticated by a Spanish official, in a region where slavery was lawful, is no determination of the transferred person's slavery).

§ 1655. **Same: Sundry Questions involving Certified Copies and Sworn Copies of the Register.** In the foregoing inquiries, it has been assumed that the *register itself* is offered in evidence, and not (as is usual) a copy of the register. Does this assumption affect the correctness of the results reached under the foregoing principles? By no means. If the register is not produced, as of course ordinarily it cannot be, this inability to produce it serves as an excuse, under another rule (*ante*, § 1218), for using a copy of it (sworn or certified) to prove its contents. But this use of a copy of the register only removes by one stage the general inquiry as to the admissibility of the register. The copy is of itself of no efficacy except to prove the contents of the register; and, having thus proved its contents, the party is merely in the same position (*ante*, § 1226) as if he were offering the register itself in court; and thus he must after all face the main question, whether the register itself is admissible for any purpose, — the question dealt with in the seven preceding sections. The fundamental inquiry, then, so far as concerns the evidence of execution and contents of the recorded deed, involves the admissibility of the register itself; and this must be first determined upon the principles just examined, before any other question as to the use of copies of the register can be of any consequence.

But suppose that the admissibility of the register has been settled in the affirmative, and that none of the problems discussed in the foregoing sections are concerned, and suppose that a *copy of the record* is desired to be used, then certain other questions arise. It may be premised that, in the traditional usage of the profession, a "certified" or an "office" or an "attested" copy (being one and the same thing) is a copy given out by the official custodian of the record and certified or attested by him as correct; while an "examined" or a "sworn" copy is a copy made by some other person and sworn to by him testifying on the stand.[1]

(1) May a *certified copy by the registrar* be used? This is a question whether the registrar's hearsay official statement as to the contents of the record is receivable under the present Exception. A certified copy, however, of any document, is of the nature of a Certificate, not a Register (*ante*, § 1637), and this inquiry properly concerns the admissibility of certified copies in general (*post*, § 1677). It is enough here to note that, at common law in this country, the principle was recognized that every custodian of records had an implied authority to certify copies of them, and in particular, as to registrars of deeds, that by statute almost everywhere the registrar's certified copies are expressly made admissible and the mode of authentication prescribed.[2]

(2) A few of these statutes that expressly make certified copies of the register admissible *fail* expressly to make *the register itself admissible*. It is obvious, however, that this omission should not render the register

§ 1655. [1] See a further explanation of these terms, *ante*, § 1264.
[2] *Post*, §§ 1677–1682, where the authorities are examined.

inadmissible, supposing it can be produced. The certified copy merely proves the register's contents; and it would be absurd that a document which merely evidences the register should be admissible to prove the deed (from which it is twice removed), and yet the register itself should be for the same purpose inadmissible. The whole virtue of the certified copy, for proving the deed, comes from the register; and, if the register were inadmissible, the singular trick would be performed of making an inadmissible thing admissible by merely copying it. The clear implication of such statutes is that the register also should be admissible, provided it is in court; and this is the usual judicial construction.[3] It should be noted, however, that we are here dealing merely with the admissibility of the register so far as the Hearsay rule and the present Exception are concerned. There may be other reasons why the register itself should not be admitted, — the reason, for example, that the law has forbidden its removal and that its production is therefore a violation of the law; or the reason that a due regard for its safety and for public convenience requires its continuous preservation in the registrar's office; these reasons have sometimes availed with Courts (*post*, §§ 2182, 2183, 2373).

(3) Suppose the statute to make the register, or a certified copy of the register, admissible; will not a *sworn copy of the register* be equally admissible? On principle, there is no doubt that it would be. The reason appears in what has already been said. The register is the fundamental document; the registrar's entry, based on the probate made to him, is the official statement to which faith is given; and the primary object is to offer that statement in court. The register itself cannot be removed; so that its contents must be proved by copy. A sworn or examined copy is the most straightforward and unquestionable mode of doing this; but the statute has also expressly authorized, by way of exception to the Hearsay rule, the use of a certified copy. This, however, is merely an additional means provided; there is no reason why it should displace the other preëxisting legitimate means. The circumstance that the statute expressly mentions a certified copy only is no reason for excluding the other sort; for that mention was intended only to remove the doubt which otherwise might have been raised (*post*, § 1677) whether the certified copy could be used at all. A sworn or examined copy is therefore equally admissible, as it would be for any other public record.[4]

(4) A superficially related, but entirely distinct question, is whether a *certified copy is preferred* to a sworn one; *i. e.* whether the former kind must be shown unattainable before the latter can be used. The orthodox and sound opinion is that no such rule of preference obtains; the principle has already been discussed (*ante*, § 1273).

[3] The cases are collected *ante*, § 1186.

[4] 1859, Farrar *v.* Fessenden, 39 N. H. 268, 276 ("an examined copy of any instrument thus recorded" is admissible "without proof of the original"); and cases cited *ante*, §§ 1225–1227. *Contra*, but unsound: 1914, Judson *v.* Freutel, 266 Ill. 24, 107 N. E. 207.

(5) Since the register is the fundamental document whose entries evidence execution, it is to the register alone that the certified copies must relate; a *certified copy of the deed itself* is unauthorized, and can evidence nothing. In form, then, the certified copy must be of the register, not of the deed; although a certificate in the latter form could hardly be made except by inadvertence, and would therefore be liberally construed by the Courts.[5] But a *certificate of execution* appended to the deed may be admissible (*post*, § 1676*a*).

§ 1656. **Same: Other Principles of Evidence Discriminated.** We are concerned here only with the use of the register under an Exception to the Hearsay rule; and the following discriminations are worth noting. (1) There is in practice always to be considered at the same time the rule requiring the *production of the original* of a document, with its exception for recorded deeds (*ante*, §§ 1224–1227). (2) There is also to be considered the principle as to a preference between various modes of evidencing the contents of documents not produced, — that is, as between copy and recollection or as between *different kinds of copies* (*ante*, §§ 1265–1275) and *a copy of a copy* (*ante*, § 1275). (3) Again, there are principles determining the qualifications of a *witness to a copy* (*ante*, §§ 1277–1280). (4) There are also rules about proving the *whole*, and not merely a part, of a document (*post*, § 2107). (5) Finally, there are rules as to the *authentication* (or proof of genuineness) of a document produced (*post*, § 2129).

§ 1657. **Record of Assignment of Patent (of Invention).** It seems for a long time to have been the understanding of the profession that the Federal record of assignment of a patent (of invention) was admissible to prove its execution. That this opinion was unsound seems clear, in the light of the foregoing principle (*ante*, § 1648), so firmly enforced by the Courts of the various jurisdictions; for the Federal law regulating the record of such assignments provides for the registrar no means of informing himself as to the genuineness of the document. Nevertheless, the Federal judiciary for many years recognized the register (or a certified copy) as admissible to prove the assignment's execution and contents.[1] In more recent times, however, the propriety of this view has been generally questioned, on the grounds noted (*ante*, § 1648). Discordant rulings have been made in the different circuits.[2]

[5] 1858, Vickery *v.* Benson, 26 Ga. 582, 588; 1882, Preston *v.* Robinson, Vt., cited *ante*, § 1651.

§ 1657. [1] 1860, Lee *v.* Blandy, 1 Bond 361, 363; 1886, Derrick *v.* Whitman A. Co., 26 Fed. 763. Other cases, sometimes cited for this point, seem to deal only with the rule as to production of the original; they are given *ante*, § 1225.

[2] 1893, Paine *v.* Trask, 5 U. S. App. 283, 286, 5 C. C. A. 497, 56 Fed. 283 (admissibility doubted; partly because "no provision is made for authentication of the genuineness of the instrument to be recorded, as frequent in laws providing for registry, but a forged assignment may be recorded equally with a genuine one"); 1894, Mayor of New York *v.* American Cable R. Co., 26 U. S. App. 7, 9 C. C. A. 336, 60 Fed. 1016 (certified copy excluded; in part because "any stranger can put an assignment upon record"); 1896, Standard Elevator Co. *v.* Crane El. Co., 46 U. S. App. 411, 22 C. C. A. 540, 76 Fed. 767, 789 (certified copy admitted; the above arguments answered by the suggestion that the commissioner's record "is in law tantamount to a finding by the certificate that the original is genuine"; the opinion does not seem to apprehend correctly

§ 1658. **Record of Wills.** Upon the principle already examined (*ante*, § 1648), the record of a will cannot be received as evidence of its execution and contents, unless the recording officer has authority to record such documents, and, in particular, has authority to inform himself as to the will's execution. Such was in fact the recognized rule of the common law. Until the middle of the 1800s, the jurisdiction in England over matters matrimonial and testamentary had been for many centuries in the ecclesiastical Courts. But this jurisdiction over wills was understood not to concede to those Courts any jurisdiction to determine the title to lands; their jurisdiction was confined to wills of personalty. Their records, therefore, finding the due execution of a will, were not receivable to evidence its execution so far as it disposed of lands, because the ecclesiastical officers had no authority to deal with wills in that respect:

> 1726, Chief Baron GILBERT, Evidence, 71: "If a man devise lands by force of the statute of wills or by custom, the probate of the Spiritual Court cannot be given in evidence; for all their proceedings, so far as they relate to lands, are plainly 'coram non judicé,' for they have no power to authenticate any such devise. . . . [But] in a suit relating to a personal estate, the probate of the will under the seal of Court, is sufficient evidence, and no evidence contrary to it can be given that such will was not the last will and testament of the party deceased; for the Spiritual Court are the proper judges of what is and what is not the will of the testator, and since the authority of judging is committed to them, the Temporal Courts are bound by their judgments."

This had been apparently an arguable question in the preceding century;[1] but by the time of Chief Baron Gilbert the principle was fully settled. It will be noticed that, where the ecclesiastical Court had jurisdiction, its record of probate was not only admissible, but conclusive; because it was not merely an official register, but a judicial determination.

the principle of admissibility of deed-records); St. 1897, c. 391, § 5, Mar. 3, 29 Stat. L. 692, St. 1922, Feb. 18, § 6, Code 1919, § 6141 (Rev. St. 1878, § 4898, which declared an assignment of patent void against a purchaser for value without notice, unless recorded in the Patent Office within three months, is amended by adding that if such assignment is acknowledged before a notary or U. S. commissioner, or a secretary of legation or consular officer duly authorized, "the certificate of such acknowledgment under the hand and seal of such notary or other officer shall be 'prima facie' evidence of the execution of such assignment, grant, or conveyance"); 1900, National Cash-Reg. Co. *v.* Navy C. R. Co., 99 Fed. 89 (the original's execution and loss must be shown); 1905, American Graphophone Co. *v.* Leeds & C. Co., 140 Fed. 981, C. C. (certified copy of the patent-office record of an assignment, excluded, in the absence of evidence of the existence and loss of the original; Mayor *v.* American Cable Co. and National C. R. Co. *v.* Navy C. R. Co., *supra*, followed); 1913, Toledo Computing Scale Co. *v.* Computing Scale Co., 7th C. C. A. 208 Fed. 410 (certified copy of assignment not duly acknowledged, not admissible to prove execution).

Compare the statute for *patent-office records* (quoted *post*, § 1680, n. 1).

§ 1658.[1] 1635, Netter *v.* Brett, Cro. Car. 395 (will of land; excluded); 1688, Anon., Comb. 46 (same); 1696, Puleston *v.* Warburton, Comb. 394 (same); 1697, King *v.* Raines, 12 Mod. 136 (admitting the probate of a will of personalty in the Ecclesiastical Court; "because they having jurisdiction of the cause, it was an undeniable evidence, which should conclude all others from saying the contrary"); 1699, St. Legar *v.* Adams, 1 Ld. Raym. 731 (register of the Spiritual Court, to prove the contents of a lost will, admitted; but in Anon., 1 Ld. Raym. 732, *semble*, *contra*); 1701, Dike *v.* Polhill, 1 Ld. Raym. 744 (register of the Spiritual Court, not admissible to authenticate a will of land; Tracy, B., *contra*, where the purpose is not to establish title through the will).

In the United States the same principle was accepted. But at an early date the unendurable division of judicial functions in testamentary matters was almost everywhere ended by statute, and the jurisdiction over wills of both kinds was placed in a single Court; so that the determination of that Court was admissible for all wills, and where it was not conclusive, it was no more so for one kind of will than for another:

1858, LUMPKIN, J., in *Churchill* v. *Corker*, 25 Ga. 479, 490: "We maintain broadly that it is not necessary in this State that any will, whether of realty or personalty, should be proven when offered in evidence as a muniment of title; but that a certified copy, from the Ordinary, under the seal of that Court makes it evidence. This results necessarily from the fact that by law Courts of Ordinary in Georgia are clothed with original, general, and exclusive jurisdiction, except by appeal, over testate and intestate's estates, and are also courts of record. It is here that the validity of the will must be tried and established."

Thus the statutory reform granted a uniform authority, and the older distinction ceased to be of practical consequence.[2] The record of a probate of a will, when offered in evidence, is of course still receivable only where the Court granting probate had authority to do so; but this now depends entirely on the terms of the statute. These statutes are without the present purview, because they concern primarily the subject of jurisdiction of courts.

Certain other principles affect the use of will-records. (1) Supposing the

[2] The following cases illustrate the early American common-law doctrine; some of them are rendered under the statutes abovementioned, but will serve to show the distinction: *Fed.* 1909, Copley *v.* Ball, 4th C. C. A., 176 Fed. 682, 688 (certain certified copies from W. Virginia, passed upon); *Fla.* 1906, Thomas *v.* Williamson, 51 Fla. 332, 40 So. 831 (statutes as to the effect of probate, construed); *Ga.* 1858, Churchill *v.* Corker, 25 Ga. 479, 490 (certified copy of a probate will under Court seal, admissible); 1876, Thursby *v.* Myers, 57 Ga. 155, 157 (copy of record of will from ordinary's office, admitted); *Ill.* 1868, Gardner *v.* Ladue, 47 Ill. 211 (certified copy of a foreign will probated, admitted); *Mich.* Comp. L. 1915, § 13941 (record of probate to be evidence of heirship); *Minn.* 1873, First National Bank *v.* Kidd, 20 Minn. 234, 238 (certified copy of a probated will, admitted); *Mo.* 1838, Haile *v.* Palmer, 5 Mo. 403, 417 (sworn copy of a will registered in Louisiana, excluded because it was not shown how the law of Louisiana required wills to be executed and proved); *N. J.* 1888, Nelson *v.* Potter, 50 N. J. L. 325, 15 Atl. 375 (statute as to proof of wills construed); Comp. St. 1910, Conveyances, § 62; *N. Car.* 1912, Riley *v.* Carter, 158 N. C. 484, 74 S. E. 463 (under Rev. St. 1905, § 3133, a probated will from Maryland, by certified copy signed by the register of wills, excluded; the clerk of the court of probate should have signed); *Pa.* 1759, Lewis *v.* Stammers, 1 Dall. 2 (exemplification of a will probated in England, admitted, under St. 1705); 1782, Morris *v.* Vanderen, 1 Dall. 64, 66 (same); 1791, Walmesley *v.* Read, 1 Yeates 87, 89; 1807, Sharp *v.* Petit, 4 Yeates 413; 1819, Logan *v.* Watt, 5 S. & R. 212 (probated will of lands, received); 1835, Smith *v.* Bonsall, 5 Rawle 80, 83, 86; 1848, Thompson *v.* Thompson, 9 Pa. St. 234 (probated will provable by certified copy); *S. Car.* 1824, Franklin *v.* Creyon, Harp. Eq. 243, 249; *Tenn.* 1848, Weatherhead *v.* Sewell, 8 Humph. 272, 282 (the production of an attested copy of a probated will of realty under St. 1784, c. 10, § 6, is 'prima facie' evidence of execution, and throws on the contestant the burden of going forward); *Va.* 1831, Ex parte Poval, 2 Leigh 816, 818 (duly authenticated copy of a foreign probated will, sufficient, without re-proving it by witnesses); Ex parte Todd, 2 Leigh 819 (same); 1844, Taylor *v.* Burnsides, 1 Gratt. 165, 168, 210 (office copy of probated will and proceedings, received).

If the record was not admissible, the will's execution might of course be evidenced in the ordinary way: 1820, Hood *v.* Mathers, 2 A. K. Marsh. 553, 555; 1823, Elmondorff *v.* Carmichael, 3 Litt. 437, 479.

The statutes expressly admitting the record-copy of a foreign probate of will are collected *post*, § 1681, with other statutes for judicial records.

record itself to be admissible, under the above principle, to prove the will's execution, it still remains to prove the contents of the record, the production of the record itself being unnecessary, under another rule (*ante*, § 1215). For this purpose, a *certified copy* is desirable; here, however, is involved the general principle concerning the proof of *judicial records* by certified copy (since a probated will becomes a part of the court-records); the statutes affecting the use of certified copies of probated wills are therefore examined under that head (*post*, § 1681).

(2) A question may arise, under the doctrine of Completeness (*post*, § 2094), as to the *sufficiency of the contents of the record* as evidenced by the certified copy; how far, for example, the copy or the record must set out the kind or the tenor of the testimony upon which the probate was granted, has been a matter of some controversy. This, however, besides being largely regulated by statute, is in substance a question of what constitutes a proper record and of the presumption of the regularity of judicial proceedings, — matters beyond the present purview.[3]

(3) The recorded copy of an *ancient will* may sometimes be admitted without other evidence of execution, on the principle of Authentication (*post*, § 2143).

(4) The application of the rule requiring *production of the original*, especially as affecting *letters of administration*, has already been considered (*ante*, § 1238).

(5) The record of *preliminary probate*, before a judge without a jury, has in strictness no place as evidence on appeal at a final trial of probate before a jury, and therefore may be forbidden to be read;[4] but it seems an excess of judicial nicety to see any harm in it.

§ 1659. **Records of Government Land-Office.** The records of a government land-office, dealing with grants, patents, warrants, certificates, scrip, and the other variously named indicia of title, are available in evidence on principles no different from those applicable to other official deed-registers and public documents. The peculiarities, however, that are to be found in the mode of proving them are due, not to the rules of evidence, but to the principles of substantive law.

The chief question having practical effects upon the mode of proof is as to the *nature of the title-document*, — known variously as patent, certificate, or grant. If this document is of the nature of an ordinary deed of grant, then the record remaining in the government office is a mere register or copy of the substantive title-deed delivered into the grantee's hands, and consequently it must be accounted for (under the principle of § 1179, *ante*) before the register (or a certified copy of it) may be used. But if the constitutive document of title is the entry in the official record, then the document given to the purchaser is a mere copy of this, and therefore since the original is in

[3] The subject is further noticed *post*, § 2110.

[4] 1904, Weston *v.* Teufel, 213 Ill. 291, 72 N. E. 908 (citing prior cases). Compare the cases cited *ante*, § 1417.

official custody, a copy of the official original may be used without accounting for the copy given to the grantee (under the principle of § 1218, *ante*). Thus the question depends in truth upon the theory of the substantive law as to the nature of the title-document. Moreover the matter is in most jurisdictions affected by express statutory provisions. On account of this complicating element of substantive law, and the frequent difficulty of determining the precise principle involved in a decision, the statutes and decisions can best be considered under one head, in dealing with the rule for production of the original (*ante*, § 1239).

In addition to this general question, however, decisions and statutes upon a few other special rules concerning land-office documents are elsewhere to be considered; these concern (1) the *register* (or a copy) as evidence of the *execution* of a grant (*ante*, § 1651); (2) land-office *certificates* (*post*, § 1674); (3) certificates *summarizing the entries* of a register, instead of copying them in full (*post*, § 1678); (4) land-office *reports* as evidence of title (*post*, § 1672); and (5) returns of government *surveys* (*post*, § 1665).

§ 1660. **Judicial Records (Judgment of Conviction of Crime; Judicial Establishment of Lost Documents).** (1) A judicial record is not *evidence* of something else; it is a constitutive act. It is the judgment itself, not evidence of the judgment. Whether the record of another Court shall be considered when offered is not a question whether something is admissible in evidence, but whether the Court of the forum is willing or is obliged to lend its assistance to enforce the judgment of the other Court. This principle is considered elsewhere (*ante*, § 1347, *post*, § 2450), and need not be further noticed; for no question of an exception to the Hearsay rule is involved.

The question most frequently treated as one of evidence (as distinguished from that of conclusiveness under § 1347), is whether a *judgment of conviction of crime* is admissible to prove the fact of guilt when relevant in another civil or criminal case between other parties.[1]

But the admissibility of *certified copies*, as evidence of the contents of a judicial record, is genuinely a question of evidence, and involves the general principle of certified copies in a particular application (*post*, § 1681).

(2) Statute has in many jurisdictions provided a proceeding for *judicially reëstablishing* the *contents* of *documents lost or destroyed*, — deeds, wills, official registers, and many other specific classes of documents. The documents thus reëstablished are usually under the statute preserved as official records; so that such a repository of private documents becomes a record or register of a peculiar sort, by which the documents can be proved in a manner analogous to the use of deed-registers. Nevertheless, these records are after all not ordinary official registers, given in evidence by way of exception to the Hearsay rule, but are in the nature of judgments; for the statutory proceeding is almost everywhere a judicial one; and the typical question arising in

§ 1660. [1] Some authorities have been collected *ante*, § 1347 (sundry cases).

their use is whether the record is to be taken as a judgment *in rem*, binding on all the world, or as a judgment affecting only the parties to the proceeding. The conditions of their use involve the principles concerning the effect of judgments, and are thus without the present purview.[2] The use of recorded *abstracts of title* to prove lost or destroyed deed-records is elsewhere considered (*post*, § 1705).

§ 1661. **Records of Corporations.** (1) The *records of the proceedings and acts* of an *ordinary private corporation* are, according to one theory, the constitutive acts of the corporation; they are not evidence of what is done, but they *are* what is done; since the proceedings must be in writing. According to the other theory, they are merely entries of the oral doings, and are thus analogous to any ordinary person's contemporary entries of his doings. The chief practical difference between the two theories is as to their effect on the conclusiveness of the entries; and in this aspect the subject is considered under the Parol Evidence rule (*post*, § 2451).

But the *books of account*, the *stock-books*, and other books recording the acts of the officers and employees of the corporation stand on a different footing; they are merely some person's assertion; and, so far as they are admissible, they naturally come in under the Exception for Regular Entries (*ante*, §§ 1523, 1547), if the maker is accounted for as unavailable, or as Memoranda to aid Recollection (*ante*, § 735). Here, however, statutes have in some jurisdictions intervened to modify the Exception's ordinary rules and to admit the books without producing the maker of the entries. Furthermore, against persons having knowledge of their contents, the corporation records may be received as embodying an *admission*, *i. e.* by a presumed

[2] Besides the following statutes, compare the rulings cited *ante*, § 1215 (whether the *loss* of the original must be expressly proved), *ante*, § 1347 (whether the record reëstablishing the document if *conclusive*), and *ante*, § 1275 (whether the prohibition of a *copy* of *a copy* applies to such copies); the following list of statutes is probably not complete; *Ireland:* 1917, Kelly *v.* Kelly, 1 Ir. R. 51; Shanahan *v.* Shanahan, 1 Ir. R. 57 (suits to establish lost or destroyed documents; called here suits to perpetuate testimony); *United States: Fed.* Rev. St. 1878, §§ 899-904, Code §§ 1402-1407; 1918, Virginia & W. Va. Coal Co. *v.* Charles, D. C. W. D. Va. 251 Fed. 83 (careful opinion by McDowell, J.); *Ala.* Code 1907, § 5739 ff.; *Ariz.* Rev. St. 1913, Civ. C. §§ 682, 4725-4731; *Cal.* St. 1906, Spec. Sess., c. 55, p. 73, June 16, § 2; id. c. 60, p. 82, June 16; *Colo.* Comp. L. 1921, § 5614; *Fla.* Rev. G. S. 1919, §§ 3246-3267 (establishment of lost papers, records, etc.); 1903, Hoodless *v.* Jernigan, 46 Fla. 213, 35 So. 656 (certified copy of a clerk's minute-book in which a reëstablished lost judgment and execution were entered, held admissible); *Ga.* Rev. C. 1910, §§ 4191, 5810, 5312-5328; 1902, Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736 (judicially established copy suffices to prove execution); 1903, McLanahan & Alford *v.* Blackwell, 119 Ga. 64, 45 S. E. 785 (certified copy of a judicially established copy of a lost document, admitted); *Ill.* Rev. St. 1874, c. 116, §§ 1–5 (judicial records); § 9 (plat or map); § 13 (deeds, etc.); *Ia.* Comp. Code, §§ 8082-8086, St. 1886, No. 57; *La.* St. 1910, No. 234, p. 397, July 6 (detailed provisions for use of certified copies from re-established archives, the originals being burned); *Miss.* Code 1906, §§ 3170-3186, Hem. §§ 2511–2527; *Mo.* Rev. St. 1919, §§ 10611–10616; *Nev.* Rev. L. 1912, §§ 5630–5646; *N. Car.* Con. St. 1919, §§ 365–384; *Oh.* Gen. Code Ann. 1921, §§ 1151, 3610, 12359–12365; *Okl.* Comp. St. 1921, § 9539; *Or.* Laws 1920, §§ 593–596; *Pa.* St. 1786, Mar. 28, § 2, etc., Dig. §§ 8826–8835 Deeds; *S. Dak.* Rev. C. 1919, § 3048; *Tex.* Rev. Civ. St. 1911, §§ 6778–6785; *Vt.* Gen. Laws, 1917, § 2485 (judicial record); § 2488 (instrument affecting real estate in more than one town); *Va.* Code 1919, §§ 6203, 6241; *Wash.* R. & B. Code 1909, §§ 1270–1277; *W. Va.* Code 1914, c. 130, §§ 14–18; *Wis.* Stats. 1919, §§ 4151*j*–4151*o*; *Wyo.* Comp. St. 1920, §§ 6704–6707 (lost or destroyed will).

assent to the known statements. In these aspects they have already been elsewhere dealt with (*ante*, § 1074).

(2) There is, apparently, no sound reason for regarding the records of a *public corporation* as governed, for the purposes of evidence, by principles any different from those just enumerated. Nevertheless, a loose and intangible doctrine has received some currency, by which the books of a public corporation are said to be admissible to prove the facts entered,[1] — apparently with some suggestion that, as official books, they have a force under the present Exception which is denied to other corporate records. The authority on the subject is scanty; but this doctrine, in its application to the present Exception, has probably misunderstood and exaggerated the significance of the precedents. The true extent of the doctrine is a narrow one, and seems to be as follows:

(*a*) Books of entries of corporate proceedings are (as above noted) ordinarily not receivable under the Regular Entries Exception without calling the clerk or other entrant. But the records of a public officer are admissible under the present Exception without calling the entrant, because he is a public officer; and therefore the books of a public corporation (that is, with us, usually a municipal governing body) are receivable *without calling the official entrant;* their contents, as irremovable from official custody (*ante*, § 1218), being provable by certified copy (*post*, § 1680); the original may require to be authenticated (*post*, §§ 2159, 2169).

(*b*) The facts which such entries are admissible to prove are merely those which may be conceived as contained in the entries themselves, namely, the *doings of the corporation.* This is their sole scope as testimony; the officers are authorized to record the corporate acts or proceedings; their authority to record extends no further, and their record is therefore (*ante*, § 1639) no further admissible. So far, then, as the entries record (for example) the corporation's vote to lay out a street through certain property or the corporation's appointment of a wharf toll-master or the corporation's act of receiving a deed of land, they are admissible. But so far as they record the fact that Doe lived in a house on the street, or that the river-bank was public property, or that Roe had title to the land deeded, they are not admissible, because these entries record, not the corporate acts, but extrinsic facts. It is true that a statute may expressly authorize the corporation to ascertain and record such extrinsic facts, and then the record would presumably be admissible (*ante*, § 1639). But, apart from express authority, the books are receivable only to prove corporate acts. This, it will be seen, is in fact the narrow scope of their use, so far as the precedents carry it; the entries of customary rights, admitted in the older cases,[2] being in fact merely entries of corporate acts which served to found a prescriptive exercise of the right. The important

§ 1661. [1] 1801, Peake, Evidence, 64 ("Corporation books, concerning the public government of a city or town, when publicly kept, and the entries made by a proper officer are received as evidence of the facts contained in them").

[2] See the cases collected in note 5, *infra*.

thing is, then, that the ordinary phrase about using corporate books to prove "public but not private facts" [3] is misleading, so far as it suggests that the entries can be used to evidence matters other than mere corporate acts; for, whether the matter is "public" or not, the entries are not receivable to prove it if it is not a corporate act.

(c) Supposing the entries to be offered to prove merely some corporate act, nevertheless the doctrine of the disqualification of parties as witnesses (which prevailed down to the middle of the 1800s), would prevent the corporation from using its books *on its own behalf;* and it was apparently upon this principle that the adverse rulings were based. The Exception for Parties' Books was not recognized in England after the end of the 1600s (*ante*, § 1518).

(*d*) But since, under the English borough and parish system, the inhabitants were members of the corporation (so clearly that it was long maintained that an inhabitant in a suit by or against the corporation was disqualified by interest), and since as a member he had the right of access to the corporate books,[4] it would follow, on the principle of Admissions (*ante*, § 1074), that this constructive knowledge of the contents of the entries made them receivable *against members as admissions*, *i. e.* on the ordinary principle upon which corporate books are admitted as against stockholders (*ante*, § 1074). Thus, the entries must be of genuinely public matters, *i. e.* matters in which the inhabitants at large had an interest, and for which alone they could in theory be expected to consult the book. For such entries, thus placed on the footing of admissions, the book became available against all the inhabitants; and the objection as to testifying on one's own behalf disappeared, since the book was not offered as the corporation's own testimony, but as embodying an admission of the opponent.

Such seems to be the explanation of this obscure and confusing line of precedents.[5] The rulings in the United States are not complicated by the

[3] *E. g.* in Marriage *v.* Lawrence, *infra*, often cited.

[4] 1708, Love *v.* Bently, 11 Mod. 134 ("Every parishioner has a right to the parish books").

[5] 1718, Thetford's Case, 12 Vin. Abr. 90, Evidence, A, b, 15 ("The books of a corporation, containing their public acts, are very proper evidence"; here a book not appearing to be kept by the proper person was rejected, "yet their common books are evidence in regard they contain a register of their public transactions"); 1718, R. *v.* Motherwell, 1 Stra. 93 (supposed corporate minutes, all written by one not an officer, rejected; "Corporation books are generally allowed to be given in evidence when they have been publicly kept as such and the entries made by the proper officer; not but that entries made by other persons may be good, if the town clerk be sick or refuses to attend; but then that must be made to appear"); 1720, Warriner *v.* Giles, 2 Stra. 954 (London city books, said to be evidence to prove the boundaries of the markets set out by the city); 1789, London *v.* Lynn, 1 H. Bl. 206, 214 (on an issue as to a custom of exemption from toll, the defendant town was not allowed to use its books on its own behalf); 1809, R. *v.* Martin, 2 Camp. 100 (parish vestry book, admitted to show due notice of a meeting of the vestry; "what is thus recorded before the inhabitants of the parish, I must consider as having their assent"; here, the defendant, a resident, was indicted for libel on the parish treasurer, whose appointment at the above meeting was in issue); 1812, Price *v.* Littlewood 3 Camp. 288 (action for disturbing the plaintiff's right to a church pew; the vestry-book entry stating a user by license, etc., of the pew, admitted; in Sturia *v.* Freccia, L. R. 5 App. Cas. 646, Lord Blackburn places this case on the ground that "the entry in the vestry was intended for the information of all the parishioners who liked to come and use it"); 1818, R. *v.* Debenham, 2 B. & Ald. 185 (pauper-settlement; an entry in old corporate books

interest-disqualification; but their scope does not seem to be different from that indicated above (par. *b*).[6] It may be added that the use of public corporation books as admissions against the public at large would to-day be wholly inappropriate. On the other hand, the disqualification by interest has disappeared.

§ 1662. **Records of Legislature (Journals of Proceedings, Statutory Recitals).** (1) Entries in the *legislative journals*, for reasons analogous to those just noted with regard to corporations, are admissible to prove the proceedings of the Legislature; because the entrant is an officer charged with the duty of making such a record. This general principle is undisputed. So far, then, as the proceedings of the Legislature are relevant to be proved, the journal is admissible. If the proceeding, for example, consists in the receipt or acceptance of a report or a petition, the statements in the report or petition may be inadmissible;[1] but the fact of its receipt or the mode of its treatment may be relevant, and therefore may be evidenced by the journal.[2]

The *conclusiveness* of the enrolment of an act, as against the journals, has already been considered (*ante*, § 1350). The use of *printed volumes* to evidence the contents of the journals is governed by the principle of certified copies (*post*, § 1684).

was offered as "a public document, for it is kept in the parish chest and by a public body," but was excluded because it dealt with a fact tending to exempt the entrant parish from supporting the pauper); 1819, Marriage *v.* Lawrence, 3 B. & Ald. 142 (trespass, the defendant justifying as bailiff of Malden; an entry in old corporate books as to an early instance of a custom as to the levy of toll, etc., was excluded; Abbott, C. J.: "This was no more than a minute made by a party in his own memorandum-book, and it was in fact making evidence for himself. It is said these were public books in which this entry was found; but they were not public books for all purposes"; Bayley, J.: "If a corporation enter their own private business in the public court-book, that circumstance will not alter the nature of the entry"); 1827, Attorney-General *v.* Warwick, 4 Russ. 222 (whether a nomination to office belonged to the vicar or to the corporation; the latter's books not admitted on its own behalf, following London *v.* Lynn).

[6] 1820, Owings *v.* Speed, 5 Wheat. 420, 424 (public-land trustees; "the books of such a body are the best evidence of their acts"; here admitted to prove their allotment of land, etc.); 1873, Wilson *v.* Waltersville S. Dist., 44 Conn. 157 (clerk's record of a vote at a school-district meeting, on a subject not lawfully before the meeting, excluded); 1900, Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672 (city council records, though admissible under charter, receivable only as to matters upon which the council could lawfully act); 1855, State *v.* Van Winkle, 1 Dutch. N. J. 73, 74 (book of trustees of school district, admitted to show notice put up by them; the corporation being "established by law for a public purpose," though not required to keep a record of proceedings); 1831, Denning *v.* Roome, 6 Wend. N. Y. 651, 656 (trespass, defendant justifying as superintendent of city repairs under a city ordinance ordering a street widened; city records admitted to show the proceedings of the council as to the property, on the principle that "the books of a public body are . . . the best evidence of their acts"); 1845, Gearhart *v.* Dixon, 1 Pa. St. 224, 228 (trespass, defendant justifying as levying a tax under orders of a board of school directors; the board's records admitted to prove their proceedings); 1876, Fraser *v.* Charleston, 8 S. C. 318, 337 (books of a municipal corporation receivable to show "the exercise of the power not, as here, to show the transfer of stock issued by it).

The innumerable statutes making the records of various governmental bodies admissible to prove their proceedings need not be here noted, because they merely apply the common-law principle.

§ **1662.** [1] For the use of reports of *officers* or *committees*, see *post*, §§ 1670, 1672.

[2] 1895, Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102 (Senate journal, admitted to prove a report presented to it); 1832, Thomson *v.* Gaillard, 3 Rich. 418, 419, 425 (entry about a petition in Senate journal, receivable to show its contents); 1830, Carver *v.* Jackson, 4 Pet. 1, 13, 101 (journals of Legislature showing a petition relative to a forfeited estate, and a report thereon, admitted).

(2) With the conclusiveness of a *statutory recital* or *preamble*, in a public or a private act, upon the parties interested in the subject matter, we are not here concerned; the question there raised is one of the scope of legislative powers and the effect of a judgment (*ante*, § 1352). The inquiry here is whether, as against persons who are in no sense parties to a prior proceeding, the recitals of a statute may be used as evidence of the facts recited, on the ground that they are official statements by persons authorized to investigate and record. It is clear, in the first place, that the statements concern matters not within the personal knowledge of the declarants; the recital deals, not with the legislative proceedings, but with extrinsic facts. It follows, then, under the general principle (*ante*, §§ 1635, 1639), that, unless there is an official duty to investigate and obtain adequate information, the statement should not be received. The publicity and solemnity of the declaration — an argument sometimes advanced [3] — cannot otherwise suffice to give it any weight as evidence in a controversy. But, next, it is clear enough that the Legislature has within itself the authority to inform itself properly; for, if it can give such authority to others, it can assume the authority for itself. Accordingly, when the recital is not a mere allegation, but is a statement of the result of due investigation, it should be receivable; and this was in fact the distinction applied to the use of recitals of pedigree in English peerage acts and the like.[4] But statutory recitals have not ordinarily such a basis. They may represent merely the partisan pre-judgments of the majority; they may represent only general conclusions in which the recited particulars have not been verified with special attention; they may have been inserted without any investigation at all; and they are in general only a statement of motives — "an apology for the passage of the act" (in the apt phrase of the Court of Kentucky), rather than a deliberate finding of fact:

1816. Messrs. *Denman* and *Phillipps*, arguing, in *R.* v. *Sutton*, 4 M. & S. 532, 539: "As to their [these preambles] proving that the facts [here a riot in certain districts] were notorious, — if by that is meant [merely] a notoriety such as exists in general rumor, then the jury ought not to have taken that into consideration; if it be meant that all the world knew them, 'a fortiori' they might and ought to have been proved. For to assume that the recital in every act of Parliament is even 'prima facie' evidence of the facts recited in it, would lead to very extensive consequences, and might sometimes perhaps bring the

[3] 1816, Bayley, J., in R. v. Sutton, 4 M. & S. 532, 549 ("When we consider in what manner an act of Parliament is passed, and that it is a public proceeding in all its stages, and challenges public enquiry, and when passed is in contemplation of law the act of the whole body, it seems to me that its recital must be taken as admissible evidence").

[4] 1844, Wharton Peerage Case, 12 Cl. & F. 295, 302 (recitals of family relationship, admitted; L. C. Lyndhurst: "It is the well-known practice of this House not to allow the insertion of a statement in the recitals of a private act of Parliament, unless the truth of that statement has been previously proved to the satisfaction of the judges, to whom the bill has been referred"); 1857, Shrewsbury Peerage Case, 7 H. L. C. 1, 13 (recital of a death without issue, and other recitals, admitted; Lord St. Leonards, referring to the preceding quotation: "That used to be the practice, but it is not so now, . . . and future recitals will not therefore be evidence"); 1879, Polini v. Gray, L. R. 12 Ch. D. 411, 432, 436 (Brett and Cotton, LL.J., doubt whether such recitals are admissible at all, outside of the Committee on Privileges, but seemed unaware that the committee professed to follow the ordinary law).

truth into hazard. . . . And it is singular that one of the preambles now in question should have recited that these disorders pervaded the county of Nottingham and the adjoining counties, so that, if this were evidence, it might be adduced as proof that they existed in Lincolnshire, when it is perfectly well known that that county has been entirely free from them. . . . [The preamble] is but matter of inducement, and cannot be founded upon oath, for neither branch of the Legislature can for this purpose administer an oath; whereas all evidence ought to be upon oath."

1823, *Per* CURIAM, in *Elmondorff* v. *Carmichael*, 3 Litt. 472, 480 (excluding a recital of naturalization, etc.): "We well know that such applications [for private beneficial acts] are made frequently 'ex parte.' And if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The Legislature, in all its inquiring forms, by committees, makes no issue, and in their discretion may or may not coerce the attendance of witnesses or the production of records, and are frequently not bound by those rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive or even 'prima facie' evidence against private rights, and many individual controversies may be prejudged and drawn from the functions of the Judiciary into the vortex of Legislature usurpation. The appropriate functions of the Legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence, such a preamble as the present ought in such a controversy to be taken to answer the purpose for which it was intended, that is, an apology for the passage of the act and the reason why the Legislature so acted. Such a preamble is evidence that the facts were so represented to the Legislature, and not that they are really so."

These considerations indicate it as the wiser course to reject ordinarily such recitals as evidence. Should it be made to appear that the recitals offered in a given case are not merely allegations resting on an unknown basis, but are in fact the findings of the Legislature after proper means of information have been deliberately sought, there seems good ground for their admission as official statements made with due authority and upon adequate sources of knowledge.

So far as the precedents speak, there is no general agreement;[5] but in

[5] ENGLAND: 1571, Leicester *v.* Haydon, 1 Plowd. 384, 396, 398 (whether one erroneously attainted on indictment was bound by a recital of the attaint in an act of Parliament confirming it; assumed on all hands that the recital was at least admissible); 1628, Coke upon Littleton, 19*b* ("The rehearsall or preamble of a statute is to be taken for truth; for it cannot be thought that a statute that is made by authoritie of the whole realme, as well of the King as of the lords spirituall and temporall and of all the commons, will recite a thing against the truth"); 1816, R. *v.* Sutton, 4 M. & S. 542 (preamble of a public act, reciting the fact of rioting in certain districts, admitted; quoted *supra*); 1825, Gardner Peerage Case, Le Marchant's Rep. 276 (recital as to legitimacy, in a private act, excluded, as against one not a party to the act); 1829, Brett *v.* Beales, M. & M. 416, 421 (a private act's recitals — here as to the right of a town to levy tolls — not admitted as evidence, even where the final clause declared it to be taken as a public act).

CANADA: *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 55 (like Ont. Rev. St. 1914, c. 122, § 2); *Br. C.* Rev. St. 1911, c. 236, § 2 (vendors and purchasers; like Ont. Rev. St. c. 122, § 2); *Ont.* Rev. St. 1914, c. 122, § 2 (quoted *ante*, § 1573).

UNITED STATES: *Federal:* 1893, Kinkead *v.* U. S., 150 U. S. 483, 498, 14 Sup. 172 (legal effect of recitals in private-claim acts, determined; distinguishing Branson *v.* Wirth, 17 Wall. 32, and U. S. *v.* Jordan, 113 U. S. 418); *California:* C. C. P. 1872, § 1903 (recitals in public and private statutes, conclusive, for certain purposes; quoted *ante*, § 1352); *Georgia:* 1849, Birdsong *v.* Brooks, 7 Ga. 88, 92 (recital of a bank's assignment, etc.; "the plaintiff can take nothing by the recital of that fact in the act, when an issue is made on it"); 1850, Beall *v.* Bealls, 8 Ga. 210, 222 (constitutionality of an act of legiti-

England, and perhaps elsewhere, the distinction would probably be taken that the recitals of a public act, but not those of a private act, would be admissible; this distinction, however, being apparently not only without principle to support it but also ill adapted to indicate the true grounds of trustworthiness.

§ 1663. **Executive Proclamations.** Executive proclamations are difficult to classify; they are precisely neither Registers nor Returns nor Certificates. So far as recitals of fact therein are germane to the doing of the executive act itself, they are on principle admissible. The Executive cannot be supposed to need express authority, because he has no superior. And, in general, the office of the Executive should suffice to make admissible any recital of fact announced or recorded by him in the line of duty.

The precedents indicate no accepted rule.[1]

mation; "as to the facts in this case," the records of the Legislature "are to be treated as true until the contrary appear"; apparently meaning to treat them on the analogy of a judicial record appealed from); 1852, Thornton *v.* Lane, 11 Ga. 459, 520 (preceding case followed); 1854, Lane *v.* Harris, 16 Ga. 217, 222 (recitals in public acts; admissible); *Idaho:* Comp. St. 1919, § 7947 (like Cal. C. C. P. § 1903); *Illinois:* 1905, Wilder *v.* A. D. & R. E. Traction Co., 216 Ill. 493, 75 N. E. 194 (recital of a petition in a city ordinance, held 'prima facie' evidence); *Iowa:* 1861, Duncombe *v.* Prindle, 12 Ia. 1, 11 (preamble reciting a clerical error in a former statute, not received as conclusive); *Kentucky:* 1823, Elmondorff *v.* Carmichael, 3 Litt. 472, 480 (alienage; recital of R. B. being a naturalized citizen and of a power and a conveyance from J. B., in a statute confirming the title of a transferee from J. B., excluded; quoted *supra*); *New York:* 1845, Parmelee *v.* Thompson, 7 Hill N. Y. 77, 80 (statute of indemnification of G., held not to prove him a tavern-keeper; "the Legislature has no jurisdiction to determine facts touching the rights of individuals"); 1860, McKinnon *v.* Bliss, 21 N. Y. 206, 213 (ejectment; recitals as to forfeitures and the true ownership of the forfeited land, excluded, approving Elmondorff *v.* Carmichael); *North Carolina:* 1833, Drake *v.* Drake, 4 Dev. L. 110 (act of legitimation; Ruffin, C. J., holding the recitals as to legislative proceedings conclusive: "As to other recitals, it would seem but a decent respect, though they be not conclusive, to treat them as true until the contrary appear"); *Oklahoma:* 1913, Shawnee G. & E. Co. *v.* Motesenbocker, — Okl. —, 135 Pac. 357 (city council's resolution reciting the negligent methods of the defendant in the use of its wires, excluded); *Oregon:* Laws 1920, § 750 (like Cal. C. C. P. § 1903); *Utah:* Comp. L. 1917, § 7086 (like Cal. C. C. P. § 1903); *Vermont:* 1903, Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174 (legislative report and recitals in a private act, as to the confiscation of certain land, excluded).

Compare Endlich, Interpretation of Statutes, § 375 (1888).

§ 1663. [1] CANADA: 1881, Stone *v.* Nash, 2 P. E. I. 415 (the Governor-General's proclamation is evidence that the necessary preliminary proceedings to the coming into force of a law were duly had).

UNITED STATES: *Federal:* 1902, Chicago *v.* Pennsylvania Co., 57 C. C. A. 509, 119 Fed. 497 (action for goods destroyed by a mob during a riot; the mayor's proclamation calling for troops to suppress the riot, admitted as "a public act which had become a part of the history" of the period); 1919, Shidler *v.* U. S., 9th C. C. A., 257 Fed. 620 (charge under U. S. St. June 15, 1917, c. 30, § 3, Espionage Act, of attempting to promote the success of the enemy cause by utterances falsely stating the motives and objects of the war; the President's message to Congress on April 2, 1917, asking for a declaration of war, and stating the causes rendering such action desirable, admitted, as "an official public statement made in the course of official duty by the head of the Government to Congress" as evidence upon "the truth or falsity of the statements alleged to have been made by the defendant"); *Arkansas:* 1898, Masons F. A. A. *v.* Riley, 65 Ark. 261, 45 S. W. 684 (policy on accidental death; Governor's pardon of S. for killing the deceased, excluded); *Illinois:* 1839, Lurton *v.* Gilliam, 2 Ill. 577, 579 (Governor's proclamation, admitted to show S.'s election to Congress); *Massachusetts:* 1871, Whiton *v.* Ins. Co., 109 Mass. 25, 30 (certain proclamations and official letters of the Secretaries of State and Treasury, admitted to show that the United States "had acquired and had asserted against foreign governments a title in the island of Navassa" and that it was a guano island); 1874, Hanson *v.* S. Scituate, 115 Mass. 336, 340 (governor's general order calling for troops and assigning

2. RETURNS AND REPORTS.

§ 1664. **Returns, in General; Sheriff's Return; Sheriff's Recital in Deed.** A *return* or *report* differs from a *register*, according to the use of terms already explained (*ante*, § 1637), in that a return is only a single document, made separately for each transaction as occasion arises, and not necessarily collated regularly with others in a book; this difference arising usually in practice from the circumstance that the statement deals with something done or occurring without the official precincts. A further distinction, between *returns* proper and *reports*, is that the former term applies typically to something done or observed personally by the officer, while the latter embodies the results of his investigation of a matter not originally occurring within his personal knowledge.

Considering first the nature of a return in the narrow sense, it would seem, under the general principle (*ante*, § 1632), that *wherever the duties of an officer require him to act without the premises of the office, he has by implication an authority to return*, — that is, to write down, upon his return to his office, a statement of his doings. The necessity of preserving a record of his doings is particularly apparent where his duty is performed without the premises of the office; and therefore the general implication of an authority to make a return is no less strong than that of an authority to keep a register for doings within the office (*ante*, § 1639). The question, then, ultimately is whether the officer's duties require or authorize him to do or observe the matter in question. Since the distinction between returns proper and reports is not always carefully observed in common usage, and is perhaps often difficult to draw clearly, sundry common-law rulings as to both classes may be later considered (*post*, § 1672). There are, it would seem, only two clear instances at common law of officers impliedly authorized to make returns, — the sheriff and the surveyor. In this place may be examined first the use of a

Sheriff's Return. (*a*) It is clear enough, and well accepted, that the *sheriff's office* authorizes him by implication to *make a return* of his doings under the customary authority of his office, and this return is admissible, without calling the sheriff, as an official statement under the present Exception:[1]

quotas, admitted as evidence of the call and the assignment; here, of course, the order *was* the call and the assignment); *New York:* Laws 1893, c. 661, § 6 (Governor's order to abate a nuisance, admissible to show the existence of the nuisance); *Rhode Island:* 1904, Bosworth *v.* Union R. Co., 25 R. I. 309, 58 Atl. 982 (injury to a passenger during a riot; the Governor's proclamation to disperse the riot, noticed).

Compare the cases as to the King's certificate (*post*, § 1674), and the citations under *judicial notice* (*post*, § 2578).

§ 1664. [1] Cal. Pol. C. 1872, § 4159 ("The return of the sheriff upon process or notices is 'prima facie' evidence of the facts in such return stated"); Ida. Comp. St. 1919, § 3598; Mass. Gen. L. 1920, c. 37, § 12 (sheriff's returns of service of notices, etc. not required to be served by an officer, to be 'prima facie' evidence); Mont. Rev. C. 1921, § 4779; 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 574 (admissible, because it is "his answer under oath respecting the duty enjoined upon him by the writ"); N. C. Con. St. 1919, § 921 (return of service); N. D. Comp. L. 1913, § 3392 (sheriff's return upon process or notices is 'prima facie' evidence of "the facts stated in such return"); Ut. Comp. L. 1917, § 1510.

1628, *Dalton*, Office of Sheriffs, c. 36, p. 87: "These returnes are nothing else but the sherifes' answers, certifying the Court touching that which they are commanded to doe by the King's writ, and are to ascertaine the Court of the truth of the matter."

1809, ELLENBOROUGH, L. C. J., in *Gyfford* v. *Woodgate*, 11 East 297, "was of opinion that this [return] was 'prima facie' evidence of the facts stated in the return, upon the ground that faith was to be given to the official act of a public officer like the sheriff, even where third persons were concerned."

1845, NELSON, C. J., in *Browning* v. *Hanford*, 7 Hill N. Y. 120: "The return of a sheriff is nothing more nor less than his answer under oath respecting the duty enjoined upon him by the writ, and is intended to inform the Court of what has been done in the premises. . . . If it embraces matters not pertaining to the duties which the writ commands, that is, not touching the things which the officer is required to do in executing the process, it is thus far made without the sanction of the sheriff's official oath, and must be treated like the unsworn declaration of a private individual."

It follows, therefore, that it is admissible even against persons not parties to the suit, as any official statement is; *i. e.* the limitations applicable to its other aspect (to be noted later) as a part of a judgment record, do not affect its admissibility as an official statement.[2] It follows, also, that it is admissible only for such matters as are within the authority of his office; here the question becomes ultimately one of administrative law, *i. e.* the extent of the sheriff's duties.[3]

(*b*) The sheriff's return is, however, also a part of the record of proceedings leading up to a judgment in litigation; in this aspect, therefore, the principles of the law of judgments may come into play, and the question may arise as to the *conclusiveness of the return*. There are thus some situations in which the return is binding upon the parties only, and there are others in which it may not be disputable by any one in a collateral proceeding. The solution of such questions has occasionally been put upon grounds of policy as to the desirability of preventing repeated controversies; [4]

[2] 1809, Gyfford v. Woodgate, 2 Camp. 117; 1821, Waldo v. Spencer, 4 Conn. 79, 94; 1916, Cox v. State, 61 Okla. 182, 160 Pac. 895 (seizure of automobile for illegal carriage of liquor; sheriff's return held no evidence of "facts which he is not required to certify"); 1832, Lowry v. Cady, 4 Vt. 504, 505. *Contra:* 1908, Driggers v. U. S., 21 Okl. 60, 95 Pac. 612 (a marshal's return on a subpœna that the witness was dead, not admissible; but the opinion erroneously relies upon the theory that it is "not binding" except between the parties; of course it is not binding, but that is not the question; the only real doubt of law here was whether a return of death, instead of not found, was within his authority).

[3] A few illustrations only must here suffice; 1901, Schloss v. Inman, 129 Ala. 424, 30 So. 667 (sheriff's inventory of goods levied, not admissible to prove their value); 1869, Obermier v. Core, 25 Ark. 562, 564 (sheriff's certificate of seizure, not under process, excluded); 1900, People v. Lee, 128 Cal. 330, 60 Pac. 854 (sheriff's return of "not found" for J. P. C. as witness, not admissible to prove that no J. P. C. had existence at the time in the county; on the ground that this was not a matter "which the sheriff was required to officially ascertain or declare"; this seems erroneous, because the natural way to prove a person not within the jurisdiction is to prove that he cannot be found there; compare § 1313, *ante*); 1907, Driggers v. U. S., 7 Ind. Terr. 752, 104 S. W. 1166 (return of death, for a witness whose former testimony was offered); 1848, McCully v. Malcom, 9 Humph. Tenn. 187, 192 (a sheriff's return on a warrant is evidence that he had it when arresting).

[4] *E. g.* in the following opinions: 1675, Atkyns, J., in Whitrong v. Blaney, 2 Mod. 10, 11; 1824, Sergeant v. George, 5 Litt. 199; 1829, Taylor v. Lewis, 2 J. J. Marsh. 400.

The subject is admirably examined from the historical point of view in Professor E. R. Sunderland's "The Sheriff's Return" (1916, Columbia Law Rev. XVI, 281).

but this is after all the same policy that governs the conclusiveness of judgments, and no other principles than those of that branch of the law seem to be involved. This aspect of sheriff's returns has therefore no concern for us here.

(*c*) A return acted upon by another party may create for the sheriff *an estoppel*, so that he may not dispute it in an action against himself. It is, at the least, necessarily an admission (*ante*, § 1056) usable as evidence in an action against him. The controversy here, then, is whether it amounts in a given case to an estoppel or is a mere disputable admission. This, being a question of substantive law, is beyond the present purview.

(*d*) A question of much interest, and in great controversy, has been whether the *recitals in a sheriff's deed* are admissible to prove his authority to sell, without producing the judgment and the execution. On principle, the solution is as follows: (1) The deed is not valid unless the sheriff had authority to sell; that authority to sell could come only from a judgment against the owner and a writ of execution, based upon the judgment, ordering the sheriff to sell; this judgment roll, therefore (or a certified copy) must be produced, in order to prove the sheriff's authority; (2) Even if it could be assumed that the sheriff's office gives him a general authority to recite that he has in this instance a specific order to sell, nevertheless, since this order is contained in a written document, the contents of the document must be proved by production or by copy (under the rules of § 1215, *ante*, and § 1678, *post*), unless we are further to assume that the sheriff has an implied authority both to state the contents of the judgment and to state them in summarized form (as an exception to the rule of § 1678, *post*). These steps of assumption have usually proved too radical for the Courts to take on common-law principles; the general attitude is represented in the following passage:

1866, SHAFTER, J., in *Hihn* v. *Peck*, 30 Cal. 280, 288: "The judgment and execution go to the sheriff's power to sell and to his power to recite a sale, and therefore the recitals are not admissible to prove the sheriff's authority to sell or his authority to recite a sale. To hold otherwise would be to reason in a circle. The power to sell, to recite, and to deed, having its origin in the judgment and execution, must be proved by a production of both under the rule of best evidence. But when the power has been proved, the sheriff becomes, so to speak, the accredited historian of his acts under it. He may narrate his proceedings on the back of the execution and return it into court, and, with or without that, he may issue a certificate to the purchaser; and both the certificate and the return, if made, would, within the limits of the authority delegated to him, be evidence against all persons of the facts stated or recited therein. As already remarked, it is also the official duty of the sheriff to make a like statement or recital in his deed; and it follows that a recital so made must be entitled to the same effect, as an instrument of evidence," as the return on the execution.

This conclusion seems unavoidable on strict principle. The contrary conclusion reached by a few Courts, seems to have rested in part upon the presumption of the regularity of official doings (*post*, § 2534). But practical convenience seems in experience to have demanded the latter, and not the

former result; so that statute has in many,[5] perhaps most jurisdictions, interfered to exempt from production of the judgment roll or a copy of it, and to permit the sheriff's recital to suffice.[6] It should be added that, even

[5] *E. g.* Ark. Dig. 1919, § 1534; § 8390 (quieting title). Cal. C. C. P. 1872, § 1928 (sheriff's deed of conveyance to be 'prima facie' evidence of transfer); Conn. Gen. St. 1918, § 1306 (tax-collector's deed); Ill. Rev. St. 1874, c. 30, § 12 (in deeds by masters in chancery, sheriffs, executors, etc., a recital of the judgment or decree in full is not necessary); Mo. Rev. St. 1919, § 5402; § 12948; Va. Code 1919, § 6196; Wis. Stats. 1919, §§ 4154, 4155.

[6] Since the statutes have so widely abrogated the judicial rule, and these statutes are too lengthy and too complicated with matters of local execution-procedure to be dealt with here, it seems undesirable to attempt to set forth the state of the law in the various jurisdictions. The following list contains only some of the series of cases illustrating the common treatment: *Arkansas:* 1849, Hutchinson *v.* Kelly, 10 Ark. 178, 181, Scott, J., diss. (production required); 1853, Newton *v.* Bank, 14 Ark. 9, 10 (not required); 1856, Jordan *v.* Bradshaw, 17 Ark. 106, 108 (same); *California:* St. 1850, April 22, § 207 (a sheriff's deed must recite the "date of the judgments, and other particulars as recited in the execution and these recitals shall be "evidence of the facts recited"); 1866, Hihn *v.* Peck, 30 Cal. 280, 288 (judgment and execution being produced, the deed-recitals by the sheriff are evidence of the sale; explaining Donohue *v.* McNulty, 24 Cal. 411; the statute was not referred to, but the judgment and execution were themselves offered, and the recitals were relied on only to prove the sale; quoted *supra*); 1874, Clark *v.* Sawyer, 48 Cal. 133, 140 (declares that "judgment and execution must be introduced," but the statute, "when the recitals are full, dispenses with the necessity of introducing the judgment and execution"; Hihn *v.* Peck not cited); 1878, Harper *v.* Rowe, 53 Cal. 233, 234 ("the method of proving the judgment to be valid is by the production of the roll"; no statute or cases cited); *Florida:* 1893, McGhee *v.* Wilkins, 31 Fla. 83, 85, 12 So. 228 (judgment and execution must be produced); *Georgia:* 1861, Boatright *v.* Porter, 32 Ga. 130, 140 (recital sufficient, upon loss of judgment, etc., being shown); 1880, Shackleford *v.* Hooper, 65 Ga. 366 (production required); 1903, Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76 (prior cases examined); 1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; *New York:* C. P. A. 1920, § 376 (recital in recorded sheriff's deed of a sale twenty years before, to be evidence of a lost execution or writ, on certain conditions); *North Carolina:* 1878, Rollins *v.* Henry, 78 N. C. 342, 348 ("The return to an execution is ordinarily the best evidence of a levy and sale"; but if it is not returned and is lost, and a judgment and execution are proved to exist, the recital in the sheriff's deed is admissible as an official statement to show the fact of levy and sale; and, *semble*, also of the judgment and the execution, provided the sale is an ancient one; explaining Edwards *v.* Tipton, 77 N. C. 222, Hardin *v.* Cheek, 3 Jones L. 135, and Owen *v.* Barksdale, 8 Ired. 81); *Oregon:* Laws 1920, § 599–1 (county records destroyed); *Pennsylvania:* 1784, Burke *v.* Ryan, 1 Dall. 94 (recitals admitted, without producing the record; but here there had been ancient possession); 1796, Wilson *v.* M'Veagh, 2 Yeates 86 (judgment and execution required to be shown by exemplification or abstract; 'the consequences of asserting the doctrine that a sheriff by his recital could deduce a power to sell lands would be highly mischievous"); 1819, Weyand *v.* Tipton, 5 S. & R. 332 (recitals are no evidence of authority to sell judgment and execution must be produced); 1823, Hampton *v.* Speckenagle, 9 S. & R. 212, 221 (same); 1841, Braddee *v.* Brownfield, 2 S. & R. 271, 289 (preceding cases approved); *South Carolina:* 1802, Hopkins *v.* De Graffenreid, 2 Bay 441, 445 (recitals in a sheriff's deed, admissible for all parts of his proceedings; production of the execution or *fi. fa.* not required; Waties and Grimke, JJ., diss.); 1805, D'Urphy *v.* Nelson, 1 Brev. 476 (recital of the execution, here lost, received); 1811, Tobin *v.* Seay, 2 Brev. 470 (production not required); 1819, Barkley *v.* Screven, 1 N. & McC. 408 (production of the execution required, but only the last, not the intermediate ones; for lands, the judgment also); 1820, Vance *v.* Reardon, 2 N. & McC. 299, 302 (same, but applied equally to personalty; extracts of executions, in proving a sheriff's sale, held insufficient; Colcock and Bay, JJ., diss.); 1839, Smith *v.* Smith, Rice 232, 238, *semble* (judgment must be produced, to show authority); 1852, Floyd *v.* Mintsey, 5 Rich. 361, 365, 372 (recitals not sufficient, without producing the judgment at least); *Tennessee:* 1833, Nichols *v.* Ridley, 5 Yerg. 63, 65 (recitals to show the fact of sale, admitted); 1874, Sampson *v.* Marr, 7 Baxt. 486, 488 (sheriff's deed-recitals, evidence of advertisement, etc.); *Vermont:* 1874, Maxham *v.* Place, 46 Vt. 434, 442 (execution reciting judgment; proof of loss of judgment, held sufficient); *Virginia:* 1847, Robinett *v.* Preston, 4 Gratt. 141, 147, *semble* (sheriff's recitals of judgment and execution, sufficient without production, as against strangers setting up a title adverse to that conveyed by the officer); 1848, Jesse *v.* Preston 5 Gratt. 120, 130 (tax-collector's recitals of

at common law, the main difficulty being the requirement of producing the judgment roll, the recitals of the deed were admissible if the loss of the roll was shown; moreover, if the roll (or a copy) was produced, and the rule thus satisfied, the recitals were of course admissible to prove the fact of the sale as being an official act of the sheriff.

In the same connection, the question constantly arises whether the *whole of the record* of judgment and execution must be proved, and, conversely whether, though the judgment be produced in entirety, this suffices even where the land is not adequately identified; here the principle of Completeness (*post*, §§ 2094, 2110) comes into play.[7]

(*e*) The same principles are illustrated in the use of recitals in a *collector's tax-deed*, or in a deed by any other officer empowered to sell on a certain warrant.[8]

(*f*) Somewhat different considerations are involved in the subject of *recitals in old deeds* other than sheriffs' (*ante*, § 1573), and the admissibility of a *sheriff's inquisition of title* (*post*, § 1670).

§ 1665. **Surveyors' Returns (Maps, Registers, etc.).** The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries; it is therefore a natural implication that he has the duty and the authority to make a written return of his doings.[1] At common law in England

due proceedings authorizing sale, not sufficient without production; preceding case distinguished because adverse possession there accompanied the deed).

By statute, the recitals in an *administrator's deed* are sometimes given similar effect.

[7] The cases cited in the foregoing note illustrate this principle also; compare further § 2110, *post*.

[8] Bolan *v.* Bolan and Burke *v.* Burke are useful cases: *Florida:* Rev. G. S. 1919, § 2721 (tax-deeds to be 'prima facie' evidence); *Illinois:* 1908, Glanz *v.* Ziabek, 233 Ill. 22, 84 N. E. 36 (tax-deed alone insufficient); *Iowa:* 1899, Lawless *v.* Stamp, 108 Ia. 601, 79 N. W. 365 (receiver's recital of his appointment, not admissible); *Kentucky:* 1906, Husbands *v.* Polivick, — Ky. —, 96 S. W. 825 (collector's return of a tax-sale is presumptive evidence, under Stats. 1899, c. 81, § 7, Stats. 1915, § 3760, quoted *ante*, § 1352, n. 11); *Massachusetts:* 1898, Burke *v.* Burke, 170 Mass. 499, 49 N. E. 753 (tax-collector's deed-recitals, not evidence of facts recited); 1801, Simon *v.* Brown, 3 Yeates 186 (recitals of payment of taxes in a county commissioner's deed excluded); *Minnesota:* Gen. St. 1913, § 2132 (tax collector's deed); *Nevada:* 1868, Bolan *v.* Bolan, 4 Nev. 150 (tax-deed; production of judgment required); *North Carolina:* Con. St. 1919, § 8034; *Tennessee:* 1848, Henderson *v.* Galloway, 8 Humph. 692, 696 (recital of notice in a trustee's deed not receivable like a sheriff's); 1883, Coal C. M. & M. Co. *v.* Ross, 12 Lea 1, 8 (clerk's deed; production of decree required); *Vermont:* 1832, Hall *v.* Collins, 4 Vt. 316, 326, *semble* (tax-collector's deed-recital not evidence against one not a party, because he is "not by any law made a certifying officer for the purpose"); 1859, Townsend *v.* Downer, 32 Vt. 183, 190 (collector's deed-recitals of having done all things required, not evidence); *Virginia:* 1815, Christy *v.* Minor, 4 Munf. 431 (U. S. marshal's tax-deed recitals, not sufficient without "other proof of authority"); 1829, Allen *v.* Smith, 1 Leigh 231 (U. S. marshal's tax-deed recitals, not sufficient without proving the prerequisites of advertisement, etc., although here there had been 20 years' possession); 1830, Chapman *v.* Bennett, 2 Leigh 329, 330 (sheriff's testimony of sale of land for taxes, not sufficient without showing preliminary proceedings); 1848, Wynn *v.* Harman, 5 Gratt. 157, 166 (decree of partition and report of commissioners, sufficient without producing the whole record, if the land is adequately described); 1848, Masters *v.* Varner, 5 Gratt. 167, 171 (marshal's conveyance under Court decree ordering sale of land "in the bill mentioned"; production of a record sufficient to identify the land, required); 1852, Walton *v.* Hale, 9 Gratt. 194, 198 (deed of commissioner for delinquent taxes; recitals insufficient, without proving authority, where there is no "long acquiescence and possession").

Compare the statutes for *old recorded deeds* (*post*, § 2143, n. 5).

§ 1665. [1] His record is usually indexed and filed, and is perhaps sometimes kept as a

there were doubtless few instances of persons whose sole or constant official duty was that of a surveyor; so that most surveys became official only by virtue of a special warrant to make them. Nevertheless, the principle was sufficiently recognized at common law;[2] and it may therefore be said that wherever the office of government surveyor has been created,[3] the officer has an *implied authority of office* to make return of his official surveys, and his returns are therefore admissible.

The admissibility depends upon the authority (*ante*, § 1633); hence, on the one hand, the returns of the government surveyor are admissible to evidence only those matters which he is authorized to do; and, on the other hand, a private person's survey, if made under special warrant or if otherwise sanctioned by proper authority (*ante*, § 1633, par. 10), may become admissible:[4]

Register; but in its nature it is a Return (as defined in § 1664). Whether the surveyor's Return is not, after all, a Report (*ante*, § 1664) is a nice question; but it seems more correct to regard it as a statement of the surveyor's own doings.

Compare the rule for *inquisitions of domain* (*post*, § 1670), in which the application of the principle is slightly different.

[2] 1838, Evans *v.* Taylor, 7 A. & E. 617 (a survey of a manor in the duchy of Lancaster, not admitted to show the boundary of the manor, because the statute Extenta Manerii, 4 Edw. I, c. 1, gave no authority to define the boundaries of a manor, and no authority for the survey except this statute was shown); 1844, Doe *v.* Roberts, 13 M. & W. 520, 531 (an ancient extent, or official survey, of Crown lands, admitted; Parke, B.: "It is a finding by a public officer on a public matter"); 1852, Daniel *v.* Wilkin, 7 Exch. 429, 434, 437 (a private surveyor's survey, excluded; Parke, B.: "If the survey had been made by officers of the Crown, no doubt it would have been admissible"); 1867, Phillips *v.* Hudson, L. R. 2 Ch. 243 (a grant and survey of a manor formerly belonging to the Crown, made by the Crown under a general statute and recorded in the Augmentation Office, but relating to private property of the King, not admitted for the tenants against the lord).

But the following more recent cases, in which none of the above rulings were cited, are more strict: 1904, Mellor *v.* Walmesley, 2 Ch. 525 (report of a surveyor to a municipal board, excluded); 1904, Mercer *v.* Denne, 2 Ch. 534, 541 (report of a surveyor made to the Warden of the Cinque Ports, excluded; quoted *ante*, § 1634, n. 1); in Mellor *v.* Walmesley, 1905, 2 Ch. 164, 166, the Court of Appeal reversed the ruling in Mellor *v.* Walmesley, *supra*, but rather on the principle of § 1524, *ante*; in Mercer *v.* Denne, 1905, 2 Ch. 538, 555, the Court of Appeal affirmed the ruling in Mercer *v.* Denne, *supra*.

[3] That a distinction could be taken in this respect between surveyors of the State, a county, or a town, seems untenable; yet it seems sometimes to be made; see the citations *infra*, note 4.

[4] ENGLAND: 1899, Evans *v.* Merthyr Tydfil, 1 Ch. 241, 250 (survey of Crown land, made under the provisions of a statute and filed in the Law Revenue Office, admitted).

CANADA: 1834, Badgeley *v.* Bender, 3 U. C. Jur. o. s. 225 (official survey or map, admissible); 1877, O'Connor *v.* Dunn, 2 Ont. App. 247, 254 (surveyor's official survey, *semble*, admissible); 1885, Vankoughnet *v.* Denison, 11 Ont. App. 679 (city surveyor's map excluded); 1857, Maynes *v.* Dolan, 3 All. N. Br. 573 (Crown survey, not admitted to show that the line had actually been run).

UNITED STATES: *Alabama:* 1854, Stein *v.* Ashby, 24 Ala. 530 (government map, admissible); *Connecticut:* 1839, Wooster *v.* Butler, 13 Conn. 309, 315 (survey must be one made by authority); *Florida:* 1884, Simmons *v.* Spratt, 20 Fla. 495, 499 ("the simple filing of a private survey in a public office does not make it evidence"); *Georgia:* 1889, Polhill *v.* Brown, 84 Ga. 342, 10 S. E. 921 (State map of county, admissible); 1903, Berry *v.* Clark, 117 Ga. 964, 44 S. E. 824 (Secretary of State's certified copy of a county map on file in his office, admitted, without showing its authorship); 1877, Maples *v.* Haggard, 58 Ga. 315 (surveys made by other than county surveyors are not admissible without calling the persons making them); 1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (map by one not a county surveyor not acting under court order, excluded); *Iowa:* 1870, Pfotzer *v.* Mullaney, 30 Ia. 197 (map in MS. used in city office as official, not admitted); *Louisiana:* 1841, Carrollton R. Co. *v.* Municipality, 10 La. 44 (city map, admissible); *Massachusetts:* 1903, Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60 (official chart of coast, made by authority of St. 1807, Feb.

1836, STORY, J., in *Ellicott* v. *Pearl*, 10 Pet. 412, 441: "The survey, made by a surveyor, being under oath [of office] is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat the lines, corners, trees, and other objects on the ground, and to subjoin such remarks as may explain them. But in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties and subject to cross-examination. . . . It has never been supposed that if in such a survey the surveyor should go on to state collateral facts, or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons."

These principles generally receive consistent application. In many jurisdictions, statutes have expressly made admissible the returns and records of the surveyor-general and of the county-surveyors, as well as of various special commissioners and other officers having a surveyor's duties.[5] In a

10, § 1, admitted); *Michigan:* 1864, Smith *v.* Lawrence, 12 Mich. 431 (book of township plats of title, not required by law to be kept, excluded); *Minnesota:* 1866, Wilder *v.* St. Paul, 12 Minn. 192, 209 (map made by statutory authority, admitted); *New Hampshire:* 1852, Adams *v.* Stanyan, 24 N. H. 412 (town map made under State authority, admissible); *New Jersey:* 1795, Denn *v.* Pond, Coxe 381; *New York:* 1807, Jackson *v.* Witler, 2 Johns. 180 (official map bearing an indorsement of partition by persons chosen thereto; excluded, because the surveyor had no authority to report as to title); 1893, Blackman *v.* Riley, 138 N. Y. 318, 329, 34 N. E. 214 (ancient map by a city surveyor for a private party, received); *North Carolina:* 1888, Dobson *v.* Whisenhaut, 101 N. C. 647, 8 S. E. 126 (unofficial map, inadmissible); 1889, Burwell *v.* Sneed, 104 N. C. 119, 10 S. E. 152 (map made by a surveyor appointed by the county, excluded); 1904, Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610 (certificates of survey by a former county surveyor now in Texas, excluded; following Burwell *v.* Sneed, *supra*); *Pennsylvania:* 1773, Biddle *v.* Shippen, 1 Dall. 19 (official map or survey, admissible); 1797, Shields *v.* Buchanan, 2 Yeates 219 (survey made by a private surveyor, under land-office order, and returned into the surveyor-general's office, admitted); 1817, Salmon *v.* Rauce, 3 S. & R. 311, 315 (deputy-surveyor's return to an order of survey, receivable, because he is a sworn officer; but not when he states matters not within his duty; a return that a former survey was mistaken, excluded); 1836, Com. *v.* Alburger, 1 Whart. 469, 473 (ancient plan of Philadelphia as officially laid out in 1683, received); 1840, Wolf *v.* Goddard, 9 Watts 544 (official warrant and survey return, receivable to show the lands taken); 1869, Baird *v.* Rice, 63 Pa. 489, 497 (like Com. *v.* Alburger); *Wisconsin:* 1901, Schlei *v.* Struck, 109 Wis. 598, 85 N. W. 430.

veyor's survey or plat, admissible, "if the opposite party has notice that such survey is to be made"); *Arizona:* Rev. St. 1913, Civ. C. § 1737 (record of survey, etc., by State engineer or deputy or municipal engineering department, admissible); *Arkansas:* Dig. 1919, § 1897 (county surveyor's record, by certified copy, admissible); § 1901 (no survey by other than county surveyor or deputy to be "considered as legal evidence," unless made under U. S. authority or by "mutual consent of the parties"); § 4746 (U. S. surveys of public lands, on file with State land commissioner, admissible); *Colorado:* Comp. L. 1921, § 8823 ("The certificate of the county surveyor or any of his deputies shall be admitted as legal evidence"); § 3303 (survey plat of mining claim made under court order and recorded, admissible); § 5042 (U. S. field notes and plats, copied and filed with county clerk, to be evidence); St. 1921, c. 120 (hydrographic records of stream-flow, etc.; State and division engineers' records, to be "evidence of the facts contained therein"); *Columbia (Dist.):* Code 1919, § 1575 (District surveyor's records, admissible by his certified transcript); *Georgia:* Rev. C. 1910, § 602 (county surveyor's survey or plat, made by order of Court on notice to parties, admissible); § 6314 ("no survey shall be received in evidence "unless 10 days' notice had been given of taking the survey); *Idaho:* Comp. St. 1919, § 3671 (county surveyor's certified copy of U. S. field notes filed, admissible); § 3674 (no surveys to be "legal evidence" except when made in accordance with U. S. manual, etc.); *Illinois:* Rev. St. 1874, c. 133, § 7 (county surveyor's record of surveys, admissible); § 10 (so also for U. S. surveyor-general's field-notes in State auditor's office, admissible); *Indiana:* Burns' Ann. St. 1914, § 9518 (county surveyor's survey to be 'prima facie' evidence of corners and lines); § 8570 (coal-mine map on record with inspector of mines, admissible); *Iowa:* Code 1897, § 538, Comp. Code § 3389 (county surveyor's

[5] *Alabama:* Code 1907, § 6023 (county sur-

field-notes and plat, admissible against persons requesting survey or having reasonable notice of it beforehand); Rev. Code § 7341 ("A copy of the field notes of any surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact the ascertainment of which requires the exercise of scientific skill or calculation only"); 1919, Peterson *v.* McManus, 187 Ia. 522, 172 N. W. 460 (a Canadian official survey, not admitted, on the facts, under Code § 4634); *Kansas:* G. S. 1915, § 2708 (U. S. plats and field notes, copied by county surveyor and filed with county register of deeds, admissible); ib. § 2704 ("any survey made by any county surveyor or his deputy shall be evidence," but not conclusive); St. 1921, c. 154 (amending Gen. St. 1915, § 2704; survey by county surveyor or deputy or city engineer, to be evidence); *Louisiana:* Rev. Civ. C. 1920, § 1437 (State surveyor's plan of town lots, after filing in parish recorder's office and public notice given, to be evidence "of the description and dimensions of said property"); also § 2466; St. 1912, No. 182, p. 326, July 11 (surveys established by parish authorities; the official survey, duly certified, to be "conclusive evidence," unless set aside in a direct action for fraud or gross error); *Maryland:* Ann. Code 1914, Art. 75, § 152 (county maps issued under authority of certain prior statutes, to be admissible to evidence water boundaries); *Massachusetts:* Gen. L. 1920, c. 42, § 9 (topographical survey commissioners' triangulation points, to be evidence of town boundary lines); *Michigan:* Comp. L. 1915, § 2329 (county supervisors' record of boundaries perpetuated, admissible); § 2481 (surveyor's or deputy's certificate of survey, admissible where the surveyor or deputy is not interested); § 3350 (municipal survey-plat, admissible); §§ 3364, 3365 (same for county-supervisors' resurvey of municipal plat); 1903, Sherrard *v.* Cudney, 134 Mich. 200, 96 N. W. 15 (statute applied); § 468 (field notes, etc., in office of State land commissioner, recorded by copy in county registry of deeds, admissible); St. 1921, No. 312, p. 577 (proceedings to establish section boundaries, etc.; record of field notes, etc., to be admissible); *Minnesota:* Gen. St. 1913, § 8455 (certificate of a county surveyor or deputy, or of U. S. survey, admissible); § 790 (county commissioners' establishment of certain boundaries, etc., admissible); § 8418 (records of surveys by municipal engineering department, admissible); *Mississippi:* Code 1906, § 1963, Hem. § 1623 (certificate of a county surveyor or deputy, of a survey made of lands in the county or under Court order, to be presumptive evidence of "the facts connected with and pertinent to the survey," if the maker is not interested therein); § 1962, Hem. § 1622 (field-notes; quoted *post*, § 1680); § 1828, Hem. § 1461 (report of surveyor in ejectment, admissible if made after notice to opponent); *Missouri:* Rev. St. 1919, § 5508 (certain returns of county surveyors, to be evidence); § 12719 (no survey to be "legal evidence," except those made by a county surveyor or deputy or by the U. S. authority or by mutual consent); § 12730 (certified copies of U. S. surveyor's field-notes, filed with county surveyor, admissible, by surveyor's certified copy); *Nebraska:* Rev. St. 1922, § 5018 (county surveyor's certificate of "any survey made by him of any lands in the county," to be presumptive evidence, "unless such surveyor shall be interested in the same"); *Nevada:* Rev. L. 1912, § 1667 (certificate of a county-surveyor or deputy, admissible); St. 1915, p. 385, being St. 1913, Mar. 22, § 88 A (State engineer's maps, plats, surveys, etc., admissible in water-right contests, after 90 days' notice of intention); *New Mexico:* Annot. St. 1915, §§ 1294, 1299 (survey, plat, or field-notes or survey books of a county surveyor or deputy, admissible "only when the surveyor may be dead, or when it shall be impossible to obtain his evidence either by his personal attendance or by means of a deposition"); St. 1919, Mar. 17, c. 124 (hydrographic survey reports by State engineer or his authority or by U. S. engineer or "by any other engineer in the opinion of the State engineer qualified to make the same" is admissible); *New York:* C. P. A. § 389 (maps, surveys, and official records on file in certain public offices in New York city for twenty years, admissible); Cons. L. 1909, Drainage § 13 (filed map by drainage commissioners, admissible); Canal § 4 (State engineer's map and field-notes of canal lands, admissible); *North Carolina:* Con. St. 1919, § 7572 (county surveyor's record of surveys, in office of register of deeds, to be evidence); *North Dakota:* Comp. L. 1913, § 3427 (certificate of survey of lands by county surveyor or deputy, to be evidence, unless he is interested therein); § 3437*a* (county surveyor's records of field-notes and plats, admissible); § 5018 (county surveyor's or deputy's certificate of survey of lands in the county, to be presumptive evidence, unless he be interested therein); *Ohio:* Gen. Code Ann. 1921, §§ 2797, 2801, 2811, 2815, 3613 (certain surveys of a county surveyor, and of a private survey under official order, to be evidence); 1902, State *v.* Cincinnati T. & J. Co., 66 Oh. 182, 64 N. E. 68 (under §§ 218–223, Bates' Annot. St., the findings, maps, etc., of the canal commissioners are admissible only for the kinds of land there specified); *Oklahoma:* Comp. St. 1921, §§ 5909, 5910 (county surveyor's survey to be held "presumptively correct"; his record of field-notes and plats to be admissible); *Oregon:* Laws 1920, § 3431 (county surveyor's certified copies of field notes from U. S. surveyor-general or land-office, admissible); § 3423 (no surveys to be legal evidence, except those of county surveyor or deputy, "unless attested by two competent surveyors," except made by authority of U. S.

few of these jurisdictions, chiefly in the South, the statutory procedure (based apparently upon an early local common-law practice [6]), necessary to make the official survey receivable when it deals with private boundaries, requires the parties interested to be first *notified of the intended survey* so that they may attend and coöperate.[7]

Statutes also have made admissible various kinds of surveyors' *certificates* (*post*, § 1674). The proof of the contents of the surveyor's records by *certified copy* depends upon the general principle applicable to proof of official records by certified copy (*post*, § 1680); for a certificate of the *contents of a surveyor's record* another principle (*post*, § 1678) is also involved.[8]

Other principles concern the use of private surveys as embodying *reputation to boundaries* (*ante*, §§ 1582–1595), the statements of *deceased surveyors* under the peculiar exception for *private boundaries* (*ante*, §§ 1563–1571); the testimony of a *surveyor on the stand*, with his map (*ante*, § 791); the authentication of *ancient surveys* (*post*, §§ 2137, 2158) by age or official custody.

Distinguish the use, under substantive law, of a survey which has been referred to by a deed or a land-patent and thus incorporated into it; [9] here the survey is received, not as evidence, but as a *part of the description in the deed* (*post*, § 1777) or as a source of *interpretation* (*post*, § 2465); and this use includes most of the instances in which in practice a survey is resorted to. The *conclusiveness* of a *government survey* in establishing a boundary, and

or the State or by parties' consent); *Pennsylvania:* St. 1804, Mar. 19, Dig. 1920, § 17825 Public Land (State surveyor-general; certificate of certain entries in books of account, admissible); *South Carolina:* Civ. C. 1922, § 5527 (disputed boundaries; sworn return of surveyor appointed by Court, admissible); *South Dakota:* Rev. C. 1919, § 8194 (State engineer's hydrographic survey filed in office, admissible "as evidence in suits for the adjudication of water rights"); *Texas:* Rev. Civ. St. 1911, § 3695 (county surveyor's records of surveys and plats, "whether private or official," admissible); § 7747 (in trespass to try title, a report under oath of a surveyor appointed by court is admissible, "if said report be not rejected for good cause shown"); *Vermont:* St. 1902, no. 62 ("all books, papers, and records of the surveyor-general" in possession of the State are provable by certified copy of the Secretary of State); *Virginia:* Code 1919, § 2680 (county surveyor's recorded report and plat, to be conclusive evidence of boundary lines); § 2977 (municipal council's survey of streets, etc., to be evidence of boundaries); *Washington:* R. & B. Code 1909, § 3975 (certificate of a county engineer or his deputy, to be presumptive evidence of the facts contained, "unless such engineer or deputy shall be interested therein"); *West Virginia:* Code 1914, c. 67, § 2 *a* (surveyor's records, impliedly admissible, and provable by certified copy); St. 1915, cc. 114, 121, 130, 139, and St. 1917, c. 91, § 3 (official reporter's transcript of testimony in certain courts, receivable); St. 1921, c. 112, § 18 (certified copies of certain road maps, admissible); *Wisconsin:* Stats. 1919, § 5964 (certificate of a county surveyor or deputy, admissible, to be evidence of the facts therein stated); *Wyoming:* Comp. St. 1920, § 1544 (county surveyor's certificate of survey to be "admitted as legal evidence"); § 2116 (official survey or perambulation of town boundaries, admissible).

[6] 1813, Ewing *v.* Savary, 3 Bibb 235 (surveyor's report made without notice to absent resident, excluded).

[7] 1902, Boyett *v.* State, 132 Ala. 23, 31 So. 551 (statute applied); 1921, Cannon *v.* Yarbrough, — Miss. —, 89 So. 911 (Code 1906, § 1828, held not to exclude a survey made after suit begun and without notice to opponent); Lenoir *v.* Bank, 87 Miss. 559, 40 So. 5, followed); 1903, Watkins *v.* Havighorst, 13 Okl. 128, 74 Pac. 318 (survey without notice held not binding). That there is no inherent necessity for this notice, see *ante*, § 1385, and *post*, § 1860.

[8] For *land-office registers*, see *ante*, § 1659.

[9] *E. g.* 1849, May *v.* Baskin, 12 Sm. & M. 429 ("the original survey fixed the rights of the parties; the government sold the land according to that survey"); 1848, Eberle *v.* Board, 11 Mo. 258.

the *preference* for a *surveyor's record* rather than his testimony, involve still other principles (*ante*, § 1352, *post*, § 2427).

§ 1666. **Testimony at a Former Trial**; (1) **Judge's Notes.** Under the orthodox common-law trial system it was the practice of judges at a trial to take full notes of the testimony of the witnesses, in order to aid themselves in commenting upon the testimony in the charge to the jury. This practice has naturally died out in the United States, under the misguided and vicious rule (*post*, § 2551) now almost universal (a veritable mutilation of the common-law trial by jury), forbidding the trial judge to charge the jury upon the effect of the testimony. But while it prevailed, the question was often presented whether these *notes of the judge* were admissible, without calling him, to prove at another trial the terms of testimony delivered on the former occasion. It was generally agreed that they were not, because the notes, however full they might be, were not taken under any official duty,[1] — a strict application of the general principle (*ante*, § 1633):

1839, ABINGER, L. C. B., in *Leach* v. *Simpson*, 5 M. & W. 311, 7 Dowl. Pr. 514: "A judge only takes notes for his own private convenience; there is no law which requires him to do so."

1811, TILGHMAN, C. J., in *Miles* v. *O'Hara*, 4 Binn. 110: "It is refining too much to say that he takes his notes under the obligation of his oath of office. . . . In general, where the law directs a judge to do an official act, it receives his certificate as sufficient evidence of the act being done. But the taking notes of the evidence was not an act required by law; therefore his certificate is no evidence that these notes contain the truth."

§ 1667. **Same**: (2) **Magistrate's Report.** For one sort of judges' reports of testimony, however, there has long been a basis of statutory authority, —

§ **1666.** [1] *Accord:* 1883, Schafer *v.* Schafer, 93 Ind. 588; 1867, Webster *v.* Calden, 55 Me. 171 (report signed by the judge); 1890, State *v.* Whelehon, 102 Mo. 17, 22, 14 S. W. 730; 1898, People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024 (statement made from the bench); 1821, Foster *v.* Shaw, 7 S. & R., Pa. 162; 1844, Livingston *v.* Cox, 8 id. 62; 1908, Richards *v.* Com., 107 Va. 881, 59 S. E. 1104 (judge's notes, excluded); 1875, Zitske *v.* Goldberg, 38 Wis. 216, 229 (justice of peace's minutes, excluded); 1891, Elberfeldt *v.* Waite, 79 Wis. 284, 48 N. W. 525 (preceding case followed); 1903, Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803 (justice's minutes excluded).

Yet modern practice in *England* does not seem to observe a definite rule upon this point: 1851, R. *v.* Child, 5 Cox Cr. 197, 203 (excluded); 1858, R. *v.* Harvey, 3 Cox Cr. 99, 103, *semble* (excluded); 1860, Watson *v.* Little, 5 H. & N. 472 (legitimacy; to prove inconsistent statements of the mother in a proceeding for filiation of a bastard, the order of filiation, by deceased magistrates, reciting her oath, were admitted); 1874, Ex parte Gillebrand, Re Sidebotham, L. R. 10 Ch. App. 52 (judge's notes of evidence received, when "verified"; whether this means "sworn to," does not appear); 1892, R. *v.* Britton, 17 Cox Cr. 627 (judge's notes of proceedings, excluded in a prosecution for perjury); 1896, Griffin's Divorce, App. Cas. 133 (judge's notes of testimony, offered by certified copy, received upon verification by a witness to the testimony); 1898, Re Batt & Co.'s Reg. Trademarks, 2 Ch. 442, 701.

In *Canada* there is authority for admission: 1848, Doe *v.* Murray, 1 All. N. Br. 216 ("he takes them under the sanction of an oath"); 1862, Bennett *v.* Jones, 5 id. 342; N. Br. Consol. St. 1903, c. 127, §§ 26, 27 (judge's notes admissible, when by him produced and read by him or transmitted "to the presiding judge to be read by him"); 1890, R. *v.* Mills, 2 N. W. Terr. 297 (admitted; the judge being required by law to take notes).

The notes may of course be used by the judge to *aid his memory* on being called to the stand (*ante*, § 757). Whether he is *compellable* to take the stand involves a question of privilege (*post*, § 2372, § 2376).

committing magistrates' reports of testimony at the *preliminary hearing* for committal.

By statutes in *England*, first enacted in the 1500s, and extended in scope from time to time,[1] the magistrates were directed to take the testimony, or the material parts thereof, in writing, and to return it to the proper office for preservation. The statutes, however, did not expressly make this magistrate's return admissible (*i. e.* as an official statement, without calling the magistrate or the clerk acting under his direction). Accordingly, for a long time it seems to have been thought necessary to call the magistrate or the clerk, who verified the notes and thus used them as an aid to memory (on the principle of § 737, *ante*). Such at any rate was the English practice down to the 1700s.[2] It persisted as a tradition into the 1800s; but by that time the sounder view was occasionally advanced that the magistrate's express statutory authority to make the return sufficed to admit it (when duly authenticated) as an official statement, without calling him or his clerk.[3] The matter remained, however, in the dubitable realm of conflicting nisi prius rulings, until in 1847 a statute expressly adopted the correct and practical view.[4]

In the *United States*, the same result is reached by a majority of the Courts, although the original English view is also here represented;[5] one reason for

§ 1667. [1] They are collected in full, *ante*, § 1326.

[2] 1666, Lord Morley's Trial, 6 How. St. Tr. 770 (coroner's examination; oath of coroner required); 1679, Langhorn's Trial, 7 How. St. Tr. 417, 467 (Lord's Journal of an examination before them, not admitted without some witness' oath); 1679, Wakeman's Trial, 7 How. St. Tr. 591, 654 (same; L. C. J. North: "When there is an examination in a court of record, these not passing the examination of that Court but being taken by the clerks, we always in evidence expect there should be somebody to prove that such an examination was sworn and subscribed to"); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1440 (like Langhorn's Case); 1680, Hale, Pleas of the Crown, II, 52 ("Oath is to be made in Court by the justice or his clerk, that these examinations and informations were truly taken"); ib. 284 ("that they are the true substance of what," etc.).

[3] 1808, R. *v.* Howe, 1 Camp. 462, 6 Esp. 125 (magistrate's record of conviction, containing the witness' testimony, as required by law, excluded); 1831, R. *v.* Watkins, 1 C. & P. 550, note (Bosanquet, J.; the clerk taking the examination must be called, using his paper to refresh his memory); 1834, R. *v.* Chappel, 1 Moo. & Rob. 395 (Lord Denman, C. J.; neither magistrate nor clerk must be called); 1835, R. *v.* Richards, Moo. & Rob. note (Patteson, J.; same); 1835, R. *v.* Foster, 7 C. & P. 148 (Bosanquet and Alderson, JJ., "intimated an opinion that the [accused's] statement might be read on proof of the magistrate's handwriting, on the ground that the law required the magistrate to certify that it had been duly taken"; remarking, in reference to Lord Hale's doctrine, "it could not be intended that the magistrate or his clerk must be called, on account of their office"); 1839, R. *v.* Pikesley, 9 C. & P. 124 (held, on the facts, desirable, but not legally necessary, to call the magistrate).

[4] 1847, St. 11 & 12 Vict. c. 42, § 17 ("it shall be lawful to read such deposition in evidence," signed by the witness and the justice or justices); § 18 (the examination of the accused "may if necessary be given in evidence against him").

[5] *Federal:* 1918, New York Life Ins. Co. *v.* Neasham, 9th C. C. A., 250 Fed. 787 (coroner's report of testimony, made by law under Nev. Rev. St. § 7550, excluded, because not read to or by the witness or signed by him; unsound); *Arkansas:* 1874, Bass *v.* State, 29 Ark. 142, 145 (escape; coroner's minutes of inquest-proceedings, excluded); 1899, Payne *v.* State, 66 Ark. 545, 52 S. W. 276 (magistrate's report excluded, except as an aid to memory, because it is legally required to contain the substance only; Atkins *v.* State, 16 Ark. 588, explained as decided *contra* under a statute requiring reduction of the whole to writing and the signature by witness); *California:* 1872, People *v.* Devine, 44 Cal. 452 (coroner's report of testimony, admitted, the coroner being required by law to return it in writing); *Connecticut:* 1792, Benedict *v.* Nichols, 1 Root 434, *semble* (examination before a probate judge, admitted); *Florida:* 1901, Green *v.*

adopting it (in some jurisdictions at least) being the supposed incompleteness of the report (*post*, §§ 2098, 2099), — either because the local statute requires only the "substance" to be taken down,[6] or because in practice the notes are carelessly taken and are untrustworthy (though even these would seem safer than mere recollection-testimony, which is universally received).

It will be remembered that there are two other ways in which the report may be used, even though it is inadmissible as an official statement. (*a*) The magistrate or the clerk, being called, may use it to *aid his memory*.[7] (*b*) If the report is *signed by the witness or the accused* (as is usually required by statute), then it has become by adoption his own statement, and it is no longer merely the magistrate's report of what was testified; consequently, it may be put in as the witness' or accused's own statement, if his signature to it as read to him is proved; and an oral acknowledgment of its correctness will suffice for the same purpose.[7] It follows, when the document is used in this way, that the objection as to not calling the magistrate or his clerk disappears, since it is not put in as the officer's report.[8] Conversely, it is

State, 43 Fla. 552, 30 So. 798 (justice of the peace's certificate of a dying declaration, excluded, the justice not being called); *Georgia:* 1900, Haines *v.* State, 109 Ga. 526, 35 S. E. 141 (magistrate's report, reduced to writing "some time after the trial"; admitted); *Illinois:* 1862, Schoonover *v.* Myers, 28 Ill. 308 (magistrate's notes of testimony, not read to or signed by the witness, excluded); *Indiana:* 1920, Ohio Farmers' Ins. Co. *v.* Dobbs, — Ind. App. —, 126 N. E. 869 (testimony taken before the State fire marshal, certified by the marshal and attested by the Secretary of State under seal of State, admissible); *Iowa:* 1876, State *v.* Hayden, 45 Ia. 11, 13 (even to impeach by inconsistencies, the clerk's minutes of grand-jury testimony or the magistrate's of testimony on preliminary examination, are inadmissible, because of their customary brevity and uncertainty; the clerk or magistrate or other hearer must be called; even a report signed by the witness himself is not sufficient, unless its contents were made known to him at the time); 1899, State *v.* Reinheimer, 109 Ia. 624, 80 N. W. 669 (under Code 1897, § 5227, the committing magistrate's minutes, taken by the reporter but not read over or signed by the witness, are not admissible; compare the Iowa rule for grand jury minutes, *post*, § 1669, n. 2); 1907, State *v.* Hoffman, 134 Ia. 587, 112 N. W. 103 (approving State *v.* Reinheimer); *Massachusetts:* 1883, Com. *v.* Ryan, 134 Mass. 223, 225 (justice of the peace's report of a case, under Pub. St. 1882, c. 26, § 15, is not usable as an official record of testimony); *Michigan:* 1868, Lightfoot *v.* People, 16 Mich. 507, 512, *semble* (clerk's minutes of testimony before a magistrate, admissible); *Mississippi:* 1901, Cunning *v.* State, 79 Miss. 284, 30 So. 658 (magistrate's report, uncertified and unverified, excluded on the facts); *New York:* 1832, Bellinger *v.* People, 8 Wend. 598, *semble* (committing magistrate's report, admissible); 1840, People *v.* White, 24 Wend. 520, 533, 556 (coroner's report of testimony, excluded because in pencil; Furman, Sen., diss.); *North Carolina:* 1847, State *v.* Valentine, 7 Ired. 225, 226 (magistrate need not be called); *Pennsylvania:* 1902, Edwards *v.* Gimbel, 202 Pa. 30, 51 Atl. 357 (coroner's written report of testimony, excluded, because no duty required him to record it); *Philippine Isl.* 1908, Bagsa *v.* Nagramada, 11 P. I. 174 (justice's report of testimony, admitted to contradict the witness, even though the justice lacked jurisdiction); *South Carolina:* 1888, State *v.* Jones, 29 S. C. 227, 7 S. E. 296, *semble* (coroner's report, admitted; though other questions are confused with it).

The magistrate's report is sometimes excluded because it is *not in the form* precisely prescribed for it: 1850, R. *v.* Miller, 4 Cox Cr. 166 (deposition signed by "H. J.," not purporting to be a magistrate; not admitted, nor his actual magistracy allowed to be shown, because the statute requires it to "purport" to be so signed); 1896, State *v.* Hatcher, 29 Or. 309, 44 Pac. 584 ("The statute, having provided the manner in which the statement must be authenticated, would seem to exclude oral evidence in aid of a faulty execution, or to supply the necessary certificate").

[6] See the statutes, *ante*, § 1326.

[7] The cases to this effect are collected *ante*, § 1328.

[8] 1834, R. *v.* Chappel, 1 Moo. & Rob. 395 (Denman, L. C. J.); 1835, R. *v.* Richards, ib. 396, note (Patteson, J.); R. *v.* Hopes, 7 C. & P. 136 (Vaughan and Patteson, JJ.); R. *v.* Reading, 7 C. & P. 649 (Parke, B.); R. *v.* Rees, 7 C. & P. 568 (Denman, L. C. J.).

receivable as an official statement, even though the signature of witness or accused is not appended.[9]

From the use of the magistrate's report under the present Exception, the application to it of certain other principles of Evidence must be distinguished; namely, its required use as a *preferred* sort of *testimony* (*ante*, §§ 1326–1329), its force as *conclusive testimony* (*ante*, § 1349), and the necessity of showing it to a witness under *cross-examination* before it can be used to prove his *prior contradictory testimony* (*ante*, § 1262). Moreover, the magistrate's report of oral testimony is distinguished from the *deposition* proper, in which the witness testifies originally in writing; the distinction has been examined, *ante*, §§ 802, 1331, 1376, 1401.

Whether the *whole of the testimony* and the *precise words* must be proved involves the principle of Completeness (*post*, §§ 2098, 2099).

§ 1668. **Same**: (3) **Bill of Exceptions.** A *bill of exceptions* usually embodies so much of the testimony as is needed to be laid before the Superior Court in order to enable it to understand and rule upon the questions of law raised by the exceptions; it is signed by the trial judge, partly (at least) in token of his approval of it as a fair representation of the issues raised. May it not therefore be regarded as an official statement, by the judge, of the tenor of the testimony, whenever in another trial (even between other parties) it may be desired to prove the parts of the testimony stated in the bill? The arguments for so receiving it have been forcibly put in the following passages:

1824, OWSLEY, J., in *Baylor* v. *Smithers*, 1 T. B. Monr. 6: "The statements contained in a bill of exceptions must be supposed to have undergone not only the inspection of each party or their counsel, but moreover the scrutiny and supervision of the Court, by whom the exceptions are signed. When enrolled, those statements in fact compose part of the record, and are entitled to as much verity and are deserving as much credit as would be the testimony of any witness who might prove what the witness whose statements are contained in the record proved on a previous trial."

1859, BENNING, J., in *Smith* v. *State*, 28 Ga. 19, 23: "The test ought surely to be no more than this: Is it probable that the [party's] admission admits only what is true, that the [Court's] judgment sanctions only what is true? For the truth is all that justice requires; and taking this as the test, the paper in question would, it is certain, be admissible. Is it likely that the parties agreed to anything as proved that was not proved, even though the only purpose of this agreement was to comply with the requisitions of the law as to new trials and the law as to writs of error? Is it likely that the Court would have approved as true anything that was not true, even though the purpose of the approval was merely to comply with the requisitions of these same laws? Certainly it is not. Surely all will agree that a paper thus agreed to by the parties and approved by the Court will be more trustworthy on the question what was the evidence delivered on the trial than the daily fading recollection of persons who happened to hear the evidence when it was so delivered."

Nevertheless, the objections to this persuasive exposition are serious, and they are mainly three, — first, it is not the judge's duty to make a report of

[9] 1897, Miller *v.* Busick, 56 Oh. 437, 47 N. E. 249.

the testimony, but only to approve the form of the exceptions, so that upon strict principle the bill does not contain an authorized official statement by him; secondly, the bill contains only such fragments of the testimony as bear upon the exceptions, and is therefore not necessarily a fair representation of its tenor; thirdly, the bill is customarily prepared under conditions not likely to ensure a sufficiently correct statement of the testimony. These objections are forcefully detailed in the following passage:

1868, BECK, J., in *Boyd* v. *Bank*, 25 Ia. 257: "The rule which admits in evidence against the accused his voluntary confession and statement upon a preliminary examination is supported by reasons which do not exist in the case of a bill of exceptions. The magistrate is charged by law with the duty of reducing correctly to writing such confessions and statements. They are read over to him under the provisions of our statute, and he has the opportunity to correct them. In all cases where the authorities hold such statements to be admissible, it is the duty of the officer reducing them to writing to do so correctly; and it is presumed that the writing contains fully and perfectly the statements and admissions made by the accused. Bills of exceptions are prepared with no view to such accuracy in the statements of witnesses. They are not required to contain all of the evidence of the witnesses, nor the language used by them, but only so much of the evidence as may be necessary to explain the ruling of the Court. They are never read to the witnesses, who in fact have nothing to do with their preparation. They are often written out days, weeks, and even months after the trial. . . . The bills of exceptions are then presented to the judge, who, unless they contain some glaring mis-statements, will usually sign them. We are warranted in saying that some judges seldom refuse to sign, and often do not look over and read with care bills of exceptions presented to them by respectable opposing counsel with an indorsement of their approval and agreement. In the preparation of bills of exceptions in open court, the counsel of the respective parties often disagree upon the evidence intended to be stated, and their differences are reconciled, with the approbation of the Court, by mutual concessions which finally present the evidence as claimed by neither and which in fact does not fully satisfy either. . . . As the statute does not require it to be prepared with a view that it shall contain an accurate report of the evidence, and as in practice this is not always so, it ought not to be admitted in evidence in any proceeding to impeach or contradict a witness whose evidence it purports to contain, unless verified and supported as other proof."[1]

The majority of Courts, on one ground or another, receive the bill to prove the tenor of the former testimony.[2] From the point of view of practical safety,

§ 1668. [1] See also a good opinion by Lawrence, C. J., in Roth *v.* Smith, 54 Ill. 431, 433.

[2] *Arkansas:* 1895, St. Louis I. M. & S. R. Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571 (bill of exceptions, excluded); *Columbia (Dist.):* 1897, Anderson *v.* Reid, 10 D. C. App. 426, 430 (bill not purporting to be "an agreed statement of all the evidence of the witnesses," excluded); *Florida:* St. 1909, c. 5897, p. 45, June 3, now Rev. Gen. St. 1919, § 2723, as amended by St. 1921, c. 8572, No. 177 (on a new trial, in civil cases, if the Court is satisfied that evidence "used at the former trial, and incorporated in the bill of exceptions, cannot be had," then the bill of exceptions "may be used as evidence"; provided that "no evidence given upon a former trial . . . shall be used as evidence . . ."except as follows: (1) that the former testimony was "reported stenographically or reduced to writing in the presence of the court"; (2) that the party now was a party then; (3) that the issue is the same; (4) that the witness cannot be produced; and (5) that "the Court is satisfied that the report of such evidence taken at such former trial is a correct report"; for par. (2), (3), and (4), see further §§ 1387, n. 2, 1413, *ante*, where the principles thus involved are considered); 1914, Bennett *v.* State, 68 Fla. 494, 67 So. 125 (St. 1909, c. 5897, held to be not exclusive of other modes of proving former testimony); 1920, Blackwell *v.* State, 79 Fla. 709, 86 So. 224 (applying St. 1909, c. 5897, Comp. L. 1914, § 1523, admitting the bill of

the question is a difficult one to settle by a general rule, and must depend much on the local professional methods. But it seems clear, so far as principle is concerned, that where the parties to the later trial are (as in the usual case) the same in interest, the signing of the bill in the first trial is an admission of the correctness of its statements, and the objection that the admission was intended for that trial only (*ante*, § 1066, *post*, § 2592) may affect its weight but not its admissibility; while, as against one not a party to the former trial, the bill involves no admission of his, and is furthermore not available as an official statement of the judge.

§ 1669. **Same: (4) Notes of Stenographer, Attorney, Juryman.** (*a*) The appointment of an *official stenographer* has chiefly an administrative purpose, — that of providing conveniently, constantly, and (sometimes) without

exceptions, and making it the exclusive mode); *Georgia:* 1852, Riggins *v.* Brown, 12 Ga. 271, 275 (bill of exceptions; not decided); 1859, Smith *v.* State, 28 Ga. 19, 23 ("brief" of evidence, agreed to by parties and approved by the Court, admitted to prove former inconsistent testimony; partly as an admission, partly as a judicial order; quoted *supra*); 1869, Adair *v.* Adair, 39 Ga. 75 (testimony on a former trial as agreed upon by counsel and approved by Court, admitted); 1883, Mitchell *v.* State, 71 Ga. 128, 155, *semble* ("brief" agreed upon for a motion for new trial, admissible); 1891, Lathrop *v.* Atkinson, 87 Ga. 339, 343, 13 S. E. 517 ("brief" of evidence, approved by Court, admitted, though not complete); 1897, Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749 (brief of evidence, filed with a motion for new trial and approved by the judge, receivable); 1900, Owen *v.* Palmour, 111 Ga. 885, 36 S. E. 969 (testimony in a brief of evidence at a former trial, admitted); *Illinois:* 1870, Roth *v.* Smith, 54 Ill. 431, 433 (bill of exceptions, excluded); 1882, Stern *v.* People, 102 Ill. 540, 555 (same); 1898, Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 527 (same); *Iowa:* 1868, Boyd *v.* Bank, 25 Ia. 257 (excluded; quoted *supra*); *Kentucky:* 1824, Baylor *v.* Smithers, 1 T. B. Monr. 6 (bill of exceptions admitted to prove former inconsistent statements; quoted *supra*); 1873, Kean *v.* Com., 10 Bush 190 (witness deceased; admissible in a civil case, but not in a criminal case, because in the latter the accused has the right to cross-examine a reporting witness to the terms of the former testimony; an erroneous distinction, because the present exception to the Hearsay rule exists equally for criminal cases; *ante*, § 1398); 1895, Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299 (former testimony provable by bill of exceptions); 1896, Louisville Water Co. *v.* Upton, — Ky. —, 36 S. W. 520 (same); 1897, Boner *v.* Com., — Ky. —, 40 S. W. 700 (same; but only for civil cases); *Michigan:* 1898, Breitenwischer *v.* Clough, 116 Mich. 340, 74 N. W. 507 (bill of exceptions excluded); *Minnesota:* 1911, Finnes *v.* Selover B. Co., 114 Minn. 339, 131 N. W. 371 (evidence preserved in a "settled case," allowed and certified as required by statute, is admissible on a later trial); 1911, Howard *v.* Illinois C. R. Co., 116 Minn. 256, 133 N. W. 557 (same); *Missouri:* 1865, Jaccard *v.* Anderson, 37 Mo. 91, 96 (bill of exceptions containing the substance of the witness' testimony, admitted); Rev. St. 1919, § 5401 (evidence preserved in a bill of exceptions may be used as if it had been preserved in a deposition in the cause; but the opponent may prove "any matters contradictory thereof" as though the witness were present); *New York:* 1806, Neilson *v.* Ins. Co., 1 Johns. 301 ("case made" on a former trial, corrected before the judge, not admitted to prove inconsistent statements, because "not conclusive against third persons whose veracity or credit is called in question"; a poor reason, because no claim that it is "conclusive" is involved); *Ohio:* Gen. C. Annot. 1921, §§ 11496, 5242*a* (bill of exceptions purporting to incorporate "all the evidence given by such party or witness," admissible); 1874, Kirk *v.* Mowry, 24 Oh. St. 581 (bill of exceptions, excluded); *Pennsylvania:* 1902, Edwards *v.* Gimbel, 202 Pa. 30, 51 Atl. 357 (testimony in a bill of exceptions, not admitted in impeachment on a later trial); *Texas:* 1891, McCamant *v.* Roberts, 80 Tex. 327 (a statement of facts as testified to, made up by either counsel or Court, inadmissible to contradict a witness by his former testimony); *Wisconsin:* 1874, Wilson *v.* Noonan, 35 Wis. 343 (admissible, because the bill is consented to by the parties); 1875, Zitske *v.* Goldberg, 38 Wis. 216, 229 (undecided).

In any case the bill may be availed of by witness or counsel (on the principles of §§ 737, 762, *ante*) as an *aid to memory:* 1885, Solomon R. Co. *v.* Jones, 34 Kans. 443, 458, 8 Pac. 730.

Whether the *whole of the testimony* must be proved (*post*, §§ 2098, 2099), and whether the witness whose testimony is reported must be shown to be *deceased* or otherwise unavailable (*ante*, §§ 1401–1418), involve independent rules.

expense to litigants, a trustworthy person (usually under oath of office) to record the testimony for reference during and after the trial. Does the stenographer, under the general principle (*ante*, § 1633), become an official authorized to report the testimony, in the sense that his report is admissible in other trials (without calling him to the stand) as a statement made under an official duty? The answer should be in the affirmative, on principle; practical convenience would of course be advantaged; while in trustworthiness such reports would greatly surpass the ordinary recollection-testimony. Nevertheless, Courts generally declined to recognize the reports of an official stenographer as admissible under the present Exception.[1] It was left for statutes, in many jurisdictions, to provide expressly for the admission of such reports.[2]

§ 1669. [1]1895, Jenkins *v.* State, 35 Fla. 737, 18 So. 182, *semble;* 1887, Hardeman *v.* English, 79 Ga. 387, 390, 5 S. E. 70; 1889, State *v.* Adams, 78 Ia. 292, 43 N. W. 194 (report of stenographer appointed by justice of peace, excluded); 1899, State *v.* Reinheimer, 109 Ia. 624, 80 N. W. 669 (similar); 1881, Herrick *v.* Swomley, 56 Md. 4; 1880, Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77 (Cooley, J.: "There is no law making them evidence generally nor should there be"); 1881, Edwards *v.* Heuer, 46 Mich. 95, 97, 8 N. W. 717 ("The Legislature, in providing for the assistance of shorthand writers, did not intend that their notes should have more force than judges' minutes," which could not be used); 1887, People *v.* Carr, 64 Mich. 702, 706, 31 N. W. 590 (Misner *v.* Darling approved); 1888, Toohey *v.* Plummer, 69 Mich. 345, 350, 37 N. W. 297; 1895, People *v.* Considine, 105 Mich. 149, 63 N. W. 196; 1886, Lipscomb *v.* Lyon, 19 Nebr. 521, 27 N. W. 731, *semble;* 1894, Smith *v.* State, 42 Nebr. 356, 359, 60 N. W. 585 (official stenographer's report of proceedings at a trial, not receivable as a public document); 1888, Kerr *v.* Lunsford, 31 W. Va. 677, 8 S. E. 493; 1883, Rounds *v.* State, 57 Wis. 52, 14 N. W. 865, *semble;* 1905, Havenor *v.* State, 125 Wis. 444, 104 N. W. 116 (grand-jury's stenographic reports of testimony "are to be treated as memoranda to be used by these officials when they are called as witnesses").

Distinguish the question whether the official stenographic report, if admissible, is *preferred* to other reports of the testimony (*ante*, § 1330).

As to the standing of an official stenographer's notes in regard to the *certifying of a bill of exceptions*, distinguish a series of cases in Pennsylvania: Taylor *v.* Preston, 79 Pa. 436; Chase *v.* Vandegrift, 88 Pa. 217; Janney *v.* Howard, 150 Pa. 339, 24 Atl. 740; Rosenthal *v.* Ehrlicher, 154 Pa. 396, 26 Atl. 435; Connell *v.* O'Neil, 154 Pa. 582, 26 Atl. 607; Com. *v.* Arnold, 161 Pa. 320, 326, 29 Atl. 270; Pool *v.* White, 171 Pa. 500, 33 Atl. 879; Smith *v.* Hine, 179 Pa. 203, 36 Atl. 222; Woodward *v.* Heist, 180 Pa. 161, 36 Atl. 645; Harris *v.* Traction Co., 180 Pa. 184, 36 Atl. 727; see also Cummings *v.* Armstrong, 34 W. Va. 1, 11 S. E. 742.

[2] CANADA: *N. Br.* Consol. St. 1903, c. 127, § 26 (stenographer's notes certified pursuant to c. 119, are admissible); St. 1913, 3 Geo. V, c. 16, § 5 (official stenographer's transcript of testimony to be admissible); *N. W. Terr.* St. 1902, c. 5, § 2, and St. 1903, c. 8, § 1 (official shorthand reporter's report of testimony, admissible, when certified by himself or the clerk of court where filed); *Ont.* 1917, R. *v.* Baugh, 33 D. L. R. 191, Ont. (conspiracy; transcript of stenographic notes of former testimony, admitted under Can. Cr. C. § 999, though not signed by the judge till offered at the trial); *P. E. I.* St. 1899, c. 15, §§ 5, 8 (official stenographer's certified transcript, to be admissible); St. 1909, 9 Edw. VII, c. 3, § 15 (official stenographer's certified transcript of testimony, admissible); *Sask.* Rev. St. 1920, c. 39, § 40 (official stenographer's transcript, certified by him or by the local registrar of the court, to be admissible).

UNITED STATES: *Alabama:* 1915, Todd *v.* State, 13 Ala. App. 301, 69 So. 325 (St. 1909, p. 266, § 7, applied, on a charge of perjury); 1920, Vaughn *v.* State, 17 Ala. App. 383, 84 So. 879 (official transcript in defendant's hands, paid for by him, admitted under St. 1909, p. 263, § 7); *Arizona:* Rev. St. 1913, Civ. C. § 1679, P. C. § 1052 (official stenographer's certified report of testimony, in a criminal case, admissible); *California:* C. C. P. 1872, § 273 (official reporter's report of testimony, admissible); 1880, People *v.* Lee Fat, 54 Cal. 527, 529 (official stenographer's report, made evidence by statute, excluded, partly on the principle of Confrontation, *ante*, § 1398); 1899, People *v.* Plyler, 126 Cal. 379, 58 Pac. 904 (statute applied); 1901, Benton's Estate, 131 Cal. 472, 63 Pac. 775 (C. C. P. § 273 admits the official transcript, but only when filed); P. C. 1872, § 869 (in cases of homicide, the testimony before the committing magistrate may be proved by a transcript in longhand certified by the reporter appointed by the magistrate and filed with the county clerk); St. 1895, Mar. 26, p. 168 (Deering's P. C.

Stenographic notes, whether official or private, are not, at common law, *exclusive* or *preferred evidence* to the tenor of the testimony so reported; but statute has occasionally changed this rule (*ante*, § 1330).

1915, p. 765; coroner's official reporter; longhand transcript to be evidence of testimony taken); 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169 (the certified transcript under P. C. § 869, *supra*, is in such cases the only mode of proving the testimony; but the records must affirmatively show the lack of such a proper certificate in the absence of a specific objection; prior cases cited on the interpretation of this statute); 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (preceding case approved); 1904, People *v.* Moran, 144 Cal. 48, 77 Pac. 777 (similar point); *Colorado:* Comp. L., § 4490 (industrial commission; official stenographer's certified transcript of testimony, to be admissible "as if such stenographer were present and testified"); *Connecticut:* Gen. St. 1918, § 5724 (exemplified transcript of testimony and proceedings by an official stenographer, to be 'prima facie' evidence); § 5723 (testimony of a witness absent, etc., is provable in civil causes by a certified copy of the court stenographer's notes, "verified by his oath"); *Florida:* Rev. G. S. 1919, § 2723, as amended by St. 1921, c. 8572, No. 177 (bill of exceptions preserving testimony may be used, in civil causes; if not so preserved, but preserved stenographically or reduced to writing in the presence of the Court, the report may be used if the Court is satisfied that it is correct); § 3093 (official stenographer's transcript, certified and acknowledged, to be "'prima facie' a correct statement of such testimony"); *Indiana:* Burns' Ann. St. 1914, § 10052 *r* 2 (testimony before State public service commission, provable by official stenographer's certified transcript under oath, "as if such reporter were present"); *Iowa:* St. 1898, c. 9, § 1, Code Suppl. 1902, § 245 *a*, Comp. Code § 7391 (original or transcribed notes of testimony, "by the shorthand reporter of such court" are admissible on a retrial of the same case, "and for purposes of impeachment in any case," with the same effect as a deposition; after office ended, the reporter's transcript sworn to by him before an officer is admissible; further regulations in detail); 1898, Grieve *v.* R. Co., 104 Ia. 659, 74 N. W. 192 (statute applied); 1902, Walker *v.* Walker, 117 Ia. 609, 91 N. W. 908 (official reporter's certified transcript of testimony in another trial, not admitted except for the limited purpose of c. 9, 27th Assembly, 1898; § 3777 of the Code of 1873 being omitted from the Code of 1897); 1904, Wiltsey's Will, 122 Ia. 423, 98 N. W. 294 (Walker *v.* Walker, *supra*, followed); 1904, Lanza *v.* Le Grand Quarry Co., 124 Ia. 659, 100 N. W. 488 (testimony taken under the above statute is subject to the rules for depositions, *ante*, § 1415); 1907, Greenlee *v.* Mosnat, 136 Ia. 639, 111 N. W. 996 (St. 1898, c. 9, § 1, Code § 7391 *supra*, held not to make admissible the former testimony of a party now disqualified by the opponent's death, the testimony being otherwise inadmissible on the principle of § 1409, *ante*); *Kansas:* Gen. St. 1915, § 3003 (the transcript of a court stenographer's notes, verified by his affidavit or certificate, of "all the evidence of any witness" at any trial, etc., may be used "under like circumstances and with like effect as the deposition of such witness"); 1909, Wilmoth *v.* Wheaton, 81 Kan. 29, 105 Pac. 39 (St. 1905, c. 494, p. 810, making the court-stenographer's certified transcription admissible, does not prohibit the stenographer's oral testimony from his notes without transcription); *Kentucky:* Stats. 1915, §§ 1019 *a*, 4643 (official stenographer's report of testimony, admissible); 1903, Sievers-Carson H. Co. *v.* Curd, — Ky. —, 71 S. W. 506 (official stenographer's transcript, admitted at a second trial, under Stats. § 4643); 1904, Beavers *v.* Bowen, — Ky. —, 80 S. W. 1165 (incomplete notes by stenographer, excluded; but the part of the opinion applicable to the stipulation for using the notes as if the stenographer were present is obscure and unsound); 1904, Fuqua *v.* Com., 118 Ky. 578, 81 S. W. 923 (former testimony of a deceased witness, admissible in a criminal trial without the defendant's consent mentioned in the above statute); 1906, Austin *v.* Com., 124 Ky. 55, 98 S. W. 295 (the official stenographer's bill of evidence, under Stats. 1899, § 4643, cited *supra*, held not to be preferred to, nor to be exclusive of, the testimony of another stenographer verifying his notes); *Louisiana:* 1901, State *v.* Banks, 106 La. 480, 31 So. 53 (Act 123, of 1898, admitting a stenographer's certified report of testimony in Orleans parish, applied); *Maine:* Rev. St. 1916, c. 67, § 12 (testimony taken in courts of probate, official stenographer's certified copy of transcript admissible); c. 87, § 171 (similar, for testimony at a former trial in any court); *Massachusetts:* Gen. L. 1920, c. 233, § 80 ("transcripts from stenographic notes duly taken in the superior court under the authority of law, when verified by the certificate of the official stenographer or assistant taking them" are admissible, when the testimony itself is competent); *Michigan:* § 8131 (proceeding of State railroad commission, or testimony provable by official stenographer's transcript); *Missouri:* 1906, State *v.* Coleman, 199 Mo. 112, 97 S. W. 574 (former testimony here not admitted under the statute, because the witness was present in court); *Montana:* Rev. C. 1921, § 8935 (certified report of a court stenographer "is 'prima facie' a correct statement of such testimony," etc.); *Nevada:* Rev. L. 1912, § 4561 (official stenog-

(*b*) The reports of an ordinary *private stenographer* are of course not receivable, being merely hearsay reports by a person not produced.[3] If, however,

rapher's certified transcript of notes of testimony before State railroad commission, to be admissible "as if such reporter were present and testified"); § 4912 (official court reporter's transcript of testimony, certified by him, to be 'prima facie' evidence); § 5472 (like Utah Comp. L. 1917, § 7205); *New Jersey:* Comp. St. 1910, Evidence § 11 (official stenographic report of testimony of a deceased witness, admissible on a new trial); *Ohio:* Gen. Code Ann. 1921, § 11496 (a "competent official stenographer's" report of testimony, admissible); § 534 (State utilities commission proceedings; official stenographer's transcript of testimony, admissible "as if such reporter was present and testified"); §§ 1465-71 (same, for State liability board); § 1553 (court of common pleas; official stenographer's transcripts of testimony, to be taken as "'prima facie' evidence of their correctness"); *Oklahoma:* Comp. St. 1921, § 3071 (official reporter's certified transcript of notes of testimony, admissible "in all cases" with like effect as testimony taken by deposition); *Oregon:* Laws 1920, § 932 (official reporter's certified transcript of testimony, admissible); § 5854 (State public service commission; official stenographer's certified transcript of testimony, admissible); 1911, Beard *v.* Royal Neighbors, 60 Or. 41, 118 Pac. 171 (applying the above statute, now § 932); *Pennsylvania:* St. 1887, May 23, §§ 3, 9, Dig. 1920, § 8172, Crim. Proc., Dig. § 21859, Witnesses (former testimony may be evidenced by "notes of his examination" or "properly proven notes"); St. 1907, May 1, § 5, Dig. § 20206, Stenographers (official stenographer's certified transcript of testimony, or clerk's certified copy, admissible "without the necessity of calling the stenographer"); *Philippine Islands:* P. C. 1911, Gen. Order 58 of 1908, § 32 (criminal cases; official stenographer's certified transcript, to be 'prima facie' evidence); *Rhode Island:* Gen. L. 1909, c. 292, § 27 (stenographer's sworn transcript of shorthand deposition, admissible); c. 292, § 42 (stenographer's certificate of transcribed testimony taken "under statutory authority" and "allowed by the Court," to be admissible); *Utah:* Comp. L. 1917, §§ 7205, 9277 (official stenographer's report, certified by him, receivable when the witness is dead, etc.); § 1879 (official stenographer's certified transcript of testimony, to be "'prima facie' a correct statement of such testimony"); §§ 8553, 8750 (official stenographer's notes at preliminary hearing before magistrate, admissible when transcribed and filed); St. 1919, Mar. 13, c. 36, amending Comp. L. § 1885 (city courts may appoint reporter, whose certified transcript may be read in evidence); 1910, State *v.* Vance, 38 Utah 1, 110 Pac. 434 (stenographic notes received under the foregoing statute; procedure of filing, discussed); *Vermont:* Gen. L. 1917, § 1628 (official stenographer's certified transcript of "evidence or proceedings," admissible); *Washington:* St. 1913, c. 126, p. 386, § 6 (certified transcript by official reporter, to be evidence of "testimony or other oral proceedings"); *West Virginia:* St. 1921, c. 98, § 3 (official reporter's transcript of testimony, when certified by him and by the judge "shall be authentic for all purposes"); *Wisconsin:* Stats. 1919, § 1797-13 (State railroad commission; official stenographer's certified transcript of testimony admissible "as if such reporter were present and testified") § 4141 (official stenographer's certified transcript of testimony admissible without calling him in person); 1905, Havenor *v.* State, 125 Wis. 444, 104 N. W. 116 (statute *supra* not mentioned in excluding the stenographic reports of testimony before a grand jury); 1905, Wells *v.* Chase, 126 Wis. 202, 105 N. W. 799 (the statute *supra* perversely applied; see the citation *ante*, § 1330); *Wyoming:* Comp. St. 1920, § 1170 (official stenographer's certified transcript of "facts, testimony, and proceedings," with the clerk of the court's certificate "that such person is the official reporter thereof," to be evidence).

Whether the *whole of the testimony must* be proved (*post*, §§ 2098, 2099), and whether the witness whose testimony is reported must be shown to be *deceased* (*ante*, §§ 1401-1418), involve other principles.

Distinguish also the question whether the *official stenographic report* is *preferred* to other reports (*ante*, § 1330).

[3] *Eng.* 1843, R. *v.* O'Connell, 5 State Tr. N. S. 1 (report of trial of Feargus O'Connor, taken in shorthand and published by himself; received, at 391, but rejected at 571); *Can.* 1919, Menard *v.* King, 59 D. L. R. 144, Que. (stenographer's transcript purporting to report testimony before a royal commission); *U. S.* 1920, Sneierson *v.* U. S., 4th C. C. A., 264 Fed. 268 (notes read to the jury; exact circumstances not stated); 1907, Degg *v.* State, 150 Ala. 3, 43 So. 484; 1906, Williams *v.* Sleepy H. M. Co., 37 Colo. 62, 86 Pac. 337 (notes certified by a stenographer not called); 1871, Phares *v.* Barber, 61 Ill. 271, 276 (transcribed stenographic report, excluded); 1918, Mayor etc. of Baltimore *v.* State, 132 Md. 113, 103 Atl. 426 (counsel not allowed to read transcript of stenographic report of former testimony without calling the stenographer); 1882, People *v.* Sligh, 48 Mich. 58, 11 N. W. 782; 1867, Morris *v.* Hammerle, 40 Mo. 489, 490; 1914, State *v.* McPherson, 70 Or. 371, 141 Pac. 1018; 1896, Redford *v.* R. Co., 15 Wash. 419, 46 Pac. 650; 1888, Kerr *v.* Lunsford, 31 W. Va. 659, 677, 8 S. E. 493.

the stenographer is accounted for as deceased or otherwise unavailable, they should be received as coming fairly within the Exception for Regular Entries (*ante*, § 1523);[4] or (by statute in a few States) they may, when sworn to be correct, be received in affidavit form (*post*, § 1710), without accounting for the stenographer's absence. If the stenographer is produced, the notes may of course be used as an *aid* to memory,[5] under the general principles of that subject (*ante*, §§ 735, 758); or may be read to *contradict the stenographer* himself, under the rule for self-contradictions (*ante*, § 1259), if shown to him (when called for the opponent) and admitted by him to be genuine.[6]

(*c*) No member or clerk of a *grand jury* is authorized by his office to report testimony, and his notes are not receivable as an official statement.[7]

(*d*) Nor is an *attorney* vested by his office with such authority, so as to make his notes admissible.[8]

§ 1670. **Reports and Inquisitions, in General; Inquisitions (1) of Domain; (2) of Escheat (Pedigree and Title); (3) of Title to Personalty (Sheriff); (4) of Pedigree (Heralds' Books).** A report is to be distinguished from a return, as already defined (*ante*, § 1664), in that the latter is typically concerned with something done or observed personally by the officer, while the

[4] This has been provided by statute in *New York:* C. P. A. 1920, § 348 (notes of former testimony, taken by a stenographer now deceased or incompetent, may be read by a competent person).

In *Washington*, the stenographer need not be accounted for; St. 1905, c. 26 (testimony at a prior trial, etc., "when reported by a stenographer, or reduced to writing, and certified by the trial judge," upon three days' notice to the opponent with service of copy, "may be given in evidence in the trial of any civil action, etc.").

[5] 1911, Jones *v.* State, 174 Ala. 85, 57 So. 36; 1893, People *v.* Lem You, 97 Cal. 224, 227, 32 Pac. 11; 1909, Wilmoth *v.* Wheaton, 81 Kan. 29, 105 Pac. 39; 1912, State *v.* Gentry, 86 Kan. 534, 121 Pac. 352; 1907, Lake *v.* Com., — Ky. —, 104 S. W. 1003 (official stenographer); 1918, People *v.* Fisher, 223 N. Y. 459, 119 N. E. 845 (stenographer's notes of testimony taken before a magistrate, verified by the stenographer on the stand, admitted; what was there here to waste time upon?); 1909, State *v.* Longstreth, 19 N. D. 268, 121 N. W. 1114 (Ellsworth, J., diss. on not easily intelligible grounds); 1898, State *v.* Bartmess, 33 Or. 110, 54 Pac. 167; 1910, Smith *v.* State, 60 Tex. Cr. 293, 131 S. W. 1081 (prior cases examined); and cases cited *ante*, §§ 737, 761.

[6] People *v.* Sligh, Kerr *v.* Lunsford, note 1, *supra;* 1906, State *v.* Woodard, 132 Ia. 675, 108 N. W. 753, *semble* (minutes of testimony before the grand jury, though not usable to impeach the witness, may be used by counsel as the basis for framing questions).

Whether the *whole of the testimony* must be proved (*post*, §§ 2098, 2099), and whether a *copy*, not the original, of the notes may be used (*ante*, § 749), are independent questions.

[7] *Ia.* 1865, State *v.* Ostrander, 18 Ia. 435, 455 ("minutes of testimony taken before the grand jury" under statute, excluded); 1873, State *v.* Hayden, 45 Ia. 11, 13 (cited *ante*, § 1667; here a statute required notes to be taken); 1898, State *v.* Porter, 105 Ia. 677, 75 N. W. 519 (minutes of grand jury testimony are not "independent evidence"); 1906, State *v.* Woodard, Ia., *supra*, n. 6; 1902, State *v.* Phillips, 118 Ia. 660, 92 N. W. 876 (under Code 1897, § 5258, providing that the grand jury's clerk shall take the testimony and that the minutes shall be read over and signed by the witness, the minutes are receivable, to impeach the witness; pointing out that State *v.* Hayden is no longer law for grand jury minutes); 1907, State *v.* Hoffman, 134 Ia. 587, 112 N. W. 103 (following State *v.* Phillips); *Mo.* 1889, State *v.* Thomas, 99 Mo. 235, 255, 261, 12 S. W. 643 (minutes of testimony taken by a grand juror and signed by the witness, excluded, partly because the juror could not remember the testimony, partly because the minutes were too brief; apparently erroneous); 1890, State *v.* Whelehon, 102 Mo. 17, 22, 14 S. W. 730 (minutes taken by a grand juror acting as clerk, according to statute, inadmissible); *Wis.* 1905, Havenor *v.* State, Wis., *supra*, n. 1.

[8] 1895, Jenkins *v.* State, 35 Fla. 737, 18 So. 182 (State's attorney); 1872, Waters *v.* Waters, 35 Md. 539.

For *interpreters* and *official translations*, see *ante*, § 811, *post*, § 1810.

former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement — "inquisition" or "inquest" — suggests more clearly its special quality, namely, that of resting upon means of information other than original personal observation.

Now an inquisition or report, if made under due authority, stands upon no less favorable a footing than other official statements. As a statement made under official authority or duty, it is admissible under the general principle (*ante*, §§ 1633, 1635):

1824, Mr. *Thomas Starkie*, Evidence, 260: "Inquisitions, which are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. . . . It is not essential to the reception of evidence of this nature that the inquiry should have been made by virtue of some judicial authority and by means of witnesses examined upon oath;[1] it is sufficient if it was made by virtue of competent authority on behalf of the public, and on a subject-matter of public interest. . . . It is, however, of the very essence of evidence of this nature that the inquiry should have been made under proper authority; in general, therefore, unless the authority be in its nature notorious, it must be proved by the production of the commission; as in the case of an inquisition 'post mortem' and such private offices."

But the fundamental doctrine of the common law seems to have been that *no authority* to make an inquisition *will be implied* merely from the general nature of the office, and that an *express authority must be created* for the purpose; the report or inquisition thus being sharply distinguished in principle from the return proper (*ante*, § 1664) and the register (*ante*, § 1639). The general quality of a statement made under authority (should it exist) will suffice to admit it; but the authority which can be implied from the nature of an office is (sensibly enough) an authority to record or return only those things personally done by or before the officer (*ante*, § 1635, par. 3). An authority to record matters out of his personal knowledge — matters to which he could ordinarily not testify even if called to the stand — must therefore properly be sought in an express command, — a command involving the special task of seeking extrinsic sources of information and thus qualifying himself for the unusual duty. The command need not be renewed for each instance; it may be a general command, or a special command; but it must be an express command. It is this principle of express authority which serves to explain the attitude of the common law toward the use of inquisitions or reports. The principle is best illustrated in the doctrines about certain older forms of inquisition, now fallen into disuse, but valuable as embodying the fixed policy of the law.

(1) Beginning with Domesday Book itself,[2] there is a lengthy and numerous series of inquisitions into the state of the regal or baronial *domain*, the

§ 1670. [1] That it is 'ex parte' is no inherent objection (*ante*, § 1385).
[2] 1897, Maitland, Domesday Book and Beyond.

kinds and incidents of feudal privileges, the rights of tithe and toll, and other local customary rights.[3] In the following passage, one only of the various sorts is illustrated:

1793, KENYON, L. C. J., in *Beebee* v. *Parker*, 5 T. R. 14: "Near a century and a half ago the homage (the tenants holding under the lord of the manor) being convened together 'eo nomine' as the homage (not for the purpose of extending their claims either against the lord or strangers) . . . proceeded to describe the several customs which regulated the descent of the different species of tenure within this manor. Now can it be supposed that these persons, acting under the sanction of an oath, could for no purpose whatever give a false representation of these customs? or is it not more probable that their account was the true one? Common sense and common observation would induce us to believe the latter." [4]

These proceedings all rested for their sanction on warrants ordering the inquisition or "survey," and would no doubt be admissible to-day, had they ever any bearing; although it has long been the rule, by reason of the antiquity of the proceedings, to dispense with a distinct showing of the express authority and to presume that it existed.[5]

(2) There was also, as a once common proceeding, the inquisition of *escheat* (usually termed "*post mortem*"), which, when made by express authority, was always received and highly valued:

1844, Mr. J. *Hubback*, Succession, 584, 589: "Upon the death of each tenant 'in capite' of the Crown, a jury was summond to inquire, first, of what lands the party died seised; secondly, by what rents or services the same were held; thirdly, who was his next heir, and of what age the said heir then was. The inquest was taken upon oath, and the verdict, under the seals of the jury, was returned to the officer by whose summons the jury was assembled. This duty appears first to have belonged to the justices in eyre, but was afterwards transferred to the escheators, officers appointed by the Crown for the purpose. . . . They were continued until the restoration of Charles II, when the practice of taking them ceased, in consequence of the abolition of military tenures. . . . A genealogical utility unequalled by any later institution has been ascribed to these proceedings by very high authority. . . . [Lord Mansfield said:] 'The proof of pedigrees has become so much more difficult since inquisitions 'post mortem' have been disused, that it is easier to establish one for five hundred years before the time of Charles II, than for one hundred years since his reign.' . . . The true ground of their admissibility is the fact that they are the results of inquiries made by virtue of competent public authority. . . . An inquisition 'post mortem' cannot be read in evidence unless it be proved that a commission was issued to warrant it."

This form of inquisition has been availed of in evidence in fairly modern times, and even in our country.[6]

[3] 1814, Phillipps, Evidence, II, 101 (referring to numerous instances, not in judicial archives).

[4] *Accord:* 1786, Ashhurst, J., in Goodwin v. Spray, 1 T. R. 473; 1828, Rowe v. Brenton, 8 B. & C. 737, 743 (a "caption of seisin," made by commissioners of the Duke of Cornwall, and showing the tenants and rental of each holding, admitted).

[5] 1747, Kellington v. Trinity College, 1 Wils. 170 (ancient "survey," from the first-fruits office, of the possessions of a nunnery, admitted to show tithe customs; on objection that the authority for the survey did not appear, it was answered "that these surveys have always been allowed as proper evidence, and to be read, notwithstanding the commissions under which they were taken be lost").

Compare the cases of an *official survey* (*ante*, § 1665), in which the application of the principle is slightly different.

[6] 1709, Burridge v. Sussex, 2 Ld. Raym. 1292 (inquisition 'post mortem' of 5 Car. I;

(3) The *sheriff's* inquisition into the *title of personalty*, seized by him under a writ and claimed adversely by some third person, may originally have been receivable. But by the 1800s it began to be rejected, for the very reason that it did not fulfil the fundamental doctrine of express authority, since no writ commanded the sheriff to investigate the title; and, while it might serve as indirectly indicating the sheriff's good faith and negativing malice, it would not be received (for example) as evidence of a third person's title in support of the sheriff's allegation that his return of 'nulla bona' was true.[7]

(4) But the most informing illustration is found in the judicial treatment of the *heralds' records*. There were various sorts of books kept of old by the heralds, and concerned in various ways with the pedigree and privileges of peers and gentry. That one, however, which alone was allowed to be availed of in evidence, as an official statement by the heralds, was the visitation-book, or record of inquisitions of pedigree made from time to time by warrant from the chief of their order, who as head of the Court of Chivalry had jurisdiction over the privileges of honor and rank:

1844, Mr. J. *Hubback*, Succession, 541, 543: "These visitation-books contain the pedigrees and coats of arms of the nobility and principal gentry of England. . . . By the terms of the royal commissions the heralds were authorized to make circuits through the different counties within their respective provinces, and 'to peruse and take knowledge, survey, and view all manner of arms, cognizances, crests, and other like devices, with the notes of the descents, pedigrees, and marriages of all the nobility therein; and also to reprove, control, and make infamous, by proclamation, all such as unlawfully and without

"resolved by the whole Court, that it was good evidence, and did prove the deed and intail"); 1712, Newburgh *v.* Newburgh, 3 Brown P. C. 553 (inquisition 'post mortem', about 1636, excluded because no commission to warrant it was shown; but if its issuance is shown, production is not indispensable); 1720, Leighton *v.* Leighton, 1 Stra. 308 (inquisition 'post mortem' of 25 H. VIII, admitted to prove the deceased's seisin in fee); 1726, Anderton *v.* Magawley, 3 Brown P. C. 588 (like Newburgh *v.* Newburgh); 1757, Tooker *v.* Beaufort, 1 Burr. 146 (return under an inquisition under commissioners in 1591 as to the seisin of a priory; objected to because the defendant, not being a party, "could have no notice nor opportunity to defend it"; admitted, but no reasons given); 1810, Banbury Peerage Case, in App. to LeMarchant's Gardner Peerage Case, 409, 442, 460, 476 (inquisitions of escheat on the earldom of Banbury, admitted; other instances of such inquisitions cited at p. 476); 1837, Vaux Peerage Case, 5 Cl. & F. 526, 540 (inquisition 'post mortem,' dated 18 Jac. I, reciting the marriage of the deceased's son in 2 Jac. I, admitted; inquisition in 10 Jac. I, after the coming of age of Lord Vaux, on his attainder for recusancy, reciting an indenture, admitted); 1826, Stokes *v.* Dawes, 4 Mas. U. S. 268 (attorney-general's inquest of office as to an escheat, admitted, though the tenant was not privy; Story, J.: "The inquest of office is undoubtedly evidence in this case of a very high nature").

[7] *Eng.* 1795, Latkow *v.* Eamer, 2 H. Bl. 437 (after serving a writ of execution, the sheriff summoned a jury to try the title to the goods; their inquisition was excluded; Buller, J.: "The inquisition is not under the king's writ, but merely a proceeding by the sheriff of his own authority"); 1814, Glossop *v.* Pole, 3 M. & S. 175 (levy upon debtor's goods, returning 'nulla bona'; defendant's inquisition as sheriff as to the property of the goods, not admitted, even to mitigate damages; repudiating a dictum of C. J. Eyre in Latkow *v.* Eamer); 1817, R. *v.* Bickley, 3 Price 454 (sheriff's inquisition of title to goods; the claimant held entitled to appear and cross-examine and give evidence; admissibility not referred to).

U. S. 1811, Bayley *v.* Bates, 8 Johns. N. Y. 185, 188 (inquisition of office, made in good faith, held a defence for the sheriff in an action for false return); 1813, Townsend *v.* Phillips, 10 Johns. N. Y. 98 (inquisition admissible in mitigation of damages, in an action of trespass); 1818, Van Cleef *v.* Fleet, 15 Johns. N. Y. 147 (action for a false return; inquisition excluded, because the actual value of the goods was alone asked).

Compare the cases cited *ante*, § 1664.

just authority usurped or took any name or title of honor or dignity.' . . . [One of the orders for their work provides] that 'in all entries of descents in visitations, the said provincial kings of arms and their deputies shall not enter more descents or collateral branches with their hatches (unless the same be made out by deed, evidences, or other authentic proof) than that the partie appearing shall either probably affirm of his owne knowledge to be true or [shall] manifest that that he hathe received from his parents or neer relations, or which shall be attested by one or more persons of good quality of the neighborhood or some other credible testimony.' . . . It is obvious that, where the instructions contained in these commissions and orders were fully acted up to, a very copious and accurate genealogical history of the principal families of the kingdom would be compiled. . . . It has been stated that the visitation-books are of authority as evidence in the nature of official records. It does not appear that their admissibility has ever been judicially questioned."

When these books were offered in evidence, the reports of the heralds were received whenever they appeared to have been made by virtue of an express warrant or commission authorizing them to investigate a particular pedigree or group of pedigrees; and they were rejected when they appeared to have been made without such a warrant. In the following passages this distinction is clearly illustrated:

1857, *Shrewsbury Peerage Case*, 7 H. L. C. 1, 20; a book enrolling the pedigrees of subscribers to a building fund of the Heralds' College was offered; the book had been compiled under a royal commission authorizing the raising of the fund and the enrolment of subscribers' pedigrees. Mr. Serj. *Byles*, objecting: "Here there was no power to inquire officially into anything. The authority given was merely to receive money from all who were willing to subscribe it, to become 'benefactors' for the purpose of rebuilding the college; and, as an encouragement to subscribe, they were permitted to deposit their own statements of their own pedigrees in the College. The maker of this pedigree appears to have subscribed £20; his statement was therefore received; but no authority can be attached to it, for there was no authority in the Heralds' office to inquire into the truth of it, or to reject it if untrue. It cannot therefore be received as an official document." L. C. CRANWORTH, excluding it: "This pedigree certainly does not stand on the footing of a Heralds' visitation, for that is a document made upon authority and with means of investigation, and it is the right and duty of the persons who make these visitations to inquire and to report the result of their inquiries."

1880, Lord BLACKBURN, in *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623, 644: "The visitations of heralds were proof. There the Court of Chivalry was a prescriptive court, and the object of the Court of Chivalry and the inquiry of the heralds . . . was that they should inquire into the arms and pedigrees for the very purpose of making a register of them, and for both these reasons it is clear that, when the visitation of the heralds appointed for this purpose had been made, these things could be and they always have been received in evidence."

It was upon this principle that the heralds' books were treated when offered in evidence.[8] Accordingly, when the old practice of issuing commissions of

[8] 1683, Thanet *v.* Foster, T. Jones 224 (to prove an heirship, the heralds were sworn to a pedigree-tree made from the records of the office; but the Court required production of "the books and records from which it was deduced"); 1688, Matthews *v.* Port, Comb. 63 (visitation-book of Worcester county admitted); 1692, Stayner *v.* Droitwich, 12 Mod. 86 ("Herald's books have been allowed evidence in pedigrees"); 1717, Pitton *v.* Walter, 1 Stra. 162 ("to prove the pedigree, the Chief Justice [Pratt] admitted a visitation in 1623,

inquisition fell into disuse (probably in the 1700s), and the heralds thereafter made up their records solely by compilation from other books, or by mere enrolment, without inquiry, of such 'ex parte' statements as claimants chose to bring for the purpose, these modern heralds' books ceased to satisfy the fundamental requirement of the law, and were no longer receivable as official statements by the heralds:

1857, *De Lisle Peerage Case*, quoted in Hubback on Succession, 546: "The House made a distinction in receiving as evidence books from the Heralds' College. When those books contained the substance of the information obtained in consequence of inquiries which were made under judicial authority, when the heralds were in the habit of travelling round the country and examining the witnesses, they were held to be evidence, and had been produced in Committees of Privilege; but when that ceased, and the books were mere entries of that which the parties had chosen to have entered on those registries, without any due authority being shown for the entry, they had not been received in evidence." [9]

In this fate which overtook the heralds' books in the days of their degeneration is notably illustrated the orthodox doctrine of the common law, — a doctrine maintained with fair consistency in the present day for the very different sorts of inquisitions and reports which the novel conditions of other generations and another nationality have made familiar. The Court of Chivalry and the heralds with their inquisitions of pedigree were the prominent figures in the working out of the common-law principle; their place is now taken by the State railroad commission, with its reports of overcharges and of collisions, and the State chemist, with his analysis of food-samples. But the sagacious principle of the common law has still survived as a fair and adequate foundation for testing the propriety of modes of proof, — namely, the principle of express authority to investigate and report.

§ 1671. **Same: Inquisitions (5) of Lunacy; (6) of Death (Coroner); (7) of Population (Census).** (5) An inquisition of *lunacy* is founded on a commission authorizing expressly the investigation of the person's condition and a finding as to his lunacy:

1812, Mr. G. D. *Collinson*, Idiots and Lunatics, c. XII, §§ 2, 29, 31: "By the common law, the king's officers, his sheriff, coroner, and escheator, were bound 'virtute officii' to make inquiry concerning any matter which gave the King a title to the possession of

made by the heralds, entered in their books, and kept in their office, to be read in evidence"; also "the minute book of a former visitation" found in Lord Oxford's library); 1719, Anon., 12 Vin. Abr. 119, "Evidence," A, b, 39 (herald's books, not received by Fortescue, J., to prove a pedigree, "for he said it was made up by the party that signed it and returned into the office, and not the entries of any public office"); 1731, Norris *v.* Le Neve, 2 Barnard. 26 ("A book out of the Heralds' office was produced to prove the pedigree; . . . the Chief Justice at first doubted; but as it appeared that this pedigree was taken upon an inquest made on a visitation, he allowed it to be good evidence"); 1857, Shrewsbury Peerage Case, 7 H. L. C. 1, 25, 34 (a book from the College, not appearing to have been compiled under authority, "but probably more as a part of their pleasure than their duty," withdrawn on objection; a book of 1671, enrolling the pedigrees of benefactors who had subscribed to the rebuilding of the College, not admitted as a heralds' statement; an ordinary heralds' visitation under a commission, received; quoted *supra*); 1879, Polini *v.* Gray, L. R. 12 Ch. D. 411, 432, 436 (Brett and Cotton, LL.J., doubt as to the admission of heralds' visitation-books outside of the Committee on Privileges; yet the Committee professed to act on a general rule of law).

[9] *Accord:* 1844, Hubback, Succession, 551 ff. (citing other peerage cases).

lands, tenements, goods or chattels. . . . On special occasions, writs were directed to them to make the inquiry, and commissioners were sometimes appointed for the same purpose. When idiots and lunatics came within the jurisdiction of the crown, the king's title was found in like manner by these officers, assisted as in other cases by a jury of the county, whose verdict was called an inquisition, or inquest of office. . . . As the inquiry might be made either by writ or by commission, the latter being the more large and general, was universally adopted in preference to the former. . . . Commissions in the nature of the ancient writs are made by letters patent under the Great Seal, directed to five persons as commissioners, who, any three or more of them, are to inquire upon the oaths of good and lawful men of the county, as well within the liberties as without, by whom the truth of the matter may be better known, whether the party against whom the commission has issued be an idiot and without understanding from his nativity, or (according to the commission) a lunatic, or in the enjoyment of lucid intervals, so that he is not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels; and if so, from what time, after what manner, and how; . . . [and whether and to whom he has alienated lands, etc., etc. The commissioners are ordered] diligently to make inquisition in the premises, and to send the same without delay [to Chancery; . . . and the sheriff is to cause to appear so many good and lawful men of his bailiwick as the commissioners shall direct,] by whom the truth of the matters in the premises may be better known and inquired into."

(*a*) There is not, therefore, and never has been, any doubt as to the admissibility of an *inquisition* of lunacy, in any litigation whatever, to prove the person's mental condition at the time. The only controversy has been whether it is conclusive, *i. e.* whether it is to be regarded as a judicial proceeding and a judgment 'in rem,' binding upon all persons whatsoever.[1]

§ 1671. [1] ENGLAND: 1742, Sergeson *v.* Sealey, 2 Atk. 412 (objection made "because it is offered as evidence to affect the right of a third person [the issue being as to the mental capacity of an ancestor at the time of a purchase] and as it likewise had a retrospect of 8 years"; Lord Hardwicke "overruled the objection, and said that inquisitions of lunacy, and likewise other inquisitions, as 'post mortem', etc., are always admitted to be read, but are not conclusive evidence"); 1804, Hall *v.* Warren, 9 Ves. 605 (admissible against third person); 1811, Faulder *v.* Silk, 3 Camp. 125 (capacity of the obligor of a bond, defendant's intestate; inquisition under a commission, held admissible).

UNITED STATES: *Mo.* 1905, King *v.* Gilson, 191 Mo. 307, 90 S. W. 367 (capacity of testator; guardianship not conclusive); *N. J.* 1828, Den *v.* Clark, 5 Halst. 217 (capacity of a mortgagor; inquisition of lunacy, admitted; the only question being as to its conclusiveness); 1907, Sbarbero *v.* Miller, 72 N. J. Eq. 248, 65 Atl. 472 (bill of account by a lunatic's guardian; the finding of the commission of lunacy admitted); *N. Y.* 1831, Hart *v.* Deamer, 6 Wend. 497 (capacity of defendant as obligor of a bond; inquisition under a writ 'de lunatico,' held admissible); 1842, Osterhout *v.* Shoemaker, 3 Hill 513, 516 (Bronson, J.: "It seems to be settled that such evidence is admissible, though not conclusive"); *Pa.* 1847, Rogers *v.* Walker, 6 Pa. St. 371, 373 (admissible against third persons); 1902, Com. *v.* Harrold, 204 Pa. 154, 53 Atl. 760; 1903, Hottle *v.* Weaver, 206 Pa. 87, 55 Atl. 838; *Vt.* 1904, Wheelock's Will, 76 Vt. 235, 56 Atl. 1013 (raising a presumption of testamentary incapacity); *Wash.* 1916, Roberts *v.* Pacific Tel. & Tel. Co., 93 Wash. 274, 160 Pac. 965 (personal injury resulting in insanity; record of adjudication and commitment as insane, and of discharge as cured, admitted); *Wis.* 1899, Small *v.* Champney, 102 Wis. 61, 78 N. W. 407 (admissible in an action by the lunatic's representative to set aside a transfer).

See other cases cited in Buswell, Insanity (1885), §§ 194 ff.

No distinction is made for *criminal cases*, the inquisition being equally admissible to prove the defendant insane: 1760, Earl Ferrers' Trial, 19 How. St. Tr. 885, 937 (insanity; to prove one of the defendant's relations insane, the fact that he has been confined under a commission was proved); 1812, R. *v.* Bowler, cited Phillipps, Evidence, II, 99 (inquisition admitted to show the accused insane); 1878, Wheeler *v.* State, 34 Oh. St. 394 (same); 1921, Barton *v.* State, 89 Tex. Cr. 387, 230 S. W. 989 (whether a former committal as lunatic was conclusive, on a plea of insanity in a criminal case); 1922, Kellum *v.* State, —

There also arises for it the question whether the person's mental condition at the time of the inquisition is evidence of his condition at the time in issue; this is merely a question of the relevancy of the fact evidenced by the inquisition (*ante*, § 233) and not of the admissibility of the inquisition.[2] But this traditional proceeding upon a writ 'de lunatico inquirendo' had originally for its object (as the passage above quoted explains) the sequestration of the lunatic's property into the king's hands as guardian, and this character it has preserved in the modern equivalent proceedings for appointing a guardian and taking from the lunatic the management of *his property*. Its scope was thus strictly limited to the ultimate purpose of caring for his property.

(*b*) In the enlightenment of modern times, however, a second proceeding has grown up, having an analogous object, but capable of being independently pursued, — the proceeding to *confine the lunatic in an asylum* or hospital, *i. e.* to care for *his person*, not his property. Either or both may be necessary according to the particular nature of the hallucination or disease; but the insanity cannot be said to be less or greater that suffices to justify the one or the other proceeding. Nevertheless, by a few Courts the singular distinction has been made that the finding of an inquisition of the former sort is admissible in evidence, while that of the latter sort is not; this has been justified in the following passage:

1873, MORTON, J., in *Leggate* v. *Clark*, 111 Mass. 308, 310 (excluding an order of committal to an asylum): "The order of the judge of probate was in a proceeding to which the tenant [here defendant] was not a party, and as to which he had no opportunity to be heard, and was upon an issue different from the issue on trial. The demandant contends that it is analogous to an inquisition of lunacy or a decree of a judge of probate appointing a guardian of an insane person, and therefore admissible against strangers. But an inquisition of lunacy under the English system, and proceedings under our system to appoint a guardian of an insane person, are in the nature of proceedings 'in rem,' and are designed to fix the status of the person proceeded against. Under our system careful provision is made for notice to the alleged insane person, and for a full hearing, and the decree fixes the status of the ward as an insane person 'incapable of taking care of himself.' . . . The necessary effect of the decree is that the ward is in law, what the decree declares him to be, incapable of taking care of himself, as to all the world; otherwise the object of the statute would be entirely defeated. But an order under the statute of 1862, c. 223, § 3, [committing to an insane hospital,] is not of this character. . . . It affords a justification for the restraint of his person, but is not designed to fix his status."

As to this reasoning, it may be answered: (1) The authority of the inquisition is the same in both cases; no statute makes either expressly admis-

Tex. Cr. —, 238 S. W. 940 (robbery; defence, insanity; judgment of a county court negating insanity, two months earlier, held admissible; citing the above text with approval).

On direct appeal the finding may in any event be 'prima facie' valid: 1873, McGinnis *v.* Com., 74 Pa. 245, 247 (inquisition of habitual drunkenness).

The following ruling went on the present analogy: Hill *v.* Clifford, [1907] 2 Ch. 236 (dentists' partnership dissoluble in case of "professional misconduct"; order of Medical Council, having sole authority, expelling a partner for professional misconduct, admitted to prove the misconduct; one judge diss.).

[2] An inquisition may for this reason alone be excluded, just as any other mode of proof would be; *e. g.* 1897, Rhoades *v.* Fuller, 139 Mo. 179, 40 S. W. 760 (inquisition held after the time of the sale in issue, excluded).

sible; the common-law principle of an express authority to investigate suffices for both; (2) the fact that the present opponent "was not a party and had no opportunity to be heard" in the other proceeding is as good an objection to the guardianship-proceedings as to the committal-proceedings;[3] to say that the former is a "proceeding 'in rem'" is mere assertion, for the true nature of a proceeding 'in rem' implies a notice (by advertisement at least) to all the world, and if a proceeding without that feature can in despite be made a proceeding 'in rem' by calling it so, then it is quite as easy to call the committal-proceedings by the same name; (3) the one proceeding, as much and as little as the other, "fixes his status," that is, the one confines itself to his property, and the other to his liberty, — the latter right being hardly less important than the former. In short, there seems to be no real reason for enforcing a distinction, as to admissibility in evidence, between the two sorts of inquisition. But the erroneous reasoning in the passage above quoted has led a number of Courts to the contrary conclusion.[4]

[3] In most States, at least, there is no notice other than to the alleged lunatic and (perhaps) his relatives. But the objection is not valid: *ante*, § 1385.

[4] *Excluded: Delaware:* Rev. St. 1915, § 2603 ("the commitment of any person to said [insane] hospital shall not raise any presumption against the sanity of the person"); *Indiana:* 1884, Goodwin *v.* State, 95 Ind. 550, 557, *semble* (capacity of accused; judgment of insanity by a commission for confinement in asylum, held not conclusive, "even if competent evidence at all"); 1896, Naanes *v.* State, 143 Ind. 299, 42 N. E. 609 (examination under statute for committal of defendant, excluded); 1873, 1905, Hicks *v.* State, 165 Ind. 440, 75 N. E. 641 (proceedings of committal for insanity, not admitted to impeach the person as a witness); *Massachusetts:* Leggate *v.* Clark, 111 Mass. 308 (insanity of demandant's husband, as voiding a deed; order of the Probate Court committing him to the asylum, excluded, partly because the issues as to mental condition would not be the same, and partly because of the reasons stated in the quotation *supra;* no precedents cited on the point); *Nebraska:* 1893, Dewey *v.* Algire, 37 Nebr. 6, 9, 55 N. W. 276 (action by a guardian to set aside a conveyance; commitment proceedings not admissible to show lunacy); 1895, Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094, *semble* (holding such an adjudication of insanity not conclusive as to an accused person, but apparently leaving open the question of its admissibility).

Admitted: Federal: 1904, Keely *v.* Moore, 196 U. S. 38, 25 Sup. 169 (committal to an asylum, received, and discharge therefrom, but not the certificate of the examining physicians; yet Leggate *v.* Clark, Mass., is approved); *Arkansas:* 1920, McCully *v.* State, 141 Ark. 450, 217 S. W. 453 (incest, plea of insanity; record of a probate court showing committal to an asylum, admitted); *California:* 1922, People *v.* Prosser, — Cal. App. —, 205 Pac. 869 (certificate of discharge from hospitals "not insane," admitted); *Georgia:* 1907, Slaughter *v.* Heath, 127 Ga. 747, 57 S. E. 69 (will; a finding on an inquisition of lunacy "is admissible, but not conclusive," whether for or against sanity); *Illinois:* 1915, Holliday *v.* Shepherd, 269 Ill. 429, 109 N. E. 976 (testamentary sanity; appointment of a conservator admitted, since it did not appear that the appointment was solely based on the party being a spendthrift or a drunkard); *Indiana:* 1910, Taylor *v.* Taylor, 174 Ind. 670, 93 N. E. 9 (adjudication of insanity appointing a conservator, held admissible, but here excluded on the principle of § 233, *ante*); *Iowa:* 1910, Van Houten's Will, 147 Ia. 725, 124 N. W. 886 (finding in a proceeding for confinement and guardianship, admissible as 'prima facie' evidence); *Kansas:* 1896, Rodgers *v.* Rodgers, 56 Kan. 483, 43 Pac. 779 (adjudication for commitment, admitted in a divorce action by a wife); *Minnesota:* 1913, Bullard's Estate, McAllister *v.* Rowland, 124 Minn. 27, 144 N. W. 412 (adjudication of guardianship for an insane person, made two months after a will made, admitted; repudiating the contrary ruling in Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 id. 144); *New York:* 1920, Prentice's Will, Surrog., 181 N. Y. Suppl. 679 (order appointing a lunacy committee, whether after a jury hearing 'de lunatico' or after a proceeding under C. C. P. § 2323 *a*, is 'prima facie' though not conclusive, evidence of insanity); *Ohio:* 1878, Wheeler *v.* State, 34 Oh. St. 394 (probate judge's finding, for committal to asylum, admitted to show the accused insane, under a statute by which the

(6) *Coroner's inquisitions*, so far as *criminal* proceedings are concerned, are "in the nature of indictments";[5] and it would therefore be superfluous (rather than improper) to offer them against the accused on trial;[6] they are the foundation of the charge against him, and are a part of the formal proceedings rather than a source of evidence. If this be so, the inquisitions of the coroner would still be admissible on the part of the accused if the findings declared another person to be the wrongdoer.

But they would at any rate be admissible in *civil* proceedings as duly authorized official statements, and this seems once to have been the law,[7] but most Courts to-day appear disinclined to recognize them.[8] It may be

finding "was in effect the same as where a guardian was appointed"; the reasoning in Leggate *v.* Clark disapproved); *Oklahoma:* 1900, Maass *v.* Phillips, 10 Okl. 302, 61 Pac. 1057, *semble* (on a motion in arrest of judgment based on the defendant's insanity, an order of confinement by the county board of insanity is not controlling upon the Court); *Pennsylvania:* 1921, Com. *v.* Loomis, 270 Pa. 254, 113 Atl. 428; *Tennessee:* 1914, Bond *v.* State, 129 Tenn. 75, 165 S. W. 229 (plea of insanity in Sept. 1913, inquisition of lunacy in Nov. 1909, and verdict of insanity at a former trial in May, 1910, admitted); *Vermont:* 1909, Ex parte Allen, 83 Vt. 365, 73 Atl. 1078 (physician's sworn certificate, admitted, under a statute expressly making them admissible).

So also for a *certificate of discharge: Idaho:* Comp. St. 1919, § 4590 (certificate of discharge from insane asylum, by medical superintendent or resident physician, "shall establish the presumption of legal capacity in such person from the time of such discharge").

The following statute goes upon this principle: Haw. St. 1905, No. 19, p. 22, Apr. 3, Rev. L. 1915, § 2931, St. 1915, Apr. 28, No. 192 (divorce for leprosy; that the person "has been declared according to law to be a leper" shall be 'prima facie' evidence).

[5] 1803, East, Pleas of the Crown, I, 389; compare 380 ff.; 1680, Hale, Pleas of the Crown, I, 416 ("An inquisition taken before the coroner 'super visum corporis' in the point of felo de se is of great authority and a sufficient record whereupon process may be made upon those that detain the goods found in the inquisition").

The early history of the coroner's functions has been fully examined by Professor Gross, in his Introduction to Select Cases from the Coroner's Rolls, 1896, Seld. Soc. Publ., vol. IX.

[6] The following rulings have been made: *Eng.* 1915, George J. Smith's Trial (Notable British Trials; 1922), p. 210 (wife-murder; the defendant was allowed to put in the coroner's summing-up at the inquest); *U. S. Fed.* 1918, U. S. *v.* Sonico, U. S. Court for China, 1 Extraterr. Cas. 671 (man-slaughter; to show the wound to have been the cause of death, the record of the coroner's inquest was admitted); *La.* 1852, State *v.* Parker, 7 La. An. 83 (the finding admitted as to the "physical facts as to the death of the deceased," but not as to the tracing of the death to the accused); 1855, State *v.* Melville, 10 La. An. 456 (State *v.* Parker followed); 1898, State *v.* Tate, 50 La. An. 1183, 24 So. 592 (verdict admissible "to show the fact of a homicide having been committed," but not "the recitals of fact therein contained"; no authority cited); 1906, State *v.* Hopkins, 118 La. 99, 42 So. 660 (murder; coroner's certificate of death, admitted); *Mass.* 1806, Com. *v.* Selfridge, Mass., Lloyd & Caines' Rep. 22, 2 Amer. St. Tr. 544, 566 (manslaughter; inquisition offered to prove the fact of death; practice said to vary; no decision); *Mo.* 1905, State *v.* Coleman, 186 Mo. 151, 84 S. W. 978 (murder; inadmissible); *Ohio:* 1831, State *v.* Turner, Wright 20 (coroner's inquest not received against the accused); 1878, Wheeler *v.* State, 34 Oh. St. 394, 398 (State *v.* Turner approved); *Tenn.* 1901, Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713 (murder; coroner's verdict as to the cause of death, held inadmissible in criminal cases); *Wis.* 1910, Hedger *v.* State, 144 Wis. 279, 128 N. W. 80 (murder; coroner's verdict excluded).

[7] 1660, Toomes *v.* Etherington, 1 Wms. Saund. 361 (issue as to an intestate's 'felo de se'; an inquisition 'super visum corporis,' admitted); 1718, Jones *v.* White, 1 Stra. 68 (issue upon a testator's capacity; a coroner's inquest, finding him lunatic, was offered; the Court were divided; but the discussion treated it from the point of view of judgments).

[8] ENGLAND: 1918, Bird *v.* Keep, C. A., 2 K. B. 692 (workmen's compensation; coroner's verdict held not admissible to show the cause of death; Swinfen Eady, M. R.: "It is true that at different periods of our history, other views on this subject have prevailed"); 1921, Barnett *v.* Cohen, 1 K. B. 461 (death by wrongful act; coroner's verdict excluded, following Bird *v.* Keep).

UNITED STATES: *Alabama:* 1888, Memphis & C. R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618 (coroner's verdict, not admitted to show that the deceased was "accidentally run over," etc.); *Arkansas:* 1906, Grand Lodge *v.* Banister, 80 Ark. 190, 96 S. W. 742

noted that the lack of a special commission to investigate in each instance is here immaterial; since the coroner by his office has a general warrant to investigate the circumstances of a death.

(not decided); *California:* 1888, Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855 (inheritance of persons murdered, and an issue of survivorship; the coroner's verdict excluded); 1901, Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760 (coroner's verdict, not admitted to show the cause of death); 1906, Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695 (testator's capacity; coroner's verdict excluded); *Colorado:* 1897, Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488 (coroner's verdict not admitted to show suicide); *Columbia (Dist.):* 1914, Levy *v.* Vaughan, 42 D. C. App. 146, 154 (mal-practice; coroner's certificate of cause of death, based on hearsay only, excluded); *Delaware:* Rev. St. 1915, § 1369 (coroner's record of inquest, admissible "to prove the matters therein contained"); *Georgia:* 1878, Central Railroad *v.* Moore, 61 Ga. 151, 152 (death of a husband; "that there was a verdict at the inquest," excluded); *Illinois:* 1885, Pittsburgh, C. & St. L. R. Co. *v.* McGrath, 115 Ill. 172, 3 N. E. 439 (point not raised); 1887, U. S. Life Ins. Co. *v.* Kielgast, 26 Ill. App. 567, 571 ("that the record of the coroner's inquest" and the depositions "are not competent evidence in this suit would seem to be settled" by the foregoing case); 1889, U. S. Life Ins. Co. *v.* Vocke, 129 Ill. 557, 562, 567, 22 N. E. 467 (on appeal from the preceding ruling; coroner's verdict of insane suicide, admitted as an "inquisition made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by law"; leading case; good opinions by Craig and Baker, JJ.); 1892, Lake Shore & M. S. R. Co. *v.* Taylor, 46 Ill. App. 506, 509 (verdict admitted to show how the deceased came to his death, but not a finding that "the switch was negligently placed" by the defendant, this being "extraneous to the province of the inquest"); 1892, Chicago M. & St. P. R. Co. *v.* Staff, 46 Ill. App. 499, 501 (similar; finding as to the defendant's negligence in the rate of speed, etc., held no evidence); 1895, Pyle *v.* Pyle, 158 Ill. 289, 300, 41 N. E. 999 (verdict of suicide, admitted); 1897, Grand Lodge *v.* Wieting, 168 Ill. 408, 48 N. E. 59 (verdict admitted); 1904, Knights Templar & M. L. I. Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 (verdict admitted); 1910, People *v.* McMahon, 224 Ill. 45, 91 N. E. 104 (reading coroner's verdict and grand jury's indictment so as to show that another person was exonerated, held improper); 1913, Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411 (death by wrongful act; coroner's verdict admitted); 1915, Devine *v.* Brunswick B. C. Co., 270 Ill. 504, 110 N. E. 780 (death by wrongful act; a coroner's verdict finding the defendant "blameless for this unfortunate occurrence," held admissible); 1916, Armour & Co. *v.* Industrial Board, 273 Ill. 590, 113 N. E. 138 (workmen's compensation; coroner's verdict as to cause of injury, held admissible); 1916, Novitsky *v.* Knickerbocker Ice Co., 276 Ill. 102, 114 N. E. 545 (the plaintiff's intestate was run over and killed by the defendant's wagon; the coroner's verdict was admitted; its finding stated that N. came to his death by being run over by the defendant's wagon, and concluded by finding "that had the C. C. R. S. W. Co. not blockaded Archer Ave. with cars on both sides of street crossing this accident would not have occurred and deceased not lost his life in such a manner, and in this respect censure the above-named company"; a verdict having been rendered for the defendant, it was held that the admission of the above passage was error, since "it was not within the province of the jury to fix the civil liability of any one, etc."; this is an extraordinary ruling; the coroner's verdict said not a word about any one's civil liability; it stated that the defendant's wagon was the direct cause of death and that the R. Co. was also a cause of death; the Court's comment that the statement of the railway's blockade as a cause of death and the censure of the railway "are mere surplusage" is unfounded, and is based on a singular inattention to the idea of causation); 1917, Ohio B. S. V. Co. *v.* Ind. Board, 277 Ill. 96, 115 N. E. 149 (workmen's compensation; coroner's verdict as to cause of injury, held competent); 1917, Albaugh-Dover Co. *v.* Ind. Board, 278 Ill. 179, 119 N. E. 994 (workmen's compensation; coroner's verdict as to cause of injury, held inadmissible; foregoing cases not cited); 1918, Peoria Cordage Co. *v.* Ind. Board, 284 Ill. 90, 119 N. E. 996, June 20 (workmen's compensation; coroner's verdict as to cause of injury, held inadmissible on the ground that the coroner's authority is limited to a "death by violence, casualty, or any undue means"; all former cases approved, three judges diss.); 1918, Morris *v.* Ind. Board, 284 Ill. 67, 119 N. E. 944, June 20 (workmen's compensation; coroner's verdict as to cause of injury held admissible; former cases approved; three judges dissenting; the majority opinion was voiced by one of those dissenting in the foregoing opinion, filed on the same day); 1919, Spiegel's H. F. Co. *v.* Industrial Commission, 288 Ill. 422, 123 N. E. 606 (death of employee of plaintiff; Peoria Cordage Co. *v.* Industrial Board affirmed; all prior rulings repudiated in so far as they admitted the verdict in a civil suit to establish personal liability for a death); St. 1919, June 28,

(7) The *census* is an *inquisition of population*, manufactures, agriculture, wealth, and many other classes of sociological data, and is made under an express legislative warrant and authority; it is therefore admissible under the general principle already considered.[9] But the authority is to report

amending Rev. St. 1874, Coroners, § 18 (coroner's verdict not to be admissible to prove any fact in controversy in action for damages due to negligence resulting in death or for collection of a policy of insurance); *Iowa:* 1900, Metzradt *v.* Modern Brotherhood, 112 Ia. 522, 84 N. W. 498, *semble* (admissible); 1913, Tomlinson *v.* Sovereign Camp, 160 Ia. 472, 141 N. W. 950 (admitted; but with an insinuation that Metzradt *v.* Brotherhood is now doubted); *Kentucky:* 1904, Ætna L. Ins. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364 (excluded; best opinion on the subject, by O'Rear, J.); *Kansas:* 1921, O'Brien *v.* New England M. L. Ins. Co., — Kan. —, 197 Pac. 1100 (death claim on insurance policy; coroner's report of suicide, held not improperly excluded on the facts); *Maryland:* 1880 State *v.* County Commissioners, 54 Md. 426 (death by wrongful act; coroner's verdict not received to show that the death was due to an unsafe crossing); 1899, Supreme Council *v.* Brashears, 89 Md. 624, 43 Atl. 866 (not admitted to show suicide); *Massachusetts:* 1914, Jewett *v.* Boston Elevated R. Co., 219 Mass. 528, 107 N. E. 433 (report of a medical examiner, provided for by Rev. L. c. 24, § 9, held not admissible, in an action for wrongful death, to evidence the cause of death or other matters therein stated; unsound; a surprisingly backward-looking opinion); 1917, Shamlian *v.* Equitable Acc. Co., 226 Mass. 67, 115 N. E. 46 (death certificate of the State medical examiner, or coroner, as to the date and cause of death, admitted under Rev. L. c. 29, § 20); *Michigan:* 1901, Wasey *v.* Ins. Co., 126 Mich. 119, 85 N. W. 459 (coroner's verdict, not admitted to prove suicide); *Mississippi:* 1901, Supreme Lodge *v.* Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523 (verdict admissible to evidence the cause of death); *Missouri:* 1910, Queatham *v.* Modern Woodmen, 148 Mo. App. 33, 127 S. W. 651 (admissible to show death, but not the cause of it); Rev. St. 1919, § 13642 (workmen's compensation; coroner's inquest over employee's death, admissible); St. 1921, Mar. 28, p. 425, § 50 (workmen's compensation claims; report of proceedings at coroner's inquest, provable by certified copy); *Nebraska:* 1911, Walden *v.* Bankers' Life Ass'n, 89 Nebr. 546, 131 N. W. 962 (coroner's verdict, excluded); *North Dakota:* 1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165 (not decided); 1905, Kinney *v.* Brotherhood, 15 N. D. 21, 106 N. W. 44 (coroner's inquest-blank, filled out, excluded, no inquest having been held; but Puls *v.* Grand Lodge, *supra*, is referred to as if it decided something on this point); *Oregon:* 1903, Cox *v.* Royal Tribe, 42 Or. 365, 71 Pac. 73 (coroner's verdict not received to show suicide); *Philippine Islands:* 1908, U. S. *v.* Lorenzana, 12 P. I. 64, 70 (homicide; certificate of autopsy on the deceased, by the provincial medical officer, held not admissible to show the cause of death, under C. C. P. § 313); *South Dakota:* 1904, Chambers *v.* Modern Woodmen, 18 S. D. 173, 99 N. W. 1107 (benefit insurance; coroner's verdict not admitted to show the cause of death); *Texas:* 1905, Boehme *v.* Sovereign Camp, 36 Tex. Civ. App. 501, 85 S. W. 444 (verdict not admitted to show suicide); *Virginia:* 1884, Whitehurst *v.* Com., 79 Va. 556, 557 (murder; coroner's verdict excluded); *Wisconsin:* 1904, Fey *v.* I. O. O. F. Ins. Soc'y, 120 Wis. 358, 98 N. W. 206 (doubted); 1913, Krogh *v.* Modern Woodmen, 153 Wis. 397, 141 N. W. 276 (coroner's verdict, excluded); 1921, Groeschner *v.* John Gund Brewing Co., 173 Wis. 366, 181 N. W. 212 (death by defendant's wagon; coroner's verdict, not admitted to negligence).

Distinguish the use of the verdict as an *admission*, in *proofs* of loss by an insured's beneficiary (*ante*, § 1073), and the use of *testimony given at an inquest* (*ante*, § 1374).

[9] ENGLAND: St. 1910, 10 Edw. VII & 1 Geo. V, c. 11, § 8 (Census Ireland Act; certificate from the General Register office, purporting to be signed by the Registrar-General, to be evidence of population in any county, etc.).

UNITED STATES: *Colo.* Comp. L. 1921, § 427; State census; "the statistics as to any such enumeration" shall be "'prima facie' evidence of any such enumeration"); *Fla.* Rev. G. S. 1919, § 1955 (city or town official census, filed with clerk, to be "legal evidence of the number of bona fide inhabitants"); 1907, Gregory *v.* Woodbery, 53 Fla. 566, 43 So. 504 (population of a town; State census admitted, under the express provision of St. 1903, c. 5191, p. 134, § 3, now Rev. G. S. § 1955); *Ia.* St. 1904, c. 8, § 8, Comp. C. § 290 (census of Iowa to be evidence of "all matters therein contained"); St. 1911, c. 3, p. 2, Feb. 27, Comp. C. § 292 (Federal census report of Iowa population, to be evidence when published by the Secretary of State with a certificate as specified); *Minn.* Gen. St. 1913, § 8453 (Federal census reports of population of Minnesota filed with Secretary of State to be evidence of "the facts therein disclosed"); *Mo.* 1862, Charlotte *v.* Chouteau, 33 Mo. 194, 201 (printed census report of Canada, admitted); 1895, State *v.* Marion Co., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23 (U. S. Census admitted to show the population of a county); 1902, State *v.* Evans, 166 Mo. 347, 66 S. W. 355 (U. S. Census); *N. Y.* C. P.

general classes of facts; the details as to individual persons, factories, farms, and the like, are noted only as a necessary basis for the general and anonymous summaries. Hence the census reports are not receivable to show the age of a *particular person*, or the product of a particular factory, or the area of a particular farm.[10] Nevertheless, if by special authority a local census — as of an Indian tribe — is taken for the express purpose of registering individuals, it would become admissible; for in such case they virtually become registers of specific individuals and fall within the principle of § 1644, *ante* (register of birth, marriage, and death).[11]

Distinguish the process of *judicially noticing* a fact, such as the population of a town; thus to dispense with all evidence (*post*, § 2580) is a different thing from receiving the census as evidence.

A. 1920, § 401 ("a certificate of the director or other officer in charge of the census of the United States, attested by the Secretary of the Interior, stating the population of any part of the United States, or giving the result of said census otherwise, shall be received as 'prima facie' evidence of such facts"); *Vt.* 1888, Fulham *v.* Howe, 60 Vt. 351, 357, 14 Atl. 652 (Compendium of U. S. Census, admissible to show a town's population); *Wash.* 1901, State *v.* Neal, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135 (U. S. Census).

[10] *Accord:* 1902, Edwards *v.* Logan, 114 Ky. 312, 70 S. W. 852, 755 S. W. 257 (school census not admitted to show the minority of certain individuals); 1905, Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. 201 (census list, not admitted to show that L. W. was "not 'in esse' at the date of the deed"); 1906, Gorham *v.* Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665 (Federal census not admitted to show the existence, etc., of particular persons).

Contra: 1896, Flora *v.* Anderson, 75 Fed. 217, 231 (census reports, for the age of a person, admitted); 1906, Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055 (title by deeds executed by minors; a certified copy of the Federal census record of the ages of these families, covering the censuses 1830–1890, admitted to show the ages of individuals); 1914, State *v.* Vinn, 50 Mont. 27, 144 Pac. 773 (statutory rape; county school census, required by law to be kept, admitted to show the girl's age); 1921, Bradshaw *v.* State, — Okla. Cr. —, 197 Pac. 715 (rape under age; to prove the female's age, the county school district census, held admissible as a "record required by law to be kept by . . . any public officer," under Rev. L. § 5115); 1904, Murray *v.* Supreme Hive, 112 Tenn. 654, 80 S. W. 827 (British census report, admitted to show a person's age).

[11] *Fed.* U. S. St. 1906, Apr. 26, § 19 (sale of allotted land by a full-blood Indian, forbidden; "for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior"); 1915, U. S. *v.* Stigall, 8th C. C. A., 226 Fed. 193 (under U. S. St. 1906, Apr. 26, § 19, the Dawes Commission's entry of the name of a member of the Seminole tribe by adoption, held not evidence of the race, whether white or Indian, of the adopted person); *Ida.* Comp. St. 1919, § 1010 (census record of clerk of school district, admissible to show child's age in delinquency proceeding); *Kan.* Gen. St. 1915, § 5160 (census-roll and allotment-roll of treaty Indian tribes in Kansas, admissible to prove tribe-members, families, etc., of allottees); *Miss.* 1840, Newman *v.* Doe, 4 How. 522, 554 (official register of Choctaw heads of families, admitted); *Okla.* 1917, Miller *v.* Thompson, 63 Okl. 167, 163 Pac. 533 (U. S. Census card, admissible to show age of an Indian); 1919, Munnah *v.* Gates, 76 Okl. 167, 184 Pac. 127 (certified copy of Indian census card, issued under U. S. St. 1904, April 21, c. 1402, showing a name entered on the roll of the Seminoles by blood and as a member of the tribe by adoption is not evidence of the person's race; the issue being whether the plaintiff was a Creek of full blood); *Tex.* 1920, Langford *v.* Newsom, — Tex. —, 220 S. W. 544; and cases cited *ante*, § 1347 (conclusive evidence).

For the conclusiveness of records made under U. S. St. 1906, Apr. 26 and St. 1908, May 27, by the Commissioners to the *Five Civilized Tribes* in Oklahoma, see *ante*, § 1347.

The following case is peculiar: 1894, Hegler *v.* Faulkner, 153 U. S. 109, 14 Sup. 779 (special Indian agent's finding, under authority of U. S. St. 1854, July 31, as to the age of an Indian allottee, held inadmissible, because age was not essential to the finding of allotment title, although age was directed by the department chief to be embodied in the agent's return; unsound; this kind of artificial pedantry over the hearsay rule removes the law of evidence a thousand leagues from practicality, disgusts the bewildered layman with methods of justice, and reflects discredit upon the mental elasticity of judges who can solemnly promulgate such formulas without any regret for the condition of the law).

§ 1672. **Sundry Instances of Returns and Reports, at Common Law and by Statute.** The principle illustrated in the foregoing instances — that a report or inquisition as distinguished from a return proper, must be founded on an *express warrant or authority* to investigate and report — has received a fairly consistent recognition in its application to the miscellaneous official documents of that sort.[1] The following illustrations, more than a century apart, are typical:

§ 1672. [1] In the following list, sundry instances both of returns proper (*ante*, § 1664) and reports are included, because it is sometimes difficult to draw the line; for government *land-office reports*, compare also §§ 1659, 1665, *ante*, and the cross-references there given; compare also the rulings dealing with sundry *certificates* and *registers*, *post*, § 1674, *ante*, § 1639.

ENGLAND: 1799, Wright *v.* Barnard, 2 Esp. 701 (report of condemnation of a ship as not worth repairing, made by certain ship-carpenters in a foreign country, excluded); 1801, Roberts *v.* Eddington, 4 Esp. 88 (consul's report of arrival of ships abroad, excluded); 1815, Watson *v.* King, 4 Camp. 272, 275 (official report to the Admiralty, at the end of a voyage, by the captain of a royal vessel, received); 1880, R. *v.* Labouchere, 14 Cox Cr. 419, 427, Cockburn, C. J. (report from the Prefect of Police in Paris to the head of the Criminal Investigation Department in Scotland-Yard, describing, in answer to the latter's request, the criminal record of a person whose conduct had been libelled by the defendant, excluded); 1880, Sturla *v.* Freccia, L. R. 5 App. Cas. 623 (inheritance; issue as to the birthplace of one Mangini, a Genoese diplomatic agent; the report of an official committee, appointed to investigate his application for office, reporting in his favor and stating among other things his birthplace, excluded; by L. C. Selborne, because it did not appear to be founded upon inquiry in M.'s family; by Lords Hatherley and Watson, because it did not appear to be founded on sufficient inquiry as to the fact in issue; by Lord Blackburn, because it was not a "public" document in the sense of § 1634, *ante;* the decision is certainly over-technical; the fear expressed by L. J. James, in the case below, 12 Ch. D. 437, that there might be "misapprehension on the part of the Italian Government" was natural, for it would certainly be difficult for one not aware of the narrow spirit dominating many of our evidential rulings to suppose that this extreme ruling represented the general practice under a rational system of proof).

CANADA: 1916, R. *v.* The Despatch, 28 D. L. R. 42, E. C. (Canadian naval charts, receivable).

UNITED STATES: *Federal:* 1856, Bryan *v.* Forsyth, 19 How. 334, 338 (report of a land-register to the Secretary of Treasury upon titles; "the competency of these documents as evidence in the investigation of claims to land in the Courts of justice has not been controverted for twenty years, and is beyond question"); 1842, Watkins *v.* Holman, 16 Pet. 25, 56 (report of commissioners under a legislative act confirming a title, admitted); 1846, Buckley *v.* U. S., 4 How. 251, 258 (official appraiser's appraisement of goods imported, in a return filed in the custom-house, admitted); *Alabama:* 1903, Culver *v.* Caldwell, 137 Ala. 125, 34 So. 13 (report of an examiner of public accounts upon the accounts of the department of agriculture, excluded); *Columbia (Dist.):* 1892, Birmingham *v.* Pettit, 21 D. C. 209, 213 (report of a board of boiler-inspectors, as to the cause of explosion, the statute not requiring a report, excluded); *Georgia:* 1900, Bridges *v.* State, 110 Ga. 246, 34 S. E. 1037 (embezzlement of a school fund; the findings of a board of education, inadmissible); *Iowa:* 1874, Gordon *v.* Bucknell, 38 Ia. 438 (report of a land-office register as to the ownership of land, excluded); 1876, Butler *v.* Ins. Co., 45 Ia. 93, 96 (return of a physician examining for committal to the State insane hospital, excluded); *Kansas:* 1897, State *v.* Krause, 58 Kan. 651, 50 Pac. 882 (action on a treasurer's bond; an official examiner's report as to the condition of the treasury, excluded); *Massachusetts:* 1893, Wellington *v.* R. Co., 158 Mass. 185, 187, 33 N. E. 393 (award of land-damage commissioners, to show value, excluded); *Michigan:* 1868, Woods *v.* Monroe, 17 Mich. 238, 242 (administrator's report of sale, used to prove publication of notice); 1906, People *v.* Michigan C. R. Co., 145 Mich. 140, 108 N. W. 772 (taxation; certain official acts and reports, noticed and taken as evidence); *Missouri:* 1852, Childress *v.* Cutter, 16 Mo. 24, 31, 45 (official Spanish inventory of deceased's property admitted as evidence of survival of two minor children); *Nebraska:* 1902, Sovereign Camp *v.* Grandon, 64 Nebr. 39, 89 N. W. 448 (physician's death-certificate, required by ordinance before burial, excluded); *New Hampshire:* 1821, Davis *v.* Clements, 2 N. H. 391 (a surveyor was bound to pay over balances, but not to make on his warrant the return offered in evidence, excluded); *Ohio:* 1842, State *v.* Wells, 11 Oh. 261 (auditor's account current, not admitted to prove a treasurer's default); 1846, Lyon *v.* McCadden, 15 Oh. 551 (to show

1784, *Com.* v. *Fairfield*, Mass., Dane's Abr. c. 84, art. 2, § 3: "Indictment for passing a forged government security; the Legislature prescribed the forms of said securities and directed the treasurer to publish a list of those notes, made out in the newspapers; this he did. This list was produced to show the note in question was not in it; objected, it was no part of the treasurer's official duty to publish such list, and there was no oath it was a true one, but he ought to be in court to swear it is a true one; and the Court allowed the objection."

1894, LUMPKIN, J., in *Jones* v. *Guano Co.*, 94 Ga. 14, 20 S. E. 265, rejecting an analysis of a fertilizer made by the State chemist: "[In the official analysis], samples are taken by the inspectors and submitted for analysis to the State chemist, who makes reports to the commissioner of agriculture. . . . [But] we know of no law making official an analysis by the State chemist at the instance or request of a purchaser of fertilizers. Indeed, as we understand it, the State chemist is under no obligation to make an analysis for any private person at all. If he does so, it is simply a matter of courtesy; and although he may report an analysis thus made to the department of agriculture and it may be entered upon the records of that department, this will not give to that analysis an official character by virtue of which a copy of it will be rendered admissible as evidence in the courts."

The tendency of the Courts is to disapprove rather than to favor the admission of such reports or inquisitions, and to require a clear showing of an express authority to investigate and report. This attitude of the Courts has been, on the whole, far too strict (as noted *ante*, § 1636). There has thus arisen increasingly a need for the more liberal recognition of an authority such as would make admissible various sorts of reports dealing with matters seldom disputable and only provable otherwise at disproportionate inconvenience and cost. Accordingly, *statutes* in many jurisdictions have, for various officials, not merely granted special authority to report, but expressly declared these reports admissible. This policy, when judiciously employed, greatly facilitates the production of evidence without introducing loose methods.[2]

the amount of work done under a public contract, the official engineer's estimates were received); *Pennsylvania:* 1782, Morris *v.* Vanderen, 1 Dall. 64 (official list of original-purchasers of land from William Penn received); 1774, Hurst *v.* Dippo, 1 Dall. 20, *semble* (same); 1823, Kingston *v.* Lesley, 10 S. & R. 383, 387 (same); *Philippine Islands:* 1909, Gonzaley *v.* Palenca Tan-Quinlay, 12 P. I. 617 (balance of accounts due; reports of experts appointed in a criminal action against some of the parties, not admitted); *Tennessee:* 1900, State *v.* Missio, 105 Tenn. 218, 58 S. W. 216 (Secretary of State's annual official list of corporations, not admissible to prove the existence of a foreign corporation filing a charter); *Texas:* 1860, Allbright *v.* Governor, 25 Tex. 687, 694 (comptroller's unauthorized book-account, excluded); 1860, Highsmith *v.* State, 25 (Suppl.) Tex. 137, 139 (assessor's unauthorized accounting, excluded); *Washington:* 1898, Bardsley *v.* Sternberg, 18 Wash. 612, 52 Pac. 251 (payment of city warrants; to show that funds were in treasurer's hands, the council finance-committee's report of their examination of the treasurer's books was received).

Distinguish the use of a report (for example, of a municipal council) as an *admission*, *e. g.* 1850, Collins *v.* Dorchester, 6 Cush. Mass. 369.

[2] In the following list are collected sundry instances both of returns proper (*ante*, § 1664) and of reports, because the distinction is sometimes difficult to draw; statutes dealing with *magistrates' returns upon a deposition*, are not included, because they deal rather with a matter of procedure and also because their multiplicity of details forbids the surrender of so much space; instances of *registers* and *certificates* (so-called, but sometimes difficult to distinguish from reports) are placed *ante*, § 1639, and *post*, § 1674.

ENGLAND: 1893, St. 56 & 57 Vict. c. 23, § 3 (a written statement, made by an officer having power to stop a ship engaged in the seal fishery, of the circumstances of the stopping, etc., to be admitted).

CANADA: 1894, Ship Minnie *v.* R., 23 Can. Sup. 478 (official statement of captain of war ship on duty at the seal fisheries, received

Distinguish certain classes of statutory reports, sometimes thus provided for, which are not properly to be regarded as coming within the present principle:

under St. 56 & 57 Vict. c. 23 § 3); Newf. Consol. St. 1916, c. 39 § 10 (injuries to submarine telegraph cables; certain reports by ship-captains and others, made admissible to prove the facts stated, and without proof of signature).

UNITED STATES: *Federal:* St. 1906, June 29, § 15, c. 3592, St. L. vol. 34, p. 601, Code § 3695 (for cancelling a certificate of citizenship of a naturalized alien returning to his original country, the "statements duly certified" of U. S. diplomatic and consular officers as to the residence of such persons abroad are admissible); Code § 8133 (report of investigation into ship's provisions, made by U. S. naval officers, consul, etc., and forwarded, to U. S. district court, to be "received in evidence"); *Alabama:* Code 1907, § 549 (examiner of public accounts; his report to be a "public record"); § 3990 (Secretary of State's schedule, printed in pamphlet Acts, of the "rate of interest of each State and Territory," receivable); 1886, Camp *v.* Randle, 81 Ala. 240, 2 So. 287 (Code § 3990 applied); 1899, Holley *v.* Coffee, 123 Ala. 406, 26 So. 238 (same); *Arkansas:* Dig. 1919, § 6991 (county timber inspector's certified bill of log scalement, to be presumptive evidence); § 7014 (State secretary's certificate of public ownership of land, admissible in proceedings for trespass); *Colorado:* Comp. L. 1921, § 2891 (report of appraisers as to the amount of damage by fire set by a railroad, to be evidence of the amount); *Connecticut:* Gen. St. 1918, § 2352 (returned notice by a factory inspector, to be evidence of notice given); *Idaho:* Comp. St. 1919, § 2346 (State lumber inspector's certified bill of logs scaled or measured to be evidence "of the facts therein contained and of the correctness of such scalement or measurement, in all courts, except in favor of the inspector who made the same"); § 2465 (State public utilities commission's report of accident not to be admitted as evidence in action for "loss of life or injury to person or property"); § 4979 (State insurance examiner's report on oath, to be evidence in any proceeding in the name of the people against the insurer); *Kansas:* Gen. St. 1915, § 9467 (blue-sky law; State bank commissioner's report to be 'prima facie' evidence); *Kentucky:* Stats. 1915, § 165*a*, par. 11 ("every official report made by the commissioner" of banking, "and every report duly verified of an examination made," shall be 'prima facie' evidence, where the bank is a party); Gen. St. 1899, c. 81, § 17, Stats. 1915, § 3760 (official returns in general; quoted *ante*, § 1352, n. 11); Stats. 1915, § 2725 (report of the State inspector of mines; a certified copy "shall be 'prima facie' evidence of the truth of the recitals therein contained"); 1905, Andricus' Adm'r *v.* Pineville Coal Co., 121 Ky. 724, 90 S. W. 233 (inspector's report admitted, under the foregoing statute, to show defective ventilation of a mine); *Louisiana:* Ann. Rev. St. § 1439 ('proces verbal' by the recorder of New Orleans or a justice of the peace, as to a fire, admissible); *Massachusetts:* Gen. L. 1920, c. 152, § 9 (industrial accidents; "the report of the physician shall be admissible in evidence," provided copies have been seasonably furnished to employer and insurer); *Minnesota:* Gen. St. 1913, §§ 5457, 5761 (surveyor-general's scale-bill of logs, timber, or lumber surveyed, admissible); 1885, Clark *v.* Lumber Co., 34 Minn. 289, 25 N. W. 628 (scale-bills of surveyor-general, admitted under statute); 1888, Pratt *v.* Ducey, 38 Minn. 517, 38 N. W. 611 (scale-bill partly rejected on the facts); 1893, Douglas *v.* Leighton, 53 Minn. 176, 54 N. W. 1053 (similar); 1899, Lindsay & P. Co. *v.* Mullen, 176 U. S. 126, 20 Sup. 325 (Minnesota surveyor-general's certified scale-bills, admitted); *Mississippi:* Code 1906, § 4869, Hem. § 7654 (railroad commission's finding as to the unsafe condition of a bridge, roadbed, etc., to be 'prima facie' evidence of negligence); Code § 2909, Hem. § 5244 (land-commissioner's finding as to a claim to public lands, to be 'prima facie' correct); Code § 4451, Hem. § 7131 (board of supervisor's valuation of timber taken for a road to be 'prima facie' evidence); *New Hampshire:* Pub. St. 1891, c. 104, § 9 (militia clerk's certificate of an offence making liable to a fine, admissible); *New York:* Cons. L. 1909, Insurance § 39 (insurance superintendent's report of the condition of an insurance corporation, admissible in a State proceeding against the corporation or officers); Banking § 26 (State bank superintendent; "every official report" and "every report duly verified of any examination made," is admissible); St. 1913, c. 559, p. 1515, § 11 (amending Consol. L. 1909, Public Health, by inserting § 21 *b*; written reports of public health officers and their representatives "on questions of fact" under the health laws, to be admissible); 1921, Broeniman Co. *v.* Liberty E. & I. Co., Sup. App. T., 191 N. Y. Suppl. 429 (breach of warranty in sale of condensed milk for export; a survey-report made by an expert in Brussels, filed with the clerk of court of Commerce there, and certified by the American Consul there, excluded; the ruling exemplifies the blind bigoted technicalism that still dominates our courts in matters of proof; a trial was ordered on this ground alone, and thus the Fetish of Formalism was duly appeased by the benighted judges); *South Dakota:* Rev. C. 1919, § 2718 ("Any map or publication printed by order of either branch" of the Legislature or of Congress is a "public document," and is admissible); § 10324

(1) The findings of an *auditor*, in the judicial system of New England and elsewhere,[3] are in effect equivalent to the report of a master in chancery; he is a part of the Court, not an extraneous officer, and his report is a preliminary finding of the Court;

(2) The report of an *appraiser*, appointed to value a decedent's estate, is admissible at common law in the same proceedings, and the statutes appear not to do more than declare this;[4] whether the order of the Court would suffice as an express warrant to make the report admissible in other litigation may be doubted;

(3) The findings of a jury of *fence-viewers*,[5] or such other body as concerns itself with highway repairs and the like, are in fact the verdict of a special tribunal, whose judgment is enforceable in its own right; the principles of judgments, not of evidence, are involved;

(4) The findings of a State *industrial accident* or *public utilities* commission are in effect often the judgment of an administrative body on a litigated issue, and the judicial hearing is virtually an appeal; thus by statute it has been made admissible at the trial. But the 'ex officio' inquiry of such a commission, and its report thereon, belongs rather under the present principle.[6] Here, however, a public policy, applying to *reports upon injuries done*, seeks to induce the railroad or industrial agents to make full and prompt returns to the State official, by pledging the non-disclosure of official reports based on such information; thus a privilege applies, and the statutes in this respect are further examined *post*, § 2377;

(illegal sale of liquor; quoted *post*, § 1680); *Tennessee:* Shannon's Code 1916, § 2033 (Secretary of State's published list of corporations, admissible to prove the corporation's existence); § 1589 (report of appraisers of value of stock killed or crippled, to be 'prima facie' evidence).

[3] *Ariz.* Rev. St. 1913, Civ. C. § 669; *Me.* Rev. St. 1916, c. 87, § 88; *Mass.* Gen. L. 1920, c. 221, § 57; *N. H.* Pub. St. 1891, c. 227, § 8; *Vt.* Gen. L. 1917, § 2045 ("When judgment is rendered otherwise than on the verdict of a jury, the judges of the court may, by themselves, by the jury in court, by the report of the clerk, or by the report on oath of a person appointed by the court, ascertain the sum due").

[4] *Colo.* 1906, Austin *v.* Terry, 38 Colo. 407, 88 Pac. 189 (inventory admitted to show property to be "parcel of the estate"); *Fla.* Rev. G. S. 1919, § 3730 (inventories and appraisements of decedents' estates, admissible in actions by and against executors or administrators); *Ill.* Rev. St. 1874, c. 3, § 56 (inventories and bills of appraisement of decedent's estate may be given in evidence "in any suit by or against the executor or administrator"); 1908, Bailey *v.* Robinson, 233 Ill. 614, 84 N. E. 660 (statute applied); *Md.* Ann. Code 1914, Art. 93, § 159; *Mo.* Rev. St. 1919, § 73 (inventories and appraisements of deceased's estate, admissible); *W. Va.* Code 1914, c. 85, § 12 (personalty of decedent's estate).

[5] *N. Y.* Cons. L. 1909, County § 119 (fence-viewers' certificate of damage to sheep, admissible).

[6] The following are merely a few of such statutes; their bearing is procedural rather than evidential: *Idaho:* Comp. St. 1919, § 2514 (State public utilities commission's findings in valuation proceedings, certified under commission seal, to be admissible); *Louisiana:* St. 1915, No. 11, § 17 (trusts and monopolies; "any report by a legislative committee" of this State or the U. S., or of "any bureau or department or of any commission" of either, is admissible); *Ohio:* Gen. Code Ann. 1921, §§ 499-17, 580 (State utilities commission's findings, certified under commission's seal, to be evidence of "the facts therein stated"); *North Dakota:* Comp. L. 1913, § 4741 (findings of a railroad commission on investigation of a complaint against a common carrier, admissible); *South Dakota:* Rev. C. 1919, § 9519 (findings of State railroad commissioners on a complaint against a common carrier "shall thereafter in all judicial proceedings be deemed and taken as 'prima facie' evidence as to each and every fact found").

(5) The findings of a commission to *enroll Indian tribes*, for the purpose of land-allotment, have sometimes by Federal statute been made, not merely admissible, but conclusive; in that aspect they are noted *ante* § 1347; in the former aspect, *ante* § 1671 (census);

(6) The statutory *prohibition*, occasionally found, of the use of the report of a *fire marshal, bank-examiner, commission of public utilities* or *industrial accidents*, and the like, is in essence the establishment of a *privilege* for the persons revealing their information to the official; these statutes are noted *post*, § 2377.

3. CERTIFICATES (including CERTIFIED COPIES)

§ 1674. **Certificates in General; Sundry Instances at Common Law and by Statute; Certificates by Private Persons.** A certificate, as already defined (*ante*, § 1637), differs from a return in that it is not preserved by the officer, but is given out by him to the applicant and is kept by the latter.

This distinction is not always observed in common usage, for the term "certificate" is often applied to what is properly a return. But the distinction is a plain one; it is based on real difference of policy, and is attended with an important legal and practical result. The policy applicable to the conditions of the two is different, because the certificate, by remaining in the custody of the applicant, is not only more liable to injury or fraudulent alteration than if it had remained in official custody, but is also more open to initial forgery and more difficult to authenticate.

(1) The legal consequence of the distinction (a consequence based probably on some notion of this difference of trustworthiness) is that at common law (with two exceptions) *no authority to give certificates was implied from the office alone*. An authority to keep a register (*ante*, § 1639) or to make a return (*ante*, § 1664) might be implied from the nature of the office; but the marked tendency of the Courts was to require an express authority to make a certificate, before it could be received to prove the facts certified. The earliest definite utterance upon this subject, often quoted in later times, is broad enough in its terms:

> 1744, WILLES, L. C. J., in *Omichund* v. *Barker*, Willes 538, 549 (disapproving the latter part of the ruling in Alsop *v.* Bowtrell,[1] where a foreign clergyman's certificate was admitted to show not only his performance of the marriage ceremony, but also the parties' subsequent cohabitation): "For our law never allows a certificate of a mere matter of fact, not coupled with any matter of law,[2] to be admitted as evidence. Even the certificate of the King under his sign manual of a matter of fact (except in one old case in Chancery) has been always refused. . . . Besides, it is not the best evidence that the nature of the

§ 1674. [1] Cited *ante*, § 1645.

[2] This phrase "matter of law" apparently refers to the bishops' certificates of marriages, considered in a prior part of the same opinion; these could be used in some cases as conclusive proof of marriage; they were a mode of trial, and the bishop's certificate was in reality the adjudication of another tribunal, as already noticed (*ante*, §§ 1347, 1645). The language of L. C. J. Willes seems to signify that a certificate not amounting to a lawful adjudication by a competent tribunal ("not coupled with any matter of law," he says), *i. e.* in effect every certificate, in the sense now employed, was inadmissible.

thing will admit; but the proper and usual evidence of a fact arising beyond sea is an affidavit or deposition taken before a public notary and certified to be so under the seal of the place or the principal officer of the place; which had been admitted as evidence in some cases, where it would be too expensive, considering the nature of the cause, to take out a special commission [for a deposition]."

It is apparent, however, that Chief Justice Willes, in his unqualified statements about certificates, had in mind those certificates only which were made without specific order and under an authority implied from the general nature of the office. He clearly did not mean to disown certificates made by specific and express authority; for in the same case of Omichund *v.* Barker, where Chancery commission had been sent to Calcutta to take the testimony of Hindus and had received instructions to alter the form of the oath and to "certify in what manner the oath was administered to the witnesses and what religion they were of," the Chief Justice refers repeatedly to this return or certificate as proving the facts necessary to justify the oath and the witnesses' capacity.[3] It is evident, then, that the passage above quoted from his opinion is to be understood of those certificates only which are given under a supposed duty implied by the nature of the office. In effect, he denies that there can be any such implied duties. No one, probably, has ever supposed that a duty or authority expressly given by judicial order was insufficient to admit a certificate thus authorized. Indeed, it is precisely this distinction upon which turns the orthodox common-law rule for the admission of certified copies of judicial records (*post*, § 1677). But his words serve to show, at any rate, what is undoubted in the law, — the traditional inclination of the Courts to reject certificates, and the necessity at common law of showing an express authority, judicial or statutory, for the making of the certificate.

(2) It follows, then, on the general principle (*ante*, § 1633), that the certificate is admissible only for those *facts covered by the terms of the authority*,[4] and, conversely, that it is admissible to prove all the facts thus included:

1840, SHARKEY, C. J., in *Newman* v. *Doe*, 4 How. Miss. 555: "Certificates and other documents made by persons entrusted with authority for the purpose are evidence of the facts which they are required to certify to, to the extent of their authority."

1886, DEVENS, J., in *Com.* v. *Richardson*, 142 Mass. 74, 7 N. E. 26: "As to matters which the officer is not authorized by law to attest, his certificate is extra-official, can have no higher weight than that of a private citizen, and is therefore inadequate to make the proof required."

In the application of this principle, only a few classes of cases call for special consideration:

(*a*) The admission of the *King's certificate* (it may have been given in the form of a return) was perhaps an exception based on necessity, for he was

[3] *E. g.* "This certificate, I think, fully answers the objection that it does not appear that the witnesses believe in a God."

[4] 1789, Johnson *v.* Hocker, 1 Dall. 407 (a certificate of more than is authorized is admissible; the surplusage being rejected).

privileged from summons into court (*post*, § 2369), perhaps even from testifying at all (*post*, § 2370), and the taking of his deposition would not (in former times) have been consistent with his dignity. Yet it is possible to say that this instance is no exception, and that the King, as the source of authority, could, with the same stroke of the pen that wrote the certificate, give himself the authority to make it.[5]

(*b*) The case of the *notary's protest* was the single well-settled exception at common law (*post*, § 1676).

(*c*) The use of *certified copies* by the official custodian of the original (*post*, §§ 1678–1683) was not recognized in the English common law, apart from an express authority to make a copy, and therefore was no exception to the rule. But in the United States many Courts did recognize an exception in this respect, and implied an authority from the nature of the office.

(*d*) The case of an *official printer's* copy (*post*, § 1684) was not an exception, for there was here an express though general authority.

(*e*) The proof of a *deed's execution* by a *notary's* or registrar's *certificate* (*post*, § 1677) was not allowed at common law; and the modern practice rests on express statutory authority.

The various judicial rulings[6] dealing with the use of certificates show a

[5] Historically, to be sure, the rule probably went back to the early doctrine that the King's word was indisputable and that his seal imported absolute verity: 1224, Bracton's Note-Book, II, No. 239 ("Testificacio domini Regis per cartam vel viva voce omnem aliam probationem excedit"); and the citations *post*, § 2426. The rule is later mentioned in the following places: 1532, Perkin's Profitable Book, 142 ("in time of war" divers things shall be "tried by the certificate of the king's marshal"; but this was really a case of separate jurisdiction, like the bishop's, *supra*); 1613, Lea's Case, Godb. 198 (that A had promised the King according to a certain tenor, was proved in the Court of Requests by "a certificate made by the King's majestie that he made such a promise to him"); *ante* 1635, Hudson, Treatise of the Star Chamber, part III, § 21, in Hargr. Collect. Jurid. 206 ("The king may yield a testimony in any cause, for so did King James . . . in chancery by his letters under his signet in the lord Auberville's cause. The great judges of the realm may yield testimony; but that they do by certificate under their hands, if not by oath; but upon their bare certificate many men have been sentenced; . . . but that was only where they were authorized under the broad seal to take their verdict, for otherwise I conceive not any man should be punished under a certificate without oath"); 1680, Hale, Pleas of the Crown, II, 282 (after declaring the King disqualified by interest on a charge of treason, he names other cases, not open to that objection, in which "the King's testimony under his great seal is allowable"); 1669, Litcot *v.* Blackwell, 2 Keb. 349 (trover; one Tytus, "sent by the King to this purpose," was excluded, "this being a difference between party and party; but were the matter only concerning the King, his testimony were good, as a letter, in Sir Gerrard Fleetwood's case"); 1694 (?), Abigny *v.* Clifton, Vin. Abr. Evidence, R, b, 1, pl. 6, vol. XII, 190 ("the King under his sign manual certified to the Lord Chancellor a promise made to him in behalf of another, and this certificate was allowed good evidence").

For *Executive proclamations*, see *ante*, § 1662.

[6] Compare with the following list the other instances cited under *registers* (*ante*, § 1639), *returns* and *reports* (*ante*, § 1664), *surveyors* (*ante*, § 1665), certificates of *administrators' appointments* (*ante*, § 1238), *post-marks* (*post*, § 2152), *land-office records* (*ante* § 1659), and *certified copies* (*post*, § 1681), the varying nomenclature making it difficult to classify the documents accurately; compare also the rules for *admissions* (*ante*, § 1048), and for hearsay *statements against interest* (*ante*, § 1455), under which some of the following documents may sometimes become admissible.

ENGLAND: 1796, R. *v.* Mawbey, 6 T. R. 619, 630, 635 (indictment for presenting a false certificate of justices that a road was in repair; the certificate, apparently in effect a judgment, and so treated in counsel's argument, was held to be a legal instrument of evidence; their admission was justified as "now become too inveterate to be overturned"); 1799, Moises *v.* Thornton, 8 T. R. 303 (treating a diploma of

fairly consistent application of the general principle already noticed, with the marked tendency to exclude them in the absence of a clear showing of authority.

medicine as a certificate of an act of the corporation conferring the degree; it must appear that "the persons whose names were subscribed had authority to grant the same"; per Kenyon, L. C. J.); 1806, Johnson *v.* Ward, 6 Esp. 48 (to prove goods to have been on board a ship, the official certificate based on a report by the customs-searcher was admitted as "a paper made by authority of an act of Parliament by an officer of the customs appointed for the purpose"); 1828, Rowe *v.* Brenton, 8 B. & C. 737, 743 (document made by the Duke of Cornwall, admitted as a public document because of the Crown's interest in his lands); 1847, R. *v.* Bourdon, 2 Cox Cr. 169 (excluding the clerk of assize's list of prisoners sent to the jail in specifying the term, etc.); 1837, Vaux Peerage, 5 Cl. & F. 526, 541 (funeral certificate, made by the heralds, on the faith of the signatures of the executors and mourners, but required by special order of the Earl Marshal of England, admitted "as an official document taken by persons whose duty it was to make it up"); 1844, Hubback, Succession, 554 (other instances cited from records of peerage cases); 1880, Sturla *v.* Freccia, L. R. 5 App. Cas. 623, 633 (L. C. Selborne: "[The funeral certificates entered in the heralds' books] stand upon this ground; it was the official duty of the heralds to receive such certificates from persons who were by law competent witnesses, and to record the statements of those persons in their books").

CANADA: 1898, Quintal *v.* Chalmers, 12 Man. 231, 235 (grain inspector's certificates, excluded).

UNITED STATES: *Federal:* 1804, Church *v.* Hubbart, 2 Cr. 187, 239 (translation certified by a consul, excluded); 1811, U. S. *v.* Mitchell, 2 Wash. C. C. 418 (U. S. consul's certificate to deposit of a ship's register, admitted); 1811, U. S. *v.* Mitchell, 2 Wash. C. C. 95 (certificate of governor of St. Thomas that permission had been refused by him to take away ship's cargo, admitted); 1836, Levy *v.* Burley, 2 Sumn. 357 (consul's certificate of non-deposit of a ship's register, excluded); 1887, Coan *v.* Flagg, 123 U. S. 117, 130, 8 Sup. 47 (letters by the land office commissioner as to the time of filing a survey, admitted); 1898, Rollins *v.* Board, 33 C. C. A. 181, 90 Fed. 575 (semi-annual statement of indebtedness by the clerk of a county board, not admitted on the facts); 1902, U. S. *v.* Lew Poy Dew, 119 Fed. 786 ("the certificate of an officer is worthless as evidence unless the making of it was an official duty, and even then it is not evidence except so far as made such by some statute"; excluding a U. S. commissioner's certificate of the adjudicated status of a Chinese immigrant); 1908, Lederer *v.* Saake, C. C. E. D. Pa., 166 Fed. 810 (certificate by the Librarian of Congress that book-copies were duly on deposit with him for copyright, admitted); 1919, Lo Hop *v.* U. S., 6th C. C. A., 257 Fed. 489 (certificate of Chinese Viceroy at Canton, vised by U. S. Consul-General at Hong Kong, as to facts of mercantile status of an intending emigrant; effect of this certificate under U. S. St. 1904, April 27, c. 1630, 33 Stats. at L. 428, considered); *California:* 1853, Powell *v.* Hendrick, 3 Cal. 427, 430 (tax collector's certificate of payment, excluded); 1870, Hastings *v.* Devlin, 40 Cal. 358, 364 (certificate of the U. S. land register, as to a survey, etc., held not an official statement within any statute); *Connecticut:* 1876, Wilson *v.* School District, 44 Conn. 157, 160 (clerk's unauthorized certificate, excluded); *Georgia:* 1903, Trentham *v.* Waldrop, 119 Ga. 152, 45 S. E. 988 (county clerk's certificate of physician's licensing, admissible); *Illinois:* 1871, Harbers *v.* Tribby, 62 Ill. 56 (certificate of enlistment, not admitted); 1899, Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733 (State mine examiner's certificate of an engineer's competency, admitted); 1899, Chicago *v.* English, 180 Ill. 476, 54 N. E. 609 (comptroller's certificate of the amount of a city debt, excluded); *Indiana:* 1866, Fry *v.* State, 27 Ind. 348, 350 (State auditor's unauthorized certificate of account, excluded); *Iowa:* 1898, Lacy *v.* Kossuth Co., 106 Ia. 16, 75 N. W. 689 (board of health's certificate of services performed by a physician, admitted); 1902, Wilbur *v.* R. Co., 116 Ia. 65, 89 N. W. 101 (letter from the general land-office commissioner to a land-office register, excluded); *Louisiana:* 1836, Stein *v.* Stein, 9 La. 277, 280 (consular certificate of a foreign official's signature, excluded); *Maine:* 1841, Morton *v.* Barrett, 19 Me. 109 (consul's certificate of the death of an American seaman excluded); *Massachusetts:* 1874, Hanson *v.* South Scituate, 115 Mass. 340 (certificate of discharge from the army, admitted); *Michigan:* 1877, Smith *v.* Rich, 37 Mich. 549, 553 (county surveyor's certificates, not made according to statute, excluded); *Minnesota:* 1896, Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 840 (tax receipts by a county treasurer, admitted); *Missouri:* 1868, Williams *v.* Carpenter, 42 Mo. 327, 345 (land-office certificate of "confirmation of title" and "Hunt's minutes" receivable; but questions of substantive and statutory law are involved; compare the cross-references in § 1659, *ante*, for other Missouri authorities on related points); 1887, State *v.* Pagels, 92 Mo. 300, 310, 4 S. W. 931, note 4 (certificate of superintendent, of poorhouse, excluded); 1892,

(3) This tendency, while sufficiently proper as a judicial policy, has, however, left the process of proof often encumbered by disproportionate inconvenience and cost, in summoning witnesses to prove official acts not fairly disputable by the opponent. A need certainly exists (*ante*, § 1636) for the liberal grant to certain classes of officials of express statutory authority to give certificates. Accordingly, in most jurisdictions *statutes* have not merely granted express authority to certify specified classes of facts, but have declared such certificates admissible in evidence.[7] These statutes are, however, cum-

State *v.* Austin, 113 Mo. 538, 544, 21 S. W. 31 (prison warden's certificate of discharge, admitted, the warden being required to record discharges); *Nevada:* 1869, Western Union T. Co. *v.* Atl. & Pac. S. T. Co., 5 Nev. 102, 110 (postmaster-general's letter stating a party's acceptance of a privilege, probably sufficient); *New Hampshire:* 1833, Dunlap *v.* Waldo, 6 N. H. 450 (county clerk's certificate of appointment of a justice of the peace in New York, admissible under the law of that State); *New Jersey:* 1871, Hawthorne *v.* Hoboken, 35 N. J. L. 247, 252 (provost-marshal's certificate of enlistment, admitted); *New York:* 1815, Jackson *v.* Belknap, 12 Johns. 96 (surveyor-general's statutory certificate that certain lands had been forfeited by attainder, etc., received); 1830, Jackson *v.* Cole, 4 Cow. 587, 596 (similar certificate, by commissioners of forfeiture, of the location and appraisal of lands, received); *North Carolina:* 1820, Governor *v.* Jeffreys, 1 Hawks 208 (adjutant-general's certificate of delinquency, excluded on the facts; cited *ante*, § 1635); *Ohio:* 1842, State *v.* Wells, 11 Oh. 261 (county auditor's certificate of payment of land fees, excluded); *Pennsylvania:* 1782, Morris *v.* Vanderen, 1 Dall. 64, 65 (certificate of a former surveyor-general that a survey had been made, received); 1789, Johnson *v.* Hocker, 1 Dall. 406 (State treasurer's certificate, admitted to show the receipt of money from H., but not to show a tender elsewhere made by H. to J.); 1792, Jones *v.* Ross, 2 Dall. 143 (certificate of a list of prisoners in Hamburg, by the "late directors" of the prison, excluded as not official); 1793, Todd *v.* Ockerman, 1 Yeates 295, 299 (similar to Morris *v.* Vanderen; received as an official certificate of a sworn officer); 1895, Sewell *v.* Moore, 166 Pa. 570, 31 Atl. 370 (certificate of a fire-escape inspector, rejected because made at a time not sanctioned by the statute); *Tennessee:* 1845, Foster *v.* Montgomery, 6 Humph. 231 (clerk's certificate of the making of a lost affidavit preliminary to a deposition-order, received); *Vermont:* 1832, Seymour *v.* Beach, 4 Vt. 493, 497 (the register's certificate of administration is evidence of an administrator's appointment); *Virginia:* 1836, Wilkinson *v.* Jett, 7 Leigh 115 (certificate of a postmaster-general as to irregularities in mail-carrying, excluded); 1858, Ushers *v.* Pride, 15 Gratt. 190, 195 (auditor's certificate of delinquent tax-land, admitted); *Washington:* 1909, Dunkin *v.* Hoquiam, 56 Wash. 47, 105 Pac. 149 (army medical examiner's certificate of disability entitling to pension, not receivable in an action for personal injury); *Wisconsin:* 1919, Vogel *v.* Delaware L. & W. R. Co., 168 Wis. 567, 171 N. W. 198 (proof of value of goods consigned from abroad; consular certificate of invoice values, by the U. S. consul-general at Frankfort, admitted under U. S. Rev. St. §§ 2855, 2862, Wis. Stats. §§ 4148, 4164).

[7] Compare the cross-references at the beginning of the preceding note; compare also, as to certificates of *forgery of official signatures* on bills, and of *analysis* by chemists, § 1707, *post*, for such certificates are sometimes admitted only as affidavits; compare also § 1678, *post* (certificate of contents).

ENGLAND: St. 1905, 5 Edw. VII, c. 15, § 51 (trade-marks; the registrar's certificate to be evidence of matters certified); St. 1907, 7 Edw. VII, c. 29, § 78, Patents and Designs Act (comptroller's certificate of any matter or entry authorized, admissible); St. 1908, 8 Edw. VII, c. 67, § 88 (reform school certificate of reception of juvenile offender, or of sum due, etc., to be evidence); St. 1914, 4 & 5 Geo. V, c. 58, Criminal Justice Administration, § 38 (in summary courts, a certificate of non-payment, by a person to whom a sum of money has been ordered to be paid, is admissible, unless the Court orders the person to be called as a witness).

CANADA: *Dominion:* Rev. St. 1906, c. 133, § 17 (official analyst's certificate of adulteration of a sample, admissible, subject to the defendant's "right to require the attendance of the analyst for the purpose of cross-examination"); c. 48, § 262 (official customs certificates, admissible); c. 75, § 32 (animal contagious diseases; an order of the Governor, or the minister, or a certified copy of the inspector's declaration, etc., is 'prima facie' evidence of the existence of infection, etc., in a place, vehicle, etc.); ib. § 34 (officer's certificate is 'prima facie' evidence of an animal's infection, etc.); St. 1914, c. 12, § 8 (white phosphorus matches; certificate of an inspector as to their use, etc., to be evidence "of the matter certified"); *British Columbia:* Rev. St. 1911, c. 142, § 9 (report of inspector of liquor licenses on a matter within his duty, to be admissible); *Manitoba:* Rev. St. 1914, c. 126, § 58 (purporting

bersome in their number and variety, and could easily be simplified under some such general form as that sanctioned in New York or Florida, or under the broad rule already proposed (*ante*, § 1636).

certificate of a council registrar of a medical man's registration is admissible); c. 153, § 23 (similar for pharmacists); c. 202, § 26 (similar for veterinarians); c. 41, § 5 (registrar's certificate of incorporation of coöperative associations, admissible); c. 59, § 322 (election returning officer's certificate, admissible); c. 30, § 18 (inspector's certificate of immigrant child's age, to be conclusive); c. 82, § 24 (half-breed land titles; certain officers' certificates of birth, parentage, or death of any half-breed or descendant, or an allotment list or notice, admissible); c. 8, § 57 (official veterinarian's certificate of animal's disease, admissible); *New Brunswick:* Consol. St. 1903, c. 127, § 74 (secretary-treasurer's certificate of appointment of any parish or county officer, under the municipal seal, admissible without proof of seal, signature, or official character); *Newfoundland:* Consol. St. 1916, c. 22, § 170 (customs certificates; cited more fully *post*, § 1680); *Nova Scotia:* Rev. St. 1900, c. 163, § 12 (certain certificates under the Canadian Banking Act, admissible on proof of the signature); St. 1918, c. 8, Temperance Act, § 44 (analyst's certificate of liquor analyzed; cited *ante*, § 1352); *Ontario:* Rev. St. 1914, c. 215, § 106 (in prosecutions for liquor offences, the certificate of the government analyst as to "the analysis of any liquor" is conclusive); 1916, R. *v.* Hurley, 31 D. L. R. 18, Ont. (illegal sale of liquor; Ont. R. S. 1914, c. 215, § 106, interpreted); *Saskatchewan:* Rev. St. 1920, c. 44, §§ 13–16 (certain certificates of inspection, etc., issued under the Canada Grain Act, to be evidence); c. 194, § 87 (liquor offences; in prosecutions the provincial analyst's certificate of analysis of liquor, to be admissible); c. 44, § 21, par. 2 (land-title registrar's certified abstract to be 'prima facie' proof of "the state of the title"); *Yukon:* Consol. Ord. 1914, c. 30, § 12 (Treasury board's certificate under Dom. St. 1890, c. 31, § 14, admissible, on proof of signature).

UNITED STATES: *Federal:* Rev. St. 1878, § 884, Code § 1387 ("every certificate" executed by the comptroller of currency "in pursuance of law, and sealed with his seal of office," admissible); § 890, Code § 1392 (in suits for balances due from postmasters, a certificate of demand by the proper officer, stating certain details, admissible); 1892, U. S. *v.* Dumas, 149 U. S. 278, 285, 13 Sup. 874 (statement of a postmaster's account under statute, admitted); St. 1909, Mar. 4, c. 320, No. 349, Code § 6261 (35 Stat. L. p. 1075), § 55 (register of copyright's certificate under seal, to be evidence of "the facts stated therein" as to copyright); Code § 8071 (U. S. shipping commissioner's official act under seal, admissible as presumptive evidence "of the truth of the facts therein set forth");

Alabama: Code 1907, §§ 43–48 (on a trial involving "the merits of such fertilizer or chemical," an official analysis of it by the department of agriculture, proved by copy under seal, admissible); § 1575 (State chemist's certificate of test of illuminating oil, by copy under seal of the board of trustees of Alabama Polytechnic Institute, to be "evidence of the facts therein stated," etc.); § 1615 (support of indigent relatives; certificate of a county probate judge, that the person maintained by the county was a pauper and was so maintained, admissible); § 224 (same for dental examiners); § 984 (militia commander's certificate of membership, admissible to prove exemption from poll-tax and jury-duty); § 3924 (treasurer's certificate, admissible to prove judge of probate's failure to pay over escheat-money); § 5933 (Supreme Court clerk's certificate of the neglect of a circuit court clerk to send a transcript in an appealed criminal case, admissible); § 5916 (Supreme Court clerk's certificate of the sending of an execution to a sheriff, or its receipt by him, admissible); § 5987 (his certificate of a rehearing, etc., admissible); § 5810 (road-overseer's sworn certificate of defaulters in road-duty, admissible); St. 1911, No. 119, p. 104, Mar. 9, § 9 (certificate of official analyst of commercial feeding stuffs, under oath, to be evidence in prosecutions under the act);

Arizona: Rev. St. 1913, § 3800 (inspector's sworn certificate of violation of infected sheep law, to be evidence); § 4063 (State mine inspector's notice of dangerous condition of mine, to be evidence of party's negligence); § 4442 (State laboratory; director's certificate of analysis of food, to be evidence of "the facts therein stated"); 1898, U. S. *v.* Marks, 15 Ariz. 404, 52 Pac. 773 (to show money illegally retained by a postmaster, the departmental statement of his accounts and an order of the postmaster-general reciting his false returns, received);

Arkansas: Dig. 1919, § 4123 (certified copy of balance due, by a public officer whose duty it is to audit and keep account, admissible to prove a balance of debt due to the State); § 4736 ("official analyses" of fertilizer etc. samples shall be admissible on any issue as to "the merits of such fertilizer"); St. 1919, Mar. 28, No. 493 (death claims against insurance companies for persons in military service; U. S. Adjutant-General's certificate of death of insured, to be 'prima facie' evidence);

California: C. C. P. 1872, § 1379 (certificate of a foreign officer to take acknowledgment and oaths, receivable to prove the identity of

(4) From the use of certificates under these statutes, distinguish certain other things superficially related. (*a*) An officer authorized to certify a copy cannot at common law certify merely the *effect of the record;* but sometimes

a claimant for administration, conditionally); § 1798 (non-resident guardian's claim to appointment, provable by a certificate that by the law of his residence-country he is entitled to the estate's custody without judicial appointment; the certificate to be under seal of clerk of the court having jurisdiction, or of the highest court, attested by a minister, consul, or vice-consul of the United States resident there); Civ. C. 1872, § 2059 (certificate from ship's master or chief surviving officer "that a seaman exerted himself to the utmost to save the ship, cargo, and stores" is evidence in action for wages); St. 1885, 43, Mar. 9 (State analyst's certificate of analysis of food, drug, liquid, etc., duly submitted to him, to be 'prima facie' "evidence of the properties of the articles analyzed by him"); St. 1903, c. 225, § 11 (the certificate of the State University director of the agricultural experiment station, under University seal, of his analysis of a sample of commercial fertilizer, shall be 'prima facie' evidence, etc.); St. 1907, p. 230, Mar. 11, § 13 (State laboratory director's certificate of analysis of drug, to be evidence "of the facts therein stated"); St. 1911, p. 1248, May 1, § 5 (insecticide, etc.; like St. 1903, c. 225, § 11); St. 1921, June 3, c. 719, p. 1235 (fruit and vegetable standardization; certificate of quality and condition of fruit, etc., by agent of State agriculture department to be evidence of "the truth of the statement therein contained");

Colorado: Comp. L. 1921, § 2891 (report of appraisers as to the amount of damage by fire set by a railroad, to be evidence of the amount); § 5052 (certificate of sale by a trustee under a trust-deed of land, admissible); § 1014 (State chemist's "certificate of analysis of foods, drugs, or water, duly signed," to be presumptive evidence "of the facts therein stated"); § 3038 (State dairy commissioner's reports of analysis and tests shall be 'prima facie' evidence of the "properties, constituents, or condition of the articles analyzed"); St. 1921, c. 173 (marketing; State director's certificate of "the grade or other classification of any farm product," to be 'prima facie' evidence);

Connecticut: Gen. St. 1918, § 2435 (certificate of a director of the agricultural experiment station, or of department of health laboratory admissible to show a defect in milk); § 2826 (State chemist's certificate of analysis of liquor presented to him officially, admissible to show the facts stated);

Delaware: Rev. St. 1915, § 3528 (State chemist's sworn certificate of analysis of a sample of imitation butter, admissible in a prosecution under this act); § 703 (State chemist's sworn certificate of analysis of fertilizer sample, admissible); § 3525 (similar for meat sample);

Florida: Rev. G. S. 1919, § 2725 ("The certificate of any State officer under his seal of office as to any official fact occurring in the course of the official business of the office in which he presides shall be 'prima facie' evidence of that fact"); § 2724 (commissioner of agriculture's certificate, under official seal, as to ownership of land by the State or by a school, seminary, or internal improvement fund, admissible); § 2737 (U. S. land-office receiver's receipt, to be evidence of title in the payee named); § 2043 (State chemist or assistant's certificate of analysis of sample of food or drug, verified by his affidavit, to be evidence); § 2062 (similar, for commercial feeding stuffs); § 2405 (similar, for fertilizer); § 2727 (official certificate of sanitary condition of premises, duly posted by owner, etc., admissible in defence in action for injuries); § 4108 (State secretary's certificate of foreign corporation's compliances with law, admissible); § 4448 (similar for State treasurer's certificate of authority of fraternal benefit society); § 5470 (liquor offences; certificate of State chemist or assistant, duly made under oath, admissible to prove analysis of sample); 1914, Collins *v.* Plant, 68 Fla. 337, 67 So. 80 (like the next case); 1919, Adams *v.* American Agricultural C. Co., 78 Fla. 362, 82 So. 850 (State chemist's certificate of fertilizer analysis, admitted under Gen. St. 1906, § 1271); 1921, Fleischer *v.* Virginia-Carolina C. Co., 82 Fla. 50, 89 So. 401 (similar; statutory requirements for procedure in making the analysis, considered); 1895, Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568 (certificates of the land-office receiver, admissible as evidence of title under certain conditions);

Georgia: Rev. C. 1910, §§ 1773, 1783 (State agricultural commissioner's "official analysis of any fertilizer or chemical," admissible, by certified copy under department seal); § 1829 (State oil inspector's analysis, "sworn to by any witness competent to make such analysis," or State chemist's certificate of analysis, admissible); 1913, Arlington Oil & G. Co. *v.* Swann, 13 Ga. App. 562, 79 S. E. 476 (State chemist's certificate of analysis of fertilizer, deposited under Civ. Code, § 1773, admissible; analysis of the specific lot sold to the party is not necessary);

Idaho: § 1681 (State chemist's sworn certificate of analysis of food, drink, oil, etc., to be evidence "of the facts therein certified");

Illinois: St. 1909, p. 145, June 4, § 2 (validation of deeds executed outside of the State without a seal; certificate of Secretary of State or court of record or judge thereof, under seal, of

by statute he is authorized to do so; these statutes, which are sometimes impossible to be discriminated from those of the above class, are later dealt with (*post*, § 1678). (*b*) When a certificate is authorized, the question may

the "country or other place," where executed, as to local law or usage dispensing with seal, admissible);
Indiana: Burns' Ann. St. 1914, § 477 (State secretary's certificate under State seal as to time of deposit of act of the General Assembly, admissible); § 6993 (commissioners' certificate of a recount of ballots, admissible to prove the facts recited); § 9211 (Secretary of State's certificate of the date of receipt of laws in counties, admissible); § 4545 (county recorder's certificate of the filing of a road-corporation's articles, admissible in an action for or against the latter); § 4629 (Secretary of State's certificate of an increase of an insurance-company's capital stock, admissible);
Kansas: Gen. St. 1915, § 4099 (animal feedstuffs; State director of experiment's "certified statement of the results of the analysis," admissible); ib. § 4854 (similar for fertilizers); § 9921 (State experiment station chemist's certificate of analysis, under oath, of dairy product, admissible in prosecutions);
Kentucky: Stats. 1915, § 1631 (auditor's certificate of returns of delinquent taxes, sale, etc., admissible); Gen. Stats. 1899, c. 81, § 17, Stats. 1903, § 3760 (official certificates in general; quoted *ante*, § 1352, n. 11);
Louisiana: Rev. Civ. C. 1920, § 6 (publication of a law, provable by the Secretary of State's certificate under official seal, "delivered from" his register);
Maine: Rev. St. 1916, c. 2, § 51 (clerk of court's attested list or certificate, under court seal, shall be "legal but not conclusive evidence of the appointment and qualification" of justice of the peace, trial justice, and notary public); c. 30, § 43 (municipal officer's certificate of inspection, when posted, to be evidence of compliance with fire precautions); c. 36, § 20 (certificate of analysis of fertilizer, food, drug, etc., by director of the Maine Agricultural Experiment Station, to be evidence "of the facts therein stated");
Maryland: Ann. Code 1914, Art. 19, § 22 (comptroller's certificate of account of an officer collecting State moneys, admissible in an action against officer); Art. 32, § 7 (registration book of State board of dental examiners, provable by transcript of custodian under board seal);
Massachusetts: Gen. L. 1920, c. 138, §§ 54, 56 (department of health's certificate of analysis of liquor seized, admissible); c. 112, § 45 (board of dentistry-registration's certificate, to be evidence of the right to practise dentistry);
Michigan: Comp. L. 1915, § 11776 (certificate of appointment of an executor, etc., admissible); § 62 (dates of a legislative session, provable by certificate of the Secretary of State printed with the session-laws); § 100 (amount of an extradition fee, provable by certificate of the proper officer in the other State); § 2629 (publication of a village ordinance, provable by the clerk's certificate); § 3003 (same for a city ordinance); §§ 3160, 3391 (municipal or county treasurer's certificate of the amount of compensation in the treasury for land or improvement condemnation, admissible); § 3467 (municipal clerk's certificate of a fireman's service, admissible); § 3597 (notice of register of electors, provable by certified copy by the county clerk); § 4044 (collector's certificate of tax, valuation, etc., admissible); § 4098 (all tax records, certificates, etc., to be 'prima facie' evidence of facts stated); § 4264 (auditor general's certificate of tax due from a corporation, etc., admissible); § 4362 (court's certificate of proceedings to lay out county road, admissible);
Minnesota: Gen. St. 1913, § 5470 (surveyor-general's certificate of a recorded log-mark, to be evidence of ownership); § 3838 (certificate of a licensed physician as to violation of duty to furnish seats to female employees, admissible); § 3710 (commercial food stuff; sworn certificate of analysis of official chemist of State dairy and food department, to be 'prima facie' evidence); § 3742 (similar, for food, etc., in misbranding offences); § 3767 (seeds; certificate of analysis by State agricultural experiment station, to be presumptive evidence);
Mississippi: Code 1906, § 1965, Hem. § 1625 (certificate by the clerk of a county board of supervisors of the default of any clerk or district attorney in transmitting a list of executions or statement of sheriff's returns, admissible); Code §§ 4423, 4429, Hem. §§ 7103, 7104 (certain official certificates to be evidence of delinquencies in road-labor); St. 1912, c. 139, p. 140, Mar. 16, § 9 (in prosecutions for offences concerning commercial feeds, the State chemist's certificate of analysis to be evidence of "the facts therein certified"); St. 1912, c. 138, p. 133, Mar. 16, § 16 (on trial of "any issue involving the merits of any fertilizer, cottonseed meal, or fertilizing material," the State chemist's "official analysis" of samples, under seal, to be evidence "in any reports [sic? Courts] of this State"); St. 1910, c. 132, § 8 (similar, for foods and drugs; here, a sworn certificate);
Missouri: Rev. St. 1919, §§ 7797, 7855, 8139, 8148, 8301, 8305, 8323, 8333, 8369, 8483, 8501, 8507, 8705, 8708, 8758, 8761 (certain tax-bills made evidence of the amounts due, etc.); § 8734 (State secretary's certificate of organization of corporation, admissible); § 10146 (same for manufacturing and business

arise how far the detailed steps of official action need to be set out in it, or can be supplied by implication without other evidence, — for example, whether with a tax-collector's certificate of sale it is necessary also to evidence the

corporations); § 11867 (State bank commissioner's certificate of organization of savings bank, etc., admissible); § 11993 (dairy product; sworn certificate of analysis by chemist of State food and drug department, admissible);
Montana: Rev. C. 1921, § 2595 (State agricultural college chemist's report, to be evidence of impurity of drug or food);
Nevada: Rev. L. 1912, § 2816 (Secretary of State's certificate, under State seal, of the failure of local officials to make due return of election, admissible); § 4163 (State comptroller's account, admissible in an action to recover a debt due to the State);
New Hampshire: Pub. St. c. 164, § 3 (Secretary of State's certificate of bank's failure to make returns, admissible);
New Jersey: St. 1911, c. 201, p. 414, § 33 (department of weights and measures; State, county, or municipal superintendent's certificate of correctness of weight or measure, admissible);
New York: C. P. A. 1920, § 367 (official certificate or affidavit, required to be made and filed, admissible to prove facts therein alleged); C. P. A. § 356 (official sealer's certificate of correctness of a surveyor's measure, admissible); C. Cr. P. 1881, § 514 *a* (certificate under seal of a prison warden, etc., admissible on a trial for a subsequent offence, to prove the imprisonment and discharge); Cons. L. 1909, Gen. Bus. § 273 (transportation superintendent's certificate of appointment of a milk-can agent, admissible); Executive § 102 (county clerk's certificate under seal of a notary's appointment and the genuineness of his certificate, admissible); Prison § 244 (prison official's certificate of sentence-commutation, admissible in a prosecution for a subsequent felony); Legislative § 41 (Governor's or Secretary of State's certificate, admissible to prove the time of a bill's becoming law); Town § 94 (town-meeting clerk's certificate of election of a justice of peace, admissible); Tax § 128 (State treasurer's and comptroller's certificate as to tax-redemptions, admissible); Drainage § 40 (drainage-commissioner's certificate of an assessment-sale, admissible); Railroad Title § 16 (railroad corporation's certificate of abandonment of a right of way, admissible); Insurance § 4 (State insurance commissioner's certificate lawfully issued, to be admissible);
North Carolina: Con. St. 1919, § 964 (State secretary's certificate of appointment or removal of commissioner of deeds, admissible); § 2286 (appointment of guardian for lunatic, etc.; certificate of superintendent of any government hospital that the party there confined is insane, sworn to and certified, admissible); § 4696 (analysis of the unlawful ingredients of a fertilizer, published in the Bulletin of the department, to be evidence in an action to recover the price); § 4697 (State chemist's certificate of analysis of fertilizer, under seal of department of agriculture, admissible); § 4741 (official analyst's sworn certificate of analysis of feeding stuff, admissible); § 4748 (similar, for stock and poultry tonics); § 4756 (similar, for foods and drugs); § 4788 (similar, for classification of farm products); § 4827 (similar, for seeds; but on accused's motion, analyst may be called for cross-examination); 1880, Palmer *v.* Love, 82 N. C. 478 (legislative scale of Confederate money-values; St. 1865–66, c. 39, § 1, applied); 1921, American Fertilizing Co. *v.* Thomas, 181 N. C. 274, 106 S. E. 835 (St. 1917, c. 143, cited);
North Dakota: Comp. L. 1913, § 513 (certificate of the secretary of the State board of dental examiners under the board seal, that a person is or is not a registered dentist, admissible); Comp. L. 1913, § 2895 (State chemist's certificate of analysis of a commercial fertilizer, to be evidence of "the facts therein stated"); § 2906 (State botanist's certificate of analysis of seed sample, to be evidence of "the facts therein stated"); § 2930 (State chemist's certificate of analysis of formaldehyde, to be evidence of "the facts therein stated"); § 2936 (similar for Paris green); § 2950 (similar for "any drug, drug products, or medicine"); § 7430 (service of process by mail, "the return registry receipt of the post office department shall be 'prima facie' proof of its mailing and of its receipt by the defendant to whom it was mailed"); § 10201 (illegal use of imitation butter; sworn certificate of the State chemist of analysis of sample, admissible);
Ohio: Gen. Code Ann. 1921 (certificate under seal of the insurance superintendent, made in pursuance of law, admissible); § 677-6 (certificate etc. by State inspector of building and loan associations, under seal of office, or copies authenticated under seal of office, admissible); § 4231 (city clerk's certificate of publication of ordinance, admissible);
Oregon: Laws 1920, § 7407 (fish warden's certificate of issuance or non-issuance of a license, admissible); § 8670 (certificate of analysis of "any food product," by State dairy and food commissioner or his deputy, admissible); 1919, Kuntz *v.* Emerson Hardwood Co., 93 Or. 565, 184 Pac. 253 (labor commissioner's certificate of existence of reasonable safeguards in factories, admissible under Lord's Or. Laws § 5046, and St. 1907, p. 302; Harris, J., diss. in part);
Pennsylvania: St. 1837, Mar. 31, Dig. 1920, § 10352, Evidence (certified translation by

advertisement of notice; this involves usually either the *presumption of regularity* of official doings (*post*, § 2534) or the rule of *completeness* (*post*, § 2108).

(*c*) Courts are bound, in recognizing the existence of *foreign States* or

U. S. consul of an extract of certain foreign burial registers, receivable); St. 1869, Feb. 18, Dig. § 12502, Interpreters (certified translations, by an official interpreter in Philadelphia, of any paper in a foreign language, attached to the original, receivable); St. 1911, June 1, § 4, Dig. § 21604, Weights (official weigh-master's certificate of coal measurement, to be evidence of the facts certified);

South Carolina: Civ. C. 1922, § 3553 (commercial fertilizers; sworn certificate of the chemist of the Clemson Agricultural College of South Carolina of analysis of the various brands, to be evidence of "the value and consistency shown by the said analysis"); Crim. L. 1922, § 315 (food offences; "the sworn certificate or a certified official report" of the chemist of the Department of Agriculture, etc., analyzing a suspected sample, to be admissible); § 857 (foodstuff offences; certificate of "the analyst or other officer, making the analysis or examination," admissible when sworn to);

South Dakota: Rev. C. 1919, § 10391 (city public weigher and measurer's certificate of weight, to be 'prima facie' evidence);

Tennessee: Shannon's Code 1916, § 1045 (comptroller's "statement" of the amount due from a delinquent tax-collector, admissible); § 325 *a* 73 (State agricultural director's certificate of analysis of commercial fertilizer, etc., under commissioner's seal, admissible);

Texas: Rev. Civ. St. 1911, § 3708 (comptroller's certificate, from the rolls in his office, of assessment or payment of taxes, admissible); St. 1911, p. 218, § 5 (State chemist's certificate under seal of analysis of commercial fertilizer, admissible "as if it were his deposition");

Utah: Comp. L. 1917, § 5719 (State auditor's due account, to be evidence of default of money to the State); § 1960 (food adulteration; State chemist's certificate of "any analysis or examination of any article" mentioned, to be evidence of the "facts set forth in such certificate");

Vermont: Gen. L. 1917, § 790 (certificate by assessor's clerk as to publication of assessment list in newspapers, admissible); § 5909 (test of milk by the agricultural experiment station, admissible); § 6290 (foods and drugs; certificate of analysis by chemist of State board of health, admissible);

Virginia: Code 1919, §§ 6197-8 (certificate of the auditor of public accounts as to tax-sales, etc., and of the auditor of West Virginia on similar matters, receivable, conditionally in certain cases of 20 or 40 days' notice to the opponent); § 3580 (county-clerk's certificate of a recorded log-brand or mark, to be evidence of it); § 1119 (State chemist's analysis of fertilizer sample, admissible on trial of "anything involving the merits" of the fertilizer); § 1136 (same, for analysis of agricultural lime); § 1150 (seed; department of agriculture's sworn chemical analysis, admissible; but on motion the analyst may be called for cross-examination); § 1178 (food; State analyst's sworn certificate, to be admissible); § 4621 (illegal transactions in ardent spirits; like ib. § 1150); St. 1918, Mar. 19, c. 388, § 30½ (certificate of analysis of intoxicating liquor, by chemist employed by State agriculture commissioner, admissible, but on motion the chemist may be called to the stand); 1916, Bracey *v.* Com., 119 Va. 867, 89 S. E. 144 (St. 1908, p. 286, § 24, making admissible the State chemist's certificate of analysis of a beverage, applied);

Washington: R. & B. Code 1909, § 5947 (certificate of the superintendent of a State insane-hospital, to be evidence of employment therein as exempting from jury-duty, etc.); § 6027 (hop inspector's certificate of the grade or quality of hops, admissible); 1896, National Bank *v.* Galland, 14 Wash. 502, 45 Pac. 35 (certificate of the comptroller of the currency, admitted to show the organization of a national bank);

West Virginia: Code 1914, c. 130, § 5 (auditor's certificate of a return or sale of delinquent land, or of payment or not of taxes thereon, or of non-entry for taxes, admissible if filed before-hand and 20 days' notice given before the first day of the term); § 5 *a* (same for a county court clerk's certificate of the last two matters, and of the amount of taxes due); § 7 (same for a Virginia auditor's certificate, with 40 days' notice);

Wisconsin: Stats. 1919, § 4152 (lists of land certified by a U. S. officer as conveyed to the State, admissible); § 4164 (substantially like N. Y. C. P. A. § 367); § 4766 (justice's certificate of conviction, admissible); § 2276 *a* (county judge's certificate of heirs, etc., of a person deceased, when recorded with the register of deeds, admissible); § 959 (38) (city clerk's certificate, under city seal, of a special assessment lien, admissible); § 2070 *a* (county judge's certificate of death of a life tenant, etc., admissible in certain cases); § 1735 (State lumber inspector's certified scale bill to be "presumptive evidence of . . . the correctness of such scalement," except in favor of the inspector); § 4152 *a* (trespass on public lands; State secretary; certificate of State's interest in specified tract, admissible); § 14.37 (certificate of an account by State boards, etc., to be evidence of its correctness);

Wyoming: Comp. St. 1920, § 3765 (State chemist's certificate of analysis of commercial feeding stuffs, admissible in prosecutions); § 3833 (similar, for official analyst's certificate of analysis of seed).

sovereigns, by the action of the Executive (*post*, § 2574); recognition by the Executive is sometimes to be ascertained by a "certificate" furnished by the Executive; but this is not an evidential use of the certificate, for the act of furnishing it is itself an act of recognition.[8] So, too, the use of a *certificate of foreign law*[9] seems to be an instance of the judge's informing himself, under the doctrine of judicial notice (*post*, § 2569), rather than of the present principle.

(*d*) Sometimes the statute makes the certificate *conclusive;* this involves another principle (*post*, §§ 1347, 1352).

(5) There may also be noted here a restricted class of *quasi-official certificates by private persons*. Where a statute creates a duty or an authority for a private person to give a certificate, it may be argued that this authority is in its nature official, at least for the purpose of making such a certificate admissible. The principle has already been examined (*ante*, § 1633*a*); and one instance of its application — certificates of marriage by ministers — has been considered (*ante*, § 1645). At common law such an authority has occasionally been deemed sufficient;[10] and by several statutes, based on convenience in proving certain formal and not disputable matters, such certificates by private persons have been expressly declared admissible.[11]

[8] 1830, U. S. *v.* Benner, 1 Baldw. 234, 237 (certificate of a Secretary of State that a person is a foreign minister or a member of the diplomatic staff "is ' per se' an authorization and reception of him").

[9] 1806, Picton's Trial, 30 How. St. Tr. 561 (certificate of the Chief Justice of Trinidad as to the law there prevailing, offered and apparently received); 1832, Dormoy's Goods, 3 Hagg. 767 (probate law of St. Martin's French Island; the ambassador's certificate, or *semble* the consul-general's, sufficient); 1862, Klingemann's Goods, 3 Sw. & Tr. 18 (certificate of the minister of the King of Hanover, to probate law, admitted); 1884, Prince Oldenburg's Goods, L. R. 9 P. D. 234 (Russian ambassador's certificate, admitted, to show the probate law of Russia for the royal family); 1859, St. 22 & 23 Vict. c. 63 (provisions for obtaining from a Court in some other part of the British Dominions, having a different law, a judicial certificate of the law there obtaining); 1861, St. 24 Vict. c. 11 (similar, for the law of foreign countries with whom a convention may have been made); the latter statute has remained futile, because no such convention has yet been made: 1902, Phipson, Evidence, 3d ed., 342.

[10] 1827, Dole *v.* Allen, 4 Greenl. Me. 527 (certificate of membership in the Quaker sect, authorized by statute, admitted, as showing membership to procure immunity from militia service).

The following case seems to belong here: 1859, Stearns *v.* Doe, 12 Gray Mass. 482, 486 (residence-port of owner of a vessel; a Federal statute requires it painted on the vessel's stern; this painted name of a port held admissible, as made presumably in compliance with the law).

[11] With the following compare the citations *post*, § 1683 (certified copies by bank-officers, etc.), § 1710 (affidavits), §§ 1698, 1702 (scientific and commercial reports), and § 2484 (experts summoned by the judge).

CANADA: *Alta.* Rules of Court 1914, R. 534 (like Ont. Rule 268); *Br. C.* Rules of Court 1912, R. 781 (judge in chambers; like Ont. R. 268); *Man.* Rules of Court 1912, R. 165 (like Ont. Rule 268); *N. Br.* Rules of Court, 1919, Ord. 55, R. 19 (like Ont. Rule 268); R. 165 (in equity, like Ont. Rule 268); Consol. St. 1916, c. 83, Ord. 50, R. 29 (judge in chambers; like *Newf.* Ont. Rule 268); *N. Sc.* Rules of Court 1919, Ord. 55, Rule 12 (like Ont. Rule 268); Rev. St. 1900, c. 44, § 10 (medical practitioner's certificate of insanity for admission of patient to Government hospital is receivable); *N. W. Terr.* Consol. Ord. 1898, c. 21, § 490 (like Ont. Rules 268); Ont. Rules of Court 1913, No. 268 ("The Court may obtain the assistance of accountants, merchants, engineers, actuaries, or scientific persons in such way as it thinks fit, the better to enable it to determine any matter in evidence in any cause or proceeding, and may act on the certificate of such persons"); 1892, Wright *v.* Collier, 19 Ont. App. 298 (Court Rules, § 94, held not to justify the implicit acceptance of a certain marine expert's opinion as the basis of decision); *Yukon:* Consol. Ord. 1914, c. 48, Rule 515 (similar to Ont. Rule 268).

UNITED STATES: *Cal.* Civ. C. 1872, § 2059

§ 1675. **Notary's Certificate of Protest.** A notary is a public officer, who takes an oath of office and (usually) is required to give an official bond. It follows that his statement made under some specific official duty is admissible in evidence without calling him; and his is the sole instance, universally accepted at common law, in which a duty to furnish a certificate is regarded as sufficiently implied from the nature of his office without the aid of an express warrant: [1]

1843, ABINGER, L. C. B., in *Brain* v. *Preece*, 11 M. & W. 773, 775: "A notary is a public officer, and is sworn to do his duty as a notary. . . . [It is not necessary to call him, for] it is like any other case of a public officer who does anything in the course of business."

1861, DIXON, C. J., in *Adams* v. *Wright*, 14 Wis. 413: "The notary's official oath is substituted for the ordinary judicial oath taken in the presence of the Court and jury."

And yet the limitations applied in practice were plainly inconsistent with this theory. At common law it was generally agreed that the notary's protest was admissible to evidence only the *dishonor* (*i. e.* presentment, demand, and refusal to accept or to pay) of a *foreign bill of exchange;* it was therefore not receivable for an inland bill,[2] nor for any note,[3] nor for the fact of notice [4] or any other facts except the dishonor. The last two limitations could be explained by declaring that such facts were not within the scope of his duty (although this was a forced distinction); but the first was clearly inconsistent with the theory of official duty, for a domestic notary was equally an officer with the foreign notary, and any recognition of the office would naturally discriminate, if at all, against the latter.[5] Accordingly, it was attempted by some

(certificate of the master or chief surviving officer of a wrecked ship that a seaman claiming wages exerted himself to the utmost to save the ship, etc., admissible); *Conn.* Gen. St. 1918, § 5730 (certificate filed with State secretary by any corporation pursuant to law, to be 'prima facie' evidence, when proved by State secretary's certified copy under seal); *Haw.* Rev. L. 1915, § 1945 (highway assessments; certificate of service of notice "by the person making the same," admissible); *Ind.* Burns' Ann. St. 1914, § 4485 (recorded certificate of election of certain church officers, admissible); § 4980 (same for election in lodges, societies, etc.); *Me.* Rev. St. 1916, c. 51, § 24 (clerk of corporation's recorded certificate of his appointment, admissible in proving service of process); *N. Dak.* Comp. L. 1913, § 6172 (like Cal. Civ. C. § 2059).

The ordinary corporative "certificate of organization" does not belong here; it is a constitutive, not an evidential document.

§ 1675. [1] It is true that the notary now often or usually keeps a register of protest and gives only a certified copy of this, so that the duty to keep a register might be implied, under § 1639, *ante*; but this was not the original practice as to protests; the notary gave an individual certificate, not a copy of his entry, and thus the case was, at least originally, a genuine one of an implied duty to give a certificate.

[2] 1815, Chesmer v. Noyes, 4 Camp. 129 (nor even of a foreign bill presented in England); 1824, Robinson v. Johnson, 1 Mo. 434; 1829, Townsley v. Simrell, 2 Pet. 170, 179; 1844, White v. Englehard, 10 Miss. 38 ("The only competent evidence would have been his deposition taken according to law, or a 'viva-voce' examination in open court"). Each of the United States was here as to another a foreign State; 1829, Townsley v. Simrell, 2 Pet. 170, 180; Buckner v. Finlay, 2 Pet. 586.

[3] 1823, Nicholls v. Webb, 8 Wheat. 326, 331 (Story, J.: "If he had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition or personal examination to support it"); 1819, Welsh v. Barrett, 15 Mass. 380, 384; 1855, Layman v. Brown, 1 Disney, 75,76.

[4] 1850, Rives v. Parmley, 18 Ala. 256, 259; 1854, Schneider v. Cochrane, 9 La. An. 235; 1842, Bank of Rochester v. Gray, 2 Hill N. Y. 227.

[5] The truth seems to be that the common-law Courts merely gave recognition to international commercial usage as far as they were forced to, the notary not being a native common-law officer. For his history, see the citations

judges to explain the law by another theory, namely, that the notary's certificate of protest was not received as an official statement, but as the statement of a private person whose certificates were by commercial usage deemed trustworthy, and that hence, when the maker was not available for testimony on the stand, and then only, — *i. e.* when he was deceased [6] or resided out of the jurisdiction, — his certificate or entry could be received, on the analogy of the Exception for Regular Entries (*ante*, § 1521):

1823, STORY, J., in *Nicholls* v. *Webb*, 8 Wheat. 326, 333, and 1829, *Townsley* v. *Sumrall*, 2 Pet. 170, 179: "Upon what foundation does this doctrine rest, but upon the usage of merchants and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers, but it is here extended to foreign officers acting as the agents and instruments of private parties. . . . Where parties reside in the same kingdom or country, there is not the same necessity for giving verity and credit to the notarial protest; the parties may produce the witnesses upon the stand, or compel them to give their depositions."

1854, SHAW, C. J., in *Porter* v. *Judson*, 1 Gray 175, 176: "[A deceased notary's protest of a promissory note is admissible], not because the protest of a promissory note is necessary and strictly an official act, . . . [but] because it is in the usual course of their duty and business to keep such memoranda."

The traces of this theory are still found in the statutes of some of the older States.[7] It successfully explained why a foreign but not a domestic protest was receivable; but it was in its own turn inconsistent in not applying the doctrine to protests of notes and to the fact of notice, for the common usage and duty of notaries was notoriously both to protest notes and to certify the fact of notice.[8] This inconsistency was perceived by a few Courts; and it seems to have been as a logical development of the theory of usage and regular entries that by those Courts the protest was admitted, as under common-law doctrine, both for notes [9] and for the fact of notice.[10]

Nevertheless, the theory of official duty, with its inconsistent and unpractical limitations, prevailed almost universally. The situation stood in need of statutory reform, both to abolish the untenable limitations and to specify the particulars of the scope of the duty. Accordingly, in almost every jurisdiction, statutes have abolished the three chief restrictions above named, and have in some instances specifically added other facts — such as the

post, § 1676, *ante*, § 1650. In Louisiana, under the civil law, they naturally ignored the limitation as to foreign protests; 1827, Allain v. Whitaker, 5 Mart. N. S. 511, 513.

[6] 1854, Porter v. Judson, 1 Gray 175, 176 (promissory note).

[7] For example, New Jersey, New York, and South Carolina.

[8] 1855, Storer, J., in Layman v. Brown, 1 Disney 75, 76 ("Although the practice prevailed in all the commercial cities of the Union to employ a notary to present dishonored notes, and to notify the indorsers if payment should be refused, it was never decreed that the practice changed the general rule of law"); 1838, Cowen, J., in Halliday v. McDougall, 20 Wend. 81, 85 (states it as the notary's practice to give and certify the notice).

[9] 1895, Nelson v. Bank, 16 C. C. A. 425, 69 Fed. 798 (Minnesota statute applied to admit the certificate of protest of a note; the same result approved as a common-law rule); 1904, Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575 (inland promissory note); 1844, Williams v. Putnam, 14 N. H. 540 ("There can be no sound reason given for establishing or preserving a distribution between them").

[10] 1841, Fitler v. Morris, 6 Whart. 406, 415.

mode of notice and the residence of the parties — to those provable by the certificate.[11]

[11] Of the rulings interpreting these statutes only a few are here given, since so much of substantive law is incidentally involved.

CANADA: *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, §§ 38, 39; *Man.* Rev. St. 1913, c. 65, §§ 29–31; *N. Sc.* Rev. St. 1900, c. 163, §§ 28, 29; *Ont.* Rev. St. 1914, c. 76, §§ 34, 35; *P. E. I.* St. 1889, §§ 35–37; *Sask.* Rev. St. 1920, c. 44, Evidence Act, §§ 22–24; *Yukon:* Consol. Ord. 1914, c. 30, §§ 28, 29.

UNITED STATES: *Federal:* Code 1919, § 3816 (Alaska; notary's protest of bill of exchange or promissory note, to be 'prima facie' evidence); *Alabama:* Code 1907, § 5171 (a certificate evidences presentment, demand, protest, service of notice, mode of notice, and reputed place of residence and post-office of the person notified, for "any instrument governed by the commercial law"); 1834, O'Connell *v.* Walker, 1 Port. 263 (not evidence of the fact of agency of the person notified); 1840, Castles *v.* McMath, 1 Ala. 326, 328 (same); 1851, Phillips *v.* Poindexter, 18 Ala. 579, 582 (protest is evidence of the agency of the person of whom demand is made as against the acceptor, where the bill is foreign); 1877, Bradley *v.* Bank, 60 Ala. 252, 259 (Louisiana notary's certificate of presentment, non-payment, and notice, received; the statute applies equally to foreign notaries); 1890, Gorce *v.* Wadsworth, 91 Ala. 416, 8 So. 712 (same; Texas notary's certificate of acknowledgment of a power of attorney received); § 3992 (record of officer protesting a note or bill, is evidence of "the facts therein stated" touching dishonor and notice, "when verified by the oath of the officer," and a copy is evidence); *Alaska:* Comp. L. 1913, § 384 (like Cal. Pol. C. § 795); *Arizona:* Rev. St. 1913, Civ. C. § 1740 ("all declarations and protests made and acknowledgments taken by notaries public," admissible); § 139 (notary's protest, under his hand and official seal, of bill or note, stating presentment, etc., to be 'prima facie' evidence of "the facts contained therein"); § 140 (notary's certificate, under his hand and official seal, of "official acts done by him as such notary," to be presumptive evidence of the facts); *Arkansas:* Dig. 1919, § 4125 (notary public's protest under official seal, admissible to prove the facts stated); § 4126 (his like certificate of notice of protest, admissible); *California:* Pol. C. 1872, § 795 (notary's protest of a bill or note, stating presentment, dishonor, service and mode of notice, and reputed residence of parties and nearest post-office, admissible); *Connecticut:* Gen. St. 1918, § 5732 (protests of notes and inland bills, protested without the State, admissible to prove the facts stated); *Columbia (Dist.):* Code 1919, § 570 (notary's certificate under seal of office, "drawn from his record, stating the protest and the facts therein recorded," is evidence like "the original protest"); § 1422 (notary's protest; similar to Cal. Pol. C. § 795); *Georgia:* Rev. C. 1910, § 5822 (notarial acts required by law as to bills and notes, provable by notary's certificate under seal); 1847, Walker *v.* Bank, 3 Ga. 486, 493 (the statute impliedly makes the certificate evidence of notice also); *Hawaii:* Rev. L. 1915, §§ 3127, 3129; *Idaho:* Comp. St. 1919, § 212 (notary's protest of a bill or note, admissible to prove dishonor, service and mode of notice, and parties' reputed residence and post-office); *Illinois:* Rev. St. 1874, c. 99, § 14 (notary's record of notice of protest and time and manner of service, admissible); *Indiana:* Burns' Ann. St. 1914, § 476 (certificate under seal of a notary in the U. S., admissible to prove the facts stated); § 9538 (notary's certificate under seal, admissible to prove the facts which he is authorized to certify); *Iowa:* Code 1897, § 4624, Comp. Code, § 7331 (notary's protest admissible to prove dishonor and notice of bill or note); 1859, Sather *v.* Rogers, 10 Ia. 231 (certificate must expressly state the fact of notice); 1860, Thorp *v.* Craig, 10 Ia. 461, 465 (same); 1860, Bradshaw *v.* Hedge, 10 Ia. 402, 405, *semble* (not evidence of residence or address); 1868, State *v.* Reidel, 26 Ia. 430, 436 (not receivable in a criminal case to show lack of funds at a bank drawn on; see *ante*, § 1398); *Kentucky:* Stats. 1915, §§ 479, 3725, 3726 (protest to be evidence of dishonor and notice, for all bills and notes; effect to be given to protests of notaries in other States, on certain conditions); *Louisiana:* R. S. 1870, § 326 (notary's certified copy of protest of facts of demand and notice for bills, notes, and orders for payment of money, admissible); § 325 (notaries' and parish recorders' record of protests and notices; the record attested by two witnesses to be "legal proof of the notices"); *Maine:* Rev. St. 1916, c. 40, § 28 (notary's certificate under official seal of protest of "foreign or inland bill of exchange or promissory note or order," admissible to show "all facts therein contained"); *Maryland:* Ann. Code 1914, Art. 13, § 6 (notary's protest of any bill or note, admissible to show non-acceptance, non-payment, presentment, and time and manner of notice); 1843, Whiteford *v.* Burckmyer, 1 Gill 127, 149 (at common law, it was evidence of presentment and of protest; by St. 1837, c. 253, additionally, of notice sent or delivered; the whole to apply to inland and foreign bills); *Michigan:* Comp. L. 1915, § 2497 (notary's certificate under official seal of "official acts done by him," admissible, but not to prove notice of non-acceptance or non-payment, if denied by affidavit); 1898, Union N. B. *v.* Milling Co., 117 Mich. 535, 76 N. W. 1

Certain other principles concerning notarial certificates are to be discriminated. (1) A notary's certificate may evidence the *execution of a deed* or the

(statute applied); 1901, Sexton *v.* Perrigo, 126 Mich. 542, 85 N. W. 1096 (under C. L. § 2635, a notary's certificate of protest was held not admissible after his death, where the fact of notice is denied by affidavit); *Minnesota:* Gen. St. 1913, §§ 5718, 5719 (record or instrument of protest of a notary of this State or a U. S. State or Territory, for a bill or note, admissible to prove the facts certified); *Mississippi:* Code 1906, § 1979, Hem. § 1639 (the "record of the officer protesting any" note or bill, and verified by his oath, to be evidence of facts therein stated touching dishonor, giving of notice, and post-office address); *Missouri:* Rev. St. 1919, § 5385 (notary's certificate of protest of a bill or note, admissible to prove dishonor, notice thereof, "and the manner of each of said acts," when verified by his affidavit and filed fifteen days before trial); 1840, Moore *v.* Bank, 6 Mo. 379 (protest of an inland bill, received, under a statute providing "like remedy" as for foreign bills); 1855, Williams *v.* Smith, 21 Mo. 419 (protest of a non-negotiable note, excluded); 1880, Faulkner *v.* Faulkner, 73 Mo. 327 (certificate not receivable under a statute to prove notice, unless verified by affidavit); *Montana:* Rev. C. 1921, § 391 (notary's protest of a bill or note is evidence of presentment, dishonor, service and mode of notice, and parties' reputed residence and nearest post-office); § 393 (county clerk's certified copy admissible for records of a former notary deposited with him); *Nebraska:* Rev. St. 1922, § 4818 (notary's certificate of demand, protest, and notice of any bill, note, or other obligation, admissible); § 8847 (notary's protest, admissible to prove dishonor and notice of a bill or note); *Nevada:* Rev. L. 1912, § 2755 (notary's protest of a bill or note, admissible to prove dishonor, service and mode of notice, and reputed residence and nearest post-office of parties notified); § 2754 ("any certificate or instrument, either printed or written, purporting to be the official act of a notary public under his seal or signature," admissible "as 'prima facie' evidence of the official character of such instrument and of the truth of the facts therein set forth"); *New Hampshire:* Pub. St. 1891, c. 18, § 3 (protest of a bill or note, to be evidence of the facts stated and of notice); *New Jersey:* Comp. St. 1910, Evidence §§ 21, 22 (notary's certificate, admissible to prove the facts stated as to presentment, dishonor, and notice; unless the opponent has notice of intention to dispute the facts); Negotiable Instruments § 207 (record of protest, or certified copy, by a notary or justice deceased or removed out of the State or not to be found after diligent inquiry, admissible to show the facts of demand and notice of bill or note); *New Mexico:* Annot. St. 1915, §§ 3935, 3937 (notary's record of protest for dishonor and of notice, for "any bill of exchange, promissory note, or other written instrument," and of time and manner of service, and of all addressees' names, also of the description and amount of the instrument admissible); *New York:* C. P. A. 1920, § 368 (notary's certificate under seal, of presentment, protest, or service of notice, of a bill or note, admissible; unless, perhaps the opponent by affidavit denies receipt of notice; in case of his death or insanity, or absence or removal preventing testimony in court, the original protest and memorandum or register is admissible); § 369 (proof of presentment, etc. of bill or note payable in another State or county may be made "in any manner authorized by the laws" thereof); *North Dakota:* Comp. L. 1913, § 842 (notary's record of protest, to be evidence of notice and time and manner of service); *Ohio:* Gen. Code Ann. 1921, § 128 (protest by notary, of this State or any U. S. State or territory of dishonor of bill or note, to be 'prima facie' evidence of "the facts therein certified"); *Oregon:* Laws 1920, § 3180 (notary public's "record of all notices" and time and manner of service, etc., to be "competent evidence"); *Pennsylvania:* St. 1815, Jan. 2, § 1, Dig. 1920, § 10350, Evidence (official acts, protests, and attestations of all domestic notaries public, admissible "in evidence of the facts therein certified"); St. 1876, Apr. 27, § 1, Dig. 1920, § 10355, Evidence (official acts and exemplifications of foreign notaries, made according to law of the country, are 'prima facie' evidence of the matters therein set forth; the U. S. consul to verify the document as specified); *Philippine Islands:* Admin. C. 1917, § 241 (notary public is empowered to "receive the proof or acknowledgment of all writings relating to commerce or navigation," enumerating them, and to "certify the truth thereof under his seal of office concerning all matters done by him by virtue of his office"); *South Carolina:* St. 1822, C. C. P. 1922, § 703, C. C. § 3865 (notary's protest of an inland bill or note, admissible to prove notice, if he is deceased or lives out of the county); 1826, Dobson *v.* Laval, 4 McC. 57 (the statute making the protest evidence of notice was intended to make it evidence of demand also); *South Dakota:* Rev. Code 1919, § 524 (notary's record of notice of protest of any written instrument, admissible); *Tennessee:* Shannon's Code 1916, §§ 3203–3206 (notary's "attestations, protestations, and other instruments of publication" under seal, admissible); *Texas:* Rev. Civ. St. 1911, § 591 (notary public's protest of bill or note, provable by certified copy of notarial record under seal); § 3697 Rev. Civ. 1895, § 2309 ("all declarations and protests made and acknowledgments taken by

making of an affidavit (*post*, § 1676); his functions in that respect are not here involved. (2) When a notary enters his protests originally in the form of a register, and furnishes the party with a *copy of the register* to serve as a certificate of protest (as is the practice in many jurisdictions), the general principle as to certified copies of public documents becomes applicable (*post*, § 1680). (3) An officer certifying a copy under this principle must set out the *literal words*, *not* merely a summary of *their effect;* this principle may be applied to notaries' copies, or statutory exceptions may be recognized (*post*, § 1678). (4) The *genuineness* of a notary's certificate is sufficiently evidenced by an impression purporting to be that of *his seal of office;* this doctrine involves the principle of Authentication (*post*, § 2165). (5) Whether the certificates must be founded on the notary's *personal knowledge* has been already considered (*ante*, § 1635).

§ 1675*a*. **Certificate of Service in Army, Navy, or Civil Office; Certificate of Death in Service.** A certificate of *service* in army, navy, or civil office, made pursuant to duty imposed by custom or statute is admissible, on principle. In the first place, it is virtually no more than a certified copy, in summary, of the regular record of service kept in the department; the record would be admissible on the principle of § 1639, *ante*, and the certified copy on that of § 1677, *post*. In the next place, it is made for the specific purpose of being exhibited and used; and to shut off its use in courts is to defeat its purpose in part. In the third place, to call for anything else in lieu of it is impracticable; for all the officers who shared in making the record cannot possibly be had as witnesses; and the chief of a Federal records-bureau is virtually inaccessible for 'viva voce' testimony; moreover, he personally knows nothing beyond the record. To exclude the certificate is practically to exclude all evidence on the subject.

In view of the fact that the United States Army and Navy contained more than four million persons during the Great War, it is essential that the admissibility of service-certificates, under whatever name, should be recognized. A few statutes have expressly so provided.[1] The Courts, however, have some-

notaries public," admissible); *Utah:* Comp. L. 1917, § 4254 (notary's record of notice of protest admissible "to prove such notices"); *Vermont:* Gen. L. 1917, § 2851 (notary's certificate is evidence of protest, non-payment, and notice, for notes and inland bills, as in the case of foreign bills); 1898, First Nat'l Bank *v.* Briggs, 70 Vt. 599, 41 Atl. 586 (a foreign protest is not evidence of notice); *Virginia:* Code 1919, § 5680 (a notary's protest is evidence of the facts stated as to presentment, demand, dishonor, and notice, both of inland and foreign bills and also of certain notes payable in this State, whether protested in or out of the State); *Washington:* R. & B. Code 1909, § 8300 (notary's record of notice of protest, with the time and manner thereof, and the names of parties notified, admissible to prove the facts stated); *West Virginia:* Code 1914, c. 51, § 7 (notary's protest of bill or note "shall be 'prima facie' evidence of what is stated therein . . . in relation to presentment, dishonor, and notice thereof"); *Wyoming:* Comp. St. 1920, § 4508 (notary's certificate under official seal, to be evidence of "the facts contained in such certificate").

§ 1675*a*. [1] ENGLAND: St. 1912, 2–3 Geo. V. c. 5, § 6 (certificate of deserting soldier's surrender, admissible).

CANADA: *Dominion:* Order-in-Council, Aug. 5, 1916, superseding that of Jan. 6, 1916 (desertion; "written statement" by commanding officer of military district that "the accused is absent from the corps or unit to which he belongs" is 'prima facie' evidence of absence without leave); 1916, R. *v.* Poulin, 31 D. L. R. 14, Ont. (order applied).

UNITED STATES: *Federal:* St. 1918, Mar. 8,

times shown a narrow common-law attitude which not only affronts common sense, but must cause deep resentment in the minds of all who value their records of military service.[2] The civilian mind here needs some liberalizing.

A certificate of *death* in service, made by the proper officer, ought equally to be admissible; for the record on which it is based is admissible, by copy, on common-law principles (*ante*, § 1641). But it has usually been left to statutes to make express provision.[3]

§ 691 (Soldiers and Sailors Civil Relief Act: "in any proceeding under this Act a certificate signed by The Adjutant-General of the Army as to persons in the Army . . . shall when produced be 'prima facie' evidence as to any of the following facts stated in such certificate: That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service. It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be 'prima facie' evidence of its contents and of the authority of the signer to issue the same"). *Manual for Courts-Martial*, ed. 1921, § 270 ("The certificate of discharge may be used by the defense either before or after the findings, for proof of good character"; this Presidential regulation has the force of law for courts-martial); *Ariz.* St. 1918, Sp. Sess. June 20, § 14 (civil rights of persons in military service; certificate of facts of military service by Adjutant-General or other named officials, admissible); *Ark.* St. 1919, Mar. 28, No. 493, Dig. 1919, § 6157 (death in foreign country in U. S. military service; in action for insurance U. S. adjutant-general's certificate sufficient); *La.* St. 1918, July 10, No. 131, § 16 (soldiers and sailors civil relief; certificate of military service by adjutant-general, etc., admissible, as in U. S. St. 1918, Mar. 8); *Me.* R. S. 1916, c. 87, § 134 (cited *post*, § 1678); c. 84, § 7 (cited *post*, §1681); *Mich.* Comp. L. 1915, § 1078 (soldier's discharge, recorded with county clerk, provable by certified copy "in all cases where such evidence may be required"); *N. J.* St. 1918, c. 253, Mar. 4, § 15 (like U. S. St. 1918, Mar. 8, § 601); *S. D.* St. 1921, c. 352, amending Rev. C. 1919, § 569 (certified copy of recorded certificate of discharge of soldiers, admissible, etc.); *Wis.* Stats. 1919, § 4170 (cited *post*, § 1678).

[2] One reason for some of these rulings may be the judicial failure to recognize good *moral character* in service as relevant to disprove the doing of a bad act (*ante*, § 59); *California:* 1887, People *v.* Eckman, 72 Cal. 582, 14 Pac. 359 (burglary; certificate of discharge of defendant from the U. S. army for disability, with good character, excluded, as a "written declaration made out of court"; no authority cited); *Georgia:* 1904, Taylor *v.* State, 120 Ga. 857, 48 S. E. 361 (homicide; certificate of discharge of U. S. army officer, stating good character, excluded; no authority cited); *Massachusetts:* 1874, Hanson *v.* South Scituate, 115 Mass. 340 (certificate of discharge from the army, admitted); *Minnesota:* 1921, State *v.* Dolliver, — Minn. —, 184 N. W. 845 (carnal knowledge of a female under age; certificate of honorable discharge from the U. S. Army, 6 months before, stating "that his character was excellent and that his services were honest and faithful," admitted on the trial, but said to be doubtful on appeal); *Missouri:* 1922, State *v.* Taylor, — Mo. —, 238 S. W. 489 (robbery; honorable discharge from the U. S. Army, not admitted to evidence accused's good character, because "not in the nature of an official document"; another example of the gross unfairness done by judicial ignorance of military traditions and regulations); *Montana:* 1899, State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026 (certificate of discharge from the army, not admissible to show the facts for which discharge was given); *New Mexico:* 1921, Keyes *v.* Keyes, — N. M. —, 199 Pac. 361 (crim. con.; to evidence plaintiff's good character, a service certificate by the Governor of the Panama Canal, Geo. W. Goethals, was excluded; the certificate read: "Voluntarily resigned, effective Mar. 10, 1915; during this period of employment his general workmanship was excellent and general conduct very good"; this is stigmatized by the Court as an "ex parte certificate"; the opinion shows no acquaintance with the law of official statements as exceptions to the hearsay rule); *Washington:* 1913, State *v.* Shaw, 75 Wash. 326, 135 Pac. 20 (murder; to discredit the accused as a witness, a military certificate of discharge for bad conduct, signed by the commanding officer, was excluded).

Compare the statutes and cases cited *ante*, § 1641 (army and navy military registers). A few other sorts of certificates from military officers are noted *ante*, § 1674.

[3] CANADA: *Manitoba:* St. 1919, c. 32, inserting § 53 A in the Evidence Act (certificate

§ 1676. **Certificate of Execution of Deed (unrecorded).** Not only did the common law not recognize any officer having power to certify to the *execution of an unrecorded deed* or other instrument of grant or contract; but its peoples seem also to have felt a repugnance to any system of authenticating deeds in that manner; so that a long time elapsed, even after the institution of the registry system, before such an innovation was attempted. The notary, that prominent figure in the legal profession on the Continent, who draws up the "act" for the parties and proves its execution by his certificate, is wanting in our legal history.[1] First appearing, with the introduction of written documents, in the countries of southern Europe, he seems never to have found favor among Germanic peoples, except as a character imported with the Roman and Italian law.[2]

In this country an occasional early statute[3] made provision for recognizing the certificates of foreign notaries or magistrates. The habits of the civil law of Europe had been adopted from the beginning into Louisiana practice,[4] and had also become familiar to the profession in Missouri, Texas, and California, where the French and Spanish archives of the original governments were a part of the legal sources. Moreover, in Pennsylvania, the practice was already sanctioned before the 1800s by a venturesome piece of judicial legislation.[5] But these instances seem to have remained purely local.[6] The doctrine of the common law, refusing to recognize such certificates, prevailed in the general understanding and practice.[7]

of the adjutant-general, etc., stating that a person was a member of the Canadian Expeditionary Force and "that he has been officially reported as having died, been killed in action, died of wounds, or presumed to be dead, shall be sufficient proof of the death of such person for any purpose"); *New Brunswick:* St. 1919, c. 43 (military certificate of death; similar to Ont. St. 1919, c. 30, § 2); *Ontario:* St. 1921, c. 40, Soldiers' and Sailors' Proof of Death Amendment Act, § 2 (revising St. 1919, c. 30, § 2; a certificate by the adjutant-general or other specified officer stating that a person was a member of the Canadian Expeditionary Force, etc., and "that he has been officially reported as having died, been killed in action, died of wounds or presumed to be dead, shall be sufficient proof of death").

UNITED STATES: *Fed.* St. 1918, Mar. 8, § 601, Soldiers' and Sailors' Civil Relief Act; and the State statutes are cited *supra*, n. 1.

The following ruling rests on contract (*ante*, § 7*a*): 1921, Woodmen of the World *v.* Maynor, 206 Ala. 176, 89 So. 750 (U. S. adjutant-general's certificate of date and cause of death of insured while in military service, admitted, under a by-law of the insurer requiring that proof of death be made by such a record).

§ 1676. [1] In de Balzac's novels of "Two Brothers" and "Cousin Pons" may be seen depicted the ways of the French notary.

[2] Bresslau, Handbuch der Urkundenlehre, 1889, I, 493-499, 549-551; Brissaud, History of French Public Law, 1915, § 430, History of French Private Law, 1912, § 502 (Continental Legal History Series, vols. III, IX); Giry, Manuel de diplomatique, 1894, b. VI, c. 1, p. 824.

[3] As in Mississippi, South Carolina, and Virginia; possibly also in Alabama.

[4] An account of "Louisiana: The Story of Its Jurisprudence," is given by the present writer in 22 American Law Review, 890.

[5] Note 9, *infra*.

[6] On the principle of § 1633, par. 2, *ante*, the Courts might at least have recognized the authority of a foreign notary in a country under the Continental system where he had the function of taking proof of deeds; and this they seem usually to have done, as indicated in the rulings *infra*, note 11, in England, Louisiana, Mississippi, New Hampshire, and New York. But this was made easier for them by the fact that the original, in the Continental system, was the "public act" kept by the notary in his office as his public record and that what he gave to the parties was in theory a copy of this; so that this latter could be received as a certified copy, under the principle of § 1680, *post*.

[7] Possibly a Dutch tradition survived; but it is a little singular that nothing appears of the Dutch civil-law practice in New Jersey or New York. In Mr. Douglas Campbell's

The codification reforms in New York, between 1830 and 1840, under the leadership of Mr. David Dudley Field, made apparently the first important attempt to introduce the broad functions of the Continental notary into our jurisprudence. The draft of those laws served as a model for the early Codes of Dakota, California, and Iowa. The lack of appurtenant traditions, and of a true notarial profession, and the loose and informal methods thus likely to prevail, were unfavorable to a wide recognition of the notary's functions and a thorough trust in his services. Yet the new system was carried by these Codes into a number of other jurisdictions,[8] and finally found a legal recognition even in the home of the great Code champion himself. Still, however, the marks of racial tradition and cautious hesitation are easily to be traced; for the method is in several States adopted to a limited extent only. Unrecorded *deeds* of realty, with certificate of execution by an authorized officer, have been made admissible, but *wills* and *commercial paper* are often expressly excepted from the principle.[9]

"The Puritan in England, Holland, and America," this interesting history of Dutch influence is traced, but his claims are probably too large; Judge Daly has examined the Dutch traces in New York in 1 E. D. Smith, Introduction.

[8] No attempt has here been made to examine the detailed statutory development in each State. But it seems clear that the main source of the spread of the system was these Codes; they served to make its history.

[9] In the following list are included both common-law rulings refusing to receive the mere certificate of a notary or a magistrate, and also statutes and interpretative rulings receiving the certificate; the rulings in note 2. § 1676 *a*, *post*, and also those in § 1651, *ante* (record as evidence of a deed's execution), should be compared.

ENGLAND: 1725, Walrond *v.* Van Moses, 8 Mod. 322 ("copy of an agreement registered in Holland, and attested by a public notary there," admitted on the facts; see *supra*, note 8); 1822, Ex parte Church, 1 Dowl. & R. 324 (U. S. notarial certificate of execution of a power of attorney, excluded; "probably in a court of civil law the notarial certificate would be sufficient"; see *supra*, note 6).

CANADA: *British Columbia:* Rev. St. 1911, c. 127, § 82 (every instrument duly proved and certified under the registry act shall be admitted "without further proof of execution"); *Nova Scotia:* Rev. St. 1900, c. 163, § 26 (a deed executed out of the Province, as well in foreign countries as in the British dominions, is receivable if indorsed with "such a certificate of its execution as is required by the Registry Act for the registration of such deed"); *Yukon:* Consol. Ord. 1914, c. 30, § 27 (like N. Sc. Rev. St. 1900, c. 163, § 26, inserting "bill of sale or other document").

UNITED STATES: *Federal:* St. 1897, Mar. 3, St. 1922, Feb. 18, § 6, Code 1919, § 6141 (amending Rev. St. § 4898; assignment of patent for industrial invention; certificate of acknowledgment by officers named, to be 'prima facie' evidence of execution); 1807, Mulatto Lucy *v.* Slade, 1 Cr. C. C. 422 (justice of the peace's certificate of acknowledgment, not admissible against a third person); 1815, Peabody *v.* Denton, 2 Gallis. 351 (notarial copy of a note, admissible to show contents, but not to show genuineness); St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186, Code § 683 (when a U. S. land-office register is subpœnaed to produce any original application for entry, etc., in any U. S. court or State court of record, the commissioner of the general office shall transmit it to him with a certificate of authenticity under official seal, and it shall then be received in evidence); St. 1909, Mar. 4, c. 320, No. 349 (35 Stat. L. p. 1075), § 43, Code § 6249 (assignment of copyright executed in foreign country; certificate of acknowledgment under official seal of U. S. consular officer or secretary of legation, admissible);

Alabama: Code 1907, §§ 5170, 5173 (notaries may take and certify acknowledgments of conveyances, oaths, affidavits); 1839, St. John *v.* Redmond, 9 Port. 428, 433 (notary's certified acknowledgment of a power of attorney to accept a bill, received); 1841, Hill *v.* Norris, 2 Ala. 640 (certificate of a release of debt, not admissible at common law or under the then statute);

Alaska: Comp. L. 1913, § 520 (like Or. Laws 1920, § 9870);

Arizona: Rev. St. 1913, Civ. C. § 1873 ("Every instrument" permitted or required to be recorded with county recorder, and lawfully acknowledged or proved, "may be read in evidence without further proof"); § 1746 ("Every written instrument," except notes, bills, and wills, may be acknowledged as by law, and the certificate of the proper officer

There is no reason why the system should not with us be as extensive in scope and practice as on the Continent and in the rest of the

entitles it "to be read in evidence . . . without other proof of execution");
Arkansas: 1839, Wilson *v.* Royston, 2 Ark. 315, 327 (deed acknowledged before a notary in another State, not received); 1881, Wilson *v.* Spring, 38 Ark. 181, 190 (due acknowledgment, without recording, insufficient); 1881, Watson *v.* Billings, 38 Ark. 278, 282 (same); 1882, Dorr *v.* School District, 40 Ark. 237, 242 (same); 1884, Grisler *v.* McKennon, 44 Ark. 517, 521 (same);
California: C. C. P. 1872, § 1948 ("Every private writing, except last wills and testaments, may be acknowledged or proved and certified" like conveyances of realty, and the certificate is evidence of execution); § 1951 (quoted *ante*, § 1651); Civ. C. 1872, § 1189 (county or district court's certificate to a certificate of acknowledgment of any instrument is 'prima facie' evidence of facts stated); Pol. C. 1872, § 3341 (city fire companies; secretary's certificate of exemption or active membership, admissible); 1918, Thomas *v.* Fursman, 177 Cal. 550, 171 Pac. 301 (Code § 1948 applied to an assignment of a cause of action);
Colorado: Comp. L. 1921, § 4901 (a duly acknowledged or proved instrument in writing "may be read in evidence without in the first instance additional proof of the execution thereof"); § 4891 (enumeration of officers in foreign countries whose certificates under seal of acknowledgment of a deed will suffice); § 4907 (instruments executed out of the State; cited more fully *ante*, § 1651); § 5388 (certain documents in the administration of estates, provable by certificate of acknowledgment; — though the awkward construction and wasteful verbiage of this simple measure represents a task of disentanglement for the reader which none but a Colorado practitioner should be forced to suffer); 1894, Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242 (statute applied to a married woman's deed); 1897, Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535 (deed acknowledged in Canada, conveying land in Colorado, no statute then providing for such certificates, excluded);
Connecticut: 1901, Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758 (genuineness of a certified copy, by a foreign official corporation-registrar, of a filed contract and schedules, allowed to be proved by a notary's certificate, attested by the U. S. deputy consul-general; good opinion by Baldwin, J.);
Delaware: Rev. St. 1915, § 3217 (mere certified acknowledgment or proof of deed is not to make it evidence without being recorded);
Florida: 1911, Malsby *v.* Gamble, 61 Fla. 310, 54 So. 766 (certificate of deed's acknowledgment, not evidence of execution; Const. Art. XI, § 21, quoted *post*, § 1676 *a*, n. 2, applies only to admit recorded deeds upon the certificate of acknowledgment);
Georgia: 1903, Durrence *v.* Northern Nat'l Bank, 117 Ga. 385, 43 S. E. 726 (under Code 1895, § 3628, quoted *ante*, § 1651, a deed filed for recording, but not yet recorded, is admissible without further evidence); 1904, Long *v.* Powell, 120 Ga. 621, 48 S. E. 184 (U. S. consul's certificate of acknowledgment, admissible under Code § 3621);
Hawaii: Rev. L. 1915, § 3116 ("every conveyance or other instrument, stamped and acknowledged or proved, and certified in the manner hereinbefore prescribed," may be "read in evidence without further proof");
Idaho: Comp. St. 1919, § 7968 (like Cal. C. C. P. § 1948); § 7969 (like Cal. C. C. P. § 1951, omitting "the original record");
Illinois: Rev. St. 1874, c. 30, § 20, as amended by St. 1903 (quoted *ante*, § 1651); c. 30, § 35 (an instrument affecting land, duly acknowledged or proved, "whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof"); c. 103, § 1 (certificate of acknowledgment of an official bond shall be 'prima facie' evidence of signing, sealing, and acknowledgment, and shall have the same effect as evidence as for a deed of realty); 1902, Ramsay's Estate, 197 Ill. 572, 64 N. E. 549 (R. S. c. 103, § 1, applied);
Indiana: 1841, Sheets *v.* Dufour, 5 Blackf. 549, 551 (certificate of acknowledgment by a justice insufficient);
Iowa: Code 1897, § 4621, Comp. Code § 7328 ("Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof"); § 4629, Comp. Code § 7336 (so also for a written instrument affecting realty or a minor's adoption, if acknowledged or proved and certified "as required");
Kansas: G. S. 1915, § 2076, G. S. 1868, c. 22, § 26 ("Every instrument in writing, conveying or affecting real estate, which shall be acknowledged or proved and certified" is admissible "without further proof");
Louisiana: in this State not only is there a cumbersome mass of statutes (quoted *ante*, § 1651), but the application of the civil-law theory involves local peculiarities; these will be found explained in the following cases: 1816, Las Caygas *v.* Larionda, 4 Mart. N. S. La. 283 (Spanish notary public's certificate of execution of power of attorney, admitted to have "the same credit in our courts of judicature which it would have in those of Spain"; see *supra*, note 6); 1830, Walden *v.* Grant, 8 Mart. 565, 568; 1832, Delogny *v.* Smith, 3 La. 418, 419; 1887, Leibe *v.* Hebersmith, 39 La. An. 1050, 3 So. 283; 1905,

world, provided only the administrative machinery is duly furnished and safeguarded.

Werner *v.* Marx, 113 La. 1002, 37 So. 905 (power of attorney from Germany, held duly authenticated by a U. S. consul's certificate to the signature and seal of the German police officer taking the acknowledgment, under Rev. St. 1876, § 1436);
Maryland: Ann. Code 1914, Art. 35, §§ 44, 45 (an instrument executed in another of the U. S. or in a foreign country; proof of execution allowable by certificate of a commissioner, judge, etc., of the proof by witness, etc., made before him, and authenticated by official seal, if a commissioner or notary, or otherwise by certificate under seal of Governor, etc.);
Michigan: Comp. L. 1915, § 12508 ("conveyances and other instruments authorized by law to be recorded," and duly acknowledged or proved, "may be read in evidence . . . without further proof thereof"); § 12529 ("every written instrument," except notes, bills, and wills, may be proved by certificate of execution made as for conveyance of realty);
Minnesota: Gen. St. 1913, § 8425 ("every written instrument," except bills and notes and wills, may be proved or acknowledged like a conveyance of realty, and then "the certificate of the proper officer endorsed thereon" entitles it to be read); § 5741 (certificate of acknowledgment of instrument by a corporation, to be evidence "that the execution and delivery thereof was authorized by law"); 1891, Lydiard *v.* Chute, 45 Minn. 277, 278, 280, 47 N. W. 967 (deed acknowledged abroad but not under statute, excluded); 1893, Romer *v.* Conter, 53 Minn. 171, 173, 54 N. W. 1052 (admitting a bond proved under statute by certificate of acknowledgment); 1907, Tucker *v.* Helgren, 102 Minn. 382, 113 N. W. 912;
Mississippi: Code 1906, § 1954, Hem. § 1614 (the original of all instruments "acknowledged or proved according to the laws of the [foreign] country where they are executed, so as to be entitled to be recorded there, shall be evidence without further proof of the execution thereof"); Code § 1955, Hem. § 1615 (same for a U. S. State or Territory or District); Code § 1956, Hem. § 1616 (same for an instrument in this State, when duly certified, and "whether the same shall have been recorded or not, or disputed by the opposite party or not"); 1846, Sessions *v.* Reynolds, 7 Sm. & M. 130, 154 (certificate of deed from Liverpool, sufficient on the facts); 1849, Routh *v.* Bank, 12 Sm. & M. 161, 185 (notarial certified copy of a document 'authorized by Louisiana law to be kept by him, admitted under the Federal statute; see *supra*, note 8); 1854, Hardin *v.* Ho-yo-po-nubby, 27 Miss. 567, 580 (certificate of a clerk of the D. C. Court to a power of attorney, excluded); 1859, Morris *v.* Henderson, 37 Miss. 492, 501 (undecided, as to general principle); 1860, Lock *v.* Mayne, 39 Miss. 157, 164 (the existing statute makes an acknowledged deed admissible without other proof of execution only when it has properly been recorded; see the later St. § 1956, *supra*);
Missouri: Rev. St. 1919, §§ 2207, 2210 ("every instrument in writing, conveying or affecting real estate," duly acknowledged or proved and certified, is admissible "without further proof" except as provided); § 5386 (letter of attorney, other than for conveyance of real estate, if acknowledged or proved as for deed of real estate, may be read in evidence "without further proof of the execution");
Montana: Rev. C. 1921, § 10596 (like Col. C. C. P. § 1948); § 6933 ("all deeds to real property, heretofore executed in this State or any State or Territory of the U. S., which shall have been signed by the grantors in due form, "shall convey title," "and such deeds so executed shall be received in evidence"; a singular provision);
Nebraska: Rev. St. 1922, § 8856 ("Every private writing," except wills, "after being acknowledged or proved and certified in the manner prescribed for proof of acknowledgment of conveyances of real property, may be read in evidence without further proof"); § 5609 (same for deeds); § 5664 (certificates of acknowledgment, etc., by duly authorized U. S. Army officers are assimilated to notarial acts); 1898, Linton *v.* Cooper, 53 Nebr. 400, 73 N. W. 731 (deed acknowledged, receivable without other proof of execution and delivery; here acknowledged before a consular agent); 1901, Brown *v.* Collins, — Nebr. —, 96 N. W. 173 (statute applied to a mortgage); 1903, McKenzie *v.* Beaumont, 70 Nebr. 179, 97 N. W. 225 (statute applied to a mortgage);
Nevada: Rev. L. 1912, § 1044 ("every conveyance, or other instrument conveying or affecting real estate," admissible, if duly acknowledged or proved and certified, "without further proof");
New Hampshire: 1852, Pickard *v.* Bailey, 26 N. H. 152, 169 (notary's copy of his register, admitted under the law of Canada; because the originals are retained by the notary; see *supra*, note 6);
New Jersey: Comp. St. 1910, Conveyances, §§ 20 *b*, 20 *d*, 22 (deed bearing a due official certificate of proof or acknowledgment before a deed commissioner, etc., admissible as if "then and there produced and proved"); § 23 (same, for deeds proved or acknowledged before specified officials elsewhere in the U. S.); §§ 64, 68, 117, 123–133 (validating certain acknowledgments);
New York: Cons. L. 1909, § 108 (commissioner's or notary's certificate of acknowledgment or proof of a written instrument, sufficient to admit it in evidence, except for bills,

§ 1676*a*. **Certificate of Execution of Recorded Deeds.** Where a registry system is provided, and the registrar is authorized to record a deed as executed

notes, or wills); Cons. L. 1909, Real Property, §§ 310, 311 (authentication of a certificate of acknowledgment); C. P. A. 1920, § 386 ("any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for the taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property"); ib. § 392 (conveyance of real property; quoted *ante*, § 1651, n. 5); St. 1913, c. 208, p. 369 (amending Consol. L. 1909, Executive, § 105, relating to notary's powers to certify the execution of deeds for use within the county); St. 1913, c. 209, p. 371 (amending Consol. L. 1909, Real Property, § 311, as to certificates of execution of deeds without the State); 1816, Mauri *v.* Heffernan, 13 John. 58, 73 (notarial certificate of the execution and contents of an obligation entered into in Spanish Venezuela, received; see note 7, *supra*);

North Dakota: Comp. L. 1913, § 7916 ("Every instrument conveying or affecting real property, acknowledged or provided and certified as provided in the Civil Code," admissible); § 5597 ("all instruments entitled to record . . shall be admissible in evidence . . and may be read in evidence without further proof thereof");

Ohio: 1827, Allen *v.* Parish, 3 Oh. 107, 110, 124 (notarial copy of a deed, by a deceased notary in another State, admitted after evidence of existence of the deed; see *supra*, note 6);

Oklahoma: Comp. St. 1921, § 5267 (instruments affecting real estate and duly acknowledged are receivable "without further proof of their execution");

Oregon: Laws 1920, § 9870 (a conveyance acknowledged or proved and certified as required for record is admissible "without further proof thereof"); § 9926, as amended by St. 1921, Feb. 23, c. 230 (deeds heretofore executed by signature only, with acknowledgment, etc. or defectively acknowledged, to be admissible); 1897, Laurent *v.* Lanning, 32 Or. 11, 51 Pac. 80 (notary's certificate of a deed-acknowledgment, admitted);

Pennsylvania: St. 1705, Dig. § 10329 (bond, specialties, powers, etc., proved before proper officer and certified "under the common or public seal of the cities, etc." where proved; "such certification shall be sufficient evidence to the Court, and jury for the proof thereof"); St. 1840, Apr. 3, § 1, Dig. 1920, § 8685, Deeds (deed acknowledged, within or without the State, and certified pursuant to law of this State for recording; such certificate will be "'prima facie' evidence of such execution and acknowledgment on proof," without requiring proof of officer's seal); 1782, McDill *v.* McDill, 1 Dall. 63 (a deed lawfully proved by one witness before a justice according to St. 1715, but not recorded, admitted; see this statute *ante*, § 1651); 1784, Hamilton *v.* Galloway, 1 Dall. 93 *d* (same; "the recording does not contribute to the proof of the deed, which is established by the oath before the justice; the recording only gives the deed a special operation by the express provisions of the Act of Assembly"); 1833, Duncan *v.* Duncan, 1 Watts 327 (same, though the statute did not expressly provide for this); 1821, Foster *v.* Shaw, 7 S. & R. 156, 163 (same for a deed so probated abroad);

Philippine Islands: C. C. P. 1901, §§ 1, 2 (mode of authenticating documents from other parts of U. S. and from other countries; rules applicable to "an instrument or document"); § 331 (like Cal. C. C. P. § 1951); 1917, Antillon *v.* Barcelon, 37 P. I. 148;

Porto Rico: Rev. St. & C. 1911, § 1462 (like Cal. C. C. P. § 1951);

South Carolina: St. 1731, Civ. C. 1922, §§ 716, 717 (deeds, bonds, other specialties, letters of attorney, etc., attested to have been proved before a Mayor, Governor, or notary of one of the United States or a foreign State, receivable "as if the witnesses to such deeds were produced and proved the same 'viva voce'"; but not to show a claim against a resident of this State, unless in "such foreign country" similar treatment is given to instruments from this State);

Utah: Comp. L. 1917, § 7114 (like Cal. C. C. P. § 1948);

Virginia: Code 1919, § 6207 (declaring admissible a deed or power of attorney executed out of the State and certified as duly proved so as to be eligible for record; or a policy of insurance, or charter-party, attested by a notary under seal of office, certified by a court of record or mayor or under the seal of State of the Kingdom, province, etc.); 1823, Kidd *v.* Alexander, 1 Rand, 456, 457 (execution of a release of a claim under seal; notarial certificate excluded); 1825, Sexton *v.* Pickering, 3 Va. 468, 470 (certificate of execution of a deed by a 'feme covert' or by a husband; when made by a magistrate of a domestic State, receivable for the former case by St. 1814, but for the latter not until St. 1819);

Washington: 1894, Gardner *v.* Port Blakely M. Co., 8 Wash. 1, 5, 35 Pac. 402 (original domestic deed, improperly recorded, provable by certificate of acknowledgment); 1913, Koloff *v.* Chicago M. & P. S. R. Co., 71 Wash. 543, 129 Pac. 398 (Bulgarian power of attorney to sue; certificate of acknowledgment, not admitted);

West Virginia: Code 1914, c. 130, § 21 (a deed or power of attorney executed out of the State and certified so as to entitle to record here, and a policy of insurance or charter-party,

upon information furnished him in the shape of an acknowledgment or other appropriate proof, the register-entry (or a certified copy) is an authorized official statement of the deed's execution, and is to-day everywhere in the United States admitted for that purpose (*ante*, § 1651).

But suppose that the *recorded original deed itself* is produced, bearing the *certificate of due acknowledgment or proof* by the registrar or other officer to whom proof or acknowledgment was made, is not this certificate equally receivable to evidence the deed's execution?[1] The answer must be in the affirmative.[2] Otherwise the law would place the offeror in the absurd position

executed out of the U. S. (?), is provable by a notary's certificate under seal, authenticated by a court of record, or the chief magistrate of a county or city, or the great seal of State); 1904, Rutherford *v.* Rutherford, 55 W. Va. 56, 47 S. E. 240 (certificate of acknowledgment of a release unrecorded, or not entitled to be recorded, inadmissible);
Wisconsin: Stats. 1919, § 4156 ("every conveyance" executed and acknowledged or proved so as to be entitled to record, and every land-patent from the U. S. or this State, and every document "affecting land or the title thereto" kept lawfully with a register of deeds, is admissible "without further proof thereof"); § 4185 ("every written instrument," except bills, notes, and wills, when proved or acknowledged and certified as provided for a conveyance of realty, admissible as if a conveyance);
Wyoming: Comp. St. 1920, § 4587 (instruments concerning an interest in land in this State, duly acknowledged or proved, "may be read in evidence, without in the first instance additional proof of the execution thereof"); § 4689 (recorded chattel mortgage, admissible).

The sufficiency of an *identity of name*, to indicate the identity of the person acknowledging with the party in issue, is considered *post*, § 2529, under the presumption of identity. The propriety of taking an *acknowledgment over the telephone* is noticed *ante*, § 669, *post*, § 2155. The operation of an acknowledgment, though defectively taken, as an *admission* is considered *ante*, § 1654, par. 6.

Compare the *presumption of execution* for a recorded or acknowledged deed, *post*, § 2521.

§ 1676a. [1] 1843, Woods, J., in Wark *v.* Willard, 13 N. H. 389, 398 ("The whole office of an acknowledgment is the verification of the due execution of the deed").

[2] *Admissible:* CANADA: *Manitoba:* Rev. St. 1913, c. 172, § 50 (registrar's certificate of due registration on an original instrument shall be evidence "of the due execution of the instrument"); *New Brunswick:* Consol. St. 1904, c. 151, § 55 (registrar's certificate and indorsement of registration shall be evidence "of the due execution of the instrument," and no proof of the registrar's signature or office is needed); § 57 (all such instruments shall be "as good and sufficient evidence as any bargains and sales enrolled" were in England); *Prince Edward Island:* St. 1889, § 47 (certificate of registration indorsed on a deed or mortgage, purporting to be signed by the registrar or assistant, shall be presumed genuine and be evidence "of the facts therein stated"); § 50 (deed or mortgage executed out of the Province; annexed certificate and affidavits "required for the registration thereof," with the registrar's certificate of due registration, is evidence of "the due execution thereof").

UNITED STATES: *Federal:* 1830, Carver *v.* Jackson, 4 Pet. 1, 82; *Alabama:* Code 1907, §§ 3374, 3360 ("conveyances of property," duly acknowledged or proved and recorded, receivable in evidence "without further proof"); § 3395 (same for conditional sales of personalty); St. 1911, No. 52, p. 31, Feb. 20, § 2 (corporate conveyances, executed by president, etc., when recorded, are admissible "without further proof"); 1834, Toulmin *v.* Austin, 5 Stew. & P. 410, 418; 1875, Harrison *v.* Simons, 55 Ala. 510, 515; 1877, Hart *v.* Ross, 57 Ala. 518, 520; *Arkansas:* Dig. 1919, §§ 1530, 1531 (every "instrument in writing conveying or affecting real estate," when duly recorded, "may be read in evidence without further proof of execution"); 1853, Hogins *v.* Brashears, 13 Ark. 242, 250; 1856, McNeil *v.* Arnold, 17 Ark. 154, 169; *California:* 1862, Clark *v.* Fry, 20 Cal. 219, 223; 1864, Landers *v.* Bolton, 26 Cal. 393, 405; *Florida:* Here, by some freak such as occasionally disfigures our State constitutions, and in phraseology of crude draftsmanship, the subject is even enshrined in the Constitution: Art. XVI, § 21 ("Deeds and mortgages which have been proved for record and recorded according to law shall be taken as 'prima facie' evidence in the courts in this State without requiring proof of execution"); *Georgia:* 1859, Bell *v.* McCawley, 29 Ga. 355, 360; 1860, Oliver *v.* Persons, 30 Ga. 391, 398 (under St. 1856 the record certificate, when the records of office are destroyed, is only presumptive of execution and may be contradicted, the issue being for the Court); 1861, Gill *v.* Strozier, 32 Ga. 688, 694 (applies only to documents authorized

of being required to bring witnesses for a deed in court but not to bring them for a deed not in court.

That any doubt could have been suggested is due merely to the faulty wording of the earlier group of statutes; these usually declared merely that

to be recorded); 1867, Doe d. Hollis *v.* Stevens, 36 Ga. 463, 472; 1884, Ross *v.* Campbell, 73 Ga. 309, 315; *Illinois:* Rev. St. 1874, c. 30, § 35 (quoted *ante*, § 1676); St. 1897, May 1, § 37 (a duly witnessed or acknowledged receipt of the owner of a registered title to land shall be "'prima facie' evidence of the genuineness of such signature"); St. 1907, May 28, p. 376, § 5 (horse-shoer's lien); *Indiana:* 1860, Lyon *v.* Perry, 14 Ind. 515; 1865, Allen *v.* Vincennes, 25 Ind. 531; 1884, Carver *v.* Carver, 97 Ind. 497, 509, 513 ("In all cases where the record is competent evidence, the deed is also competent, without further proof of its execution"); 1895, Krom *v.* Vermilion, 143 Ind. 75, 41 N. E. 539; *Kansas:* G. S. 1915, § 2084, St. 1905 (defectively acknowledged or recorded instruments, on record for 10 years, provable by production of the original); *Maine:* 1833, Knox *v.* Silloway, 1 Fairf. 201, 216, 219 (quoted *supra*); 1841, Ayers *v.* Hewitt, 1 Appl. 281, 286; *Maryland:* 1854, Barry *v.* Hoffman, 6 Md. 78, 87; Warner *v.* Hardy, 6 Md. 525, 537; *Michigan:* 1856, Lacey *v.* Davis, 4 Mich. 140, 150; 1897, Webb *v.* Holt, 113 Mich. 338, 71 N. W. 637; *Minnesota:* Gen. St. 1913, § 8456 (an instrument authorized to be recorded, and duly acknowledged or proved, is admissible "without further proof"); *Mississippi:* Code 1906, § 1956, Hem. § 1616 (recorded original of any instrument required or permitted by law to be recorded, when duly certified to be acknowledged, etc., admissible "without further proof of its execution and delivery"); *Missouri:* Rev. St. 1919, § 5356 (deeds, etc., before officers of the French or Spanish government, receivable "without further proof" when certified as recorded by the recorder of land titles); § 5293 ("marriage contracts, duly proved or acknowledged and certified and recorded," admissible "without further proof of their execution"); § 1665 (sheriff's deed recorded, admissible "without further proof of the execution thereof"); *Nevada:* Rev. L. 1912, § 2754 (notary's certificate of acknowledgment; quoted *ante*, § 1675); § 5414 (instruments affecting realty; like Cal. C. C. P. § 1951); *New Jersey:* Comp. St. 1910 (quoted *ante*, § 1676); *New Mexico:* Annot. St. 1915, § 11 (the execution of all written instruments whether or not affecting real estate, except commercial paper, may be evidenced by certificate of acknowledgment by notary, etc.); *New York:* C. P. A. 1920, § 384 (a duly recorded conveyance is provable by certificate entitling to record); *North Carolina:* 1900, Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620 (chattel mortgage); *Pennsylvania:* St. 1911, May 11, p. 259 Dig. § 8841, Evidence (sheriff's deeds; prothonotary's certificate of acknowledgment under Court seal, when the deed is recorded, suffices); *Philippine Islands:* Admin. C. 1917, § 198 (recorded instrument affecting title of unregistered land is "competent evidence"); *South Carolina:* 1834, Monk *v.* Jenkins, 2 Hill Ch. 9, 15, *semble;* 1840, Edmonston *v.* Hughes, Cheves 81, 85, *semble;* C. C. P. 1922, § 714 ("the production, without further or other proof, of the original of any and every instrument in writing," other than wills, required by law to be recorded "shall be 'prima facie' evidence of the execution of such instrument," provided it is duly recorded and ten days' notice of intention to produce is given to the opponent); § 715 (the foregoing is not to apply where fraud in the execution is claimed, provided ten days' notice of the claim is given); *South Dakota:* Rev. C. 1919, § 2724 ("Every instrument in writing which is acknowledged or witnessed and duly recorded or duly filed" is admissible "without further proof"); § 2725 (similar, for instruments affecting real property, defectively recorded before Feb. 1, 1911); *Texas:* Rev. Civ. St. 1911, § 3700 ("Every instrument of writing," lawfully recorded with the clerk of the county court and proved or acknowledged according to law at the time, or recorded for 10 years whether lawfully or not, is admissible "without the necessity of proving its execution," on conditions stated *ante*, § 1651); §§ 6855, 6856 (certain instruments recorded before Feb. 9, 1860, as noted in § 1651, *ante*, admissible); *Vermont:* 1827, Hubbard *v.* Dewey, 2 Aik. 312, 315 (clerk's certificate of the fact of record or execution of a deed, etc., receivable); 1827, Williams *v.* Wetherbee, 2 Aik. 329, 335 (admissible "without other proof of its execution than was furnished by its containing all the statutory requisites of witnessing, acknowledging, and recording"); 1832, Johnson *v.* McGuire, 4 Vt. 327 ("it is not made evidence by any statute"; but is admissible); *Washington:* 1900, Blewett *v.* Bush, 22 Wash. 536, 61 Pac. 770; *Wisconsin:* Stats. 1919, § 4156 (quoted *ante*, § 1676).

Inadmissible: Possibly in Connecticut, Massachusetts, and New Hampshire; see the citations *ante*, § 1651. In Indiana, Mullis *v.* Cavins, 1839, 5 Blackf. 77, excluding it when offered by a grantee, is probably not law since the rulings *supra*.

Undecided: 1888, Lander *v.* Propper, 6 Dak. 64, 65 (chattel mortgage; question not decided); 1852, Sanders *v.* Pepoon, 4 Fla. 465, 469 (undecided; but not admissible where not duly acknowledged).

the register (or a certified copy) could be used when the original deed was shown to be lost or otherwise unavailable, and the argument was made that the statutory authority for the use of the register was confined to the specific cases of a deed lost or the like, and furthermore that no express authority was given to the registrar or other officer to place a certificate upon the original deed. As to the latter argument, it is enough to answer that the practical inconsistency produced by the contrary result must suffice to imply such an authority. As to the former argument, it is clear that the statutory proviso was in reality intended to sanction the rule requiring the production of the original (*ante*, § 1224), and had no other limitations in view; so that, when that rule was satisfied, and the execution remained to be proved, the officer's statutory authority to take the probate of execution was still in full effect and could be availed of to evidence execution, even though it was not needed for evidencing the contents:

1833, MELLEN, C. J., in *Knox* v. *Silloway*, 1 Fairf. 201, 218 (after pointing out that an office-copy would suffice): "Now by what magic has a copy from the registry acquired more solemnity and virtue than the original, and why is it entitled to more credit in a Court of justice? Why is not a registered, unproved, original deed as good, as safe, and as satisfactory evidence, as a certified copy of such unproved original, or rather as a certified copy of the record, which is no more than a copy of the original? Is not the supposed distinction the merest phantom? . . . It must be remembered that, in the above-mentioned cases in which certified copies are admitted in evidence, they are admitted not because the registry of the original deed is full and conclusive proof of the legal execution of it, but because it is presumptive and 'prima facie' proof that the original is what it appears to be, namely, a fair and perfected contract, inasmuch as the person claiming under it has voluntarily placed it on the public records of the county. The Court, therefore, for these reasons and in these cases, presume the original deed to have been duly executed, and thus throw the 'onus probandi' upon the other party, who if he can may impeach the deed as a forgery or show that it was never delivered and perfected by the grantor."

This result was generally reached by judicial construction; but the modern statutes have often taken care to declare expressly that the original deed bearing the proper officer's certificate of due acknowledgment or probate shall be admissible.

The various kinds of officers, at home and abroad, who are authorized to make such certificates, vary in the different States, and their detailed enumeration is beyond the purview of the present work.[3]

§ 1676*b*. **Certificate of Execution (Jurat) of Affidavit or Deposition.** (1) When an *affidavit* is offered—*i. e.* a document purporting to have been sworn to by a particular person—the due taking of the oath to that document by the named person must somehow be evidenced. The jurat, or certificate of the officer administering the oath, purports to make the necessary statements for this purpose; and this certificate was at common law recognized as admis-

[3] For the requirements as to *number of witnesses* testifying before such officer, in lieu of a personal acknowledgment by the maker of the instrument, see *post*, § 2054.

sible, so far as it was made by an officer having the proper authority.[1] The admissibility of the certificate thus depends upon whether the officer has under the law an authority to administer oaths. This, however, is a matter of administrative law, and is now everywhere covered by statutes, often containing elaborate provisions, which do not fall within the present purview.

(2) In the same way, the admissibility of a certificate of the taking of a *deposition* depends upon the authority of certain officers to take a deposition and upon the statutory provisions enumerating them and prescribing the formalities of their proceedings. This also is a matter of administrative law and of procedure, not here to be dealt with (*ante*, § 1382).

(3) When the execution of an affidavit, a deposition, or a deed is certified by a purporting officer, whose certificate would be admissible for the purpose, some evidence as to the genuineness of the certificate itself must be offered, *i. e.* the *certificate must be authentical*. The purporting seal of a notary is by long tradition regarded as sufficient evidence; so also the great seal of State (*post*, §§ 2161–2166). But when the seal does not suffice, it remains to evidence three essential elements, namely, the authority of the officer (if a foreign one), the fact that the person named was such an officer, and the fact that the seal and signature were affixed by him and by no other. For this purpose, then, additional certificates may have to be employed. The general principle applicable is the same that governs the authentication of certified copies (*post*, § 1679).[2]

§ 1676*b*. [1] 1728, Ex parte Ruddock, Mosely 78 (L. C. King said "he had known an affidavit sworn before one of our consuls abroad, allowed to be read by the courts of law"); 1744, Willes, L. C. J., in Omichund *v.* Barker, Willes 538, 550 ("The proper and usual evidence of a fact arising beyond sea is an affidavit or deposition taken before a public notary and certified to be so under the seal of the place or the principal officer of the place; which has been admitted as evidence in some cases where it would be too expensive, considering the nature of the cause, to take out a special commission"); 1810, R. *v.* Benson, 2 Camp. 508 (perjury in an answer in chancery; to prove the oath, the handwriting of the master's jurat was sufficient, without calling the master); 1824, R. *v.* Hailey, 1 C. & P. 258 (affidavit of an illiterate, which should have been read over to her; Littledale, J.: "If in such a case the master, by the jurat, authenticates the fact of its having been read over, we give him credit"); R. *v.* Spencer, 1 C. & P. 260 (an answer in chancery, Abbott, C. J.: "The Courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place"); 1835, R. *v.* Foster, 7 C. & P. 148, per Alderson, B. (magistrate's jurat to an affidavit, evidence of the due swearing); 1904, Markey *v.* State, 47 Fla. 38, 37 So. 53.

The jurat suffices as 'prima facie' evidence of the taking of the oath, even though the witness if called to the stand *cannot remember* the circumstances (precisely as in the attestation of a subscribing witness, *ante*, § 1302): 1906, Komp *v.* State, 129 Wis. 20, 108 N. W. 46.

For the necessity of evidence of *identity*, see *post*, § 2529.

[2] The authorities for its application to certified copies of *official* and *judicial* records are collected *post*, §§ 1680, 1681, and for *deed* records, *ante*, § 1651. The authorities for thus authenticating certificates of *affidavits* and *depositions* are inextricably mingled with the administrative law above-mentioned, declaring such officers' authority, and cannot be considered here, but the statutes cited *post*, § 1681 (judicial records) and §§ 2161–2166 (authentication by official seal) will furnish a guide. The following illustrate the statutes and the questions which they raise.

UNITED STATES: *Connecticut:* Gen. St. 1918, § 5707 (Secretary of State of United States' certificate, admissible to prove the official character of an officer taking a deposition out of the State); *Illinois:* Rev. St. 1874, c. 51, § 30 (depositions taken out of the State "by any judge, master in chancery, notary

§ 1677. **Certified Copies; General Principle (Scope of Authority; True Copies; Time and Manner of Certifying; Genuineness of Documents on File in the Office).** It might have been supposed that, for the lawful custodian of documents in official custody, an authority could be implied (*ante*, § 1633), from the very nature of his office, to furnish copies that should be receivable in evidence. But the common law in England did not imply such an authority.

The reasons against the admission of certificates in general (*ante*, § 1674) could hardly be thought to forbid the recognition of certificates of copies of public records; for there were ample means of authenticating them, there was little risk of forgery, and the original record itself was open to all for the purpose of verifying doubt as to the copy's correctness. Moreover, the expense and the inconvenience of using a sworn copy [1] was greater, and the frequency of the need of resorting to copies of public records emphasized this consideration. It is difficult to learn the precise nature of the policy (if there was any conscious one) which sufficed to support this unenlightened doctrine. Considering the strong grasp which professional selfishness, with its deliberate multiplication of fees, had upon the methods of English law up to the middle of the 1800s,[2] and of the fixed notion (still there prevailing) as to the undesirability of making litigation less expensive, it may be surmised that these had some influence upon the professional satisfaction with that profitable rule of proof which retained the copying-fees and witness-fees chiefly in the hands of the attorney's clerks, as well as upon the favor shown by the Chancery to exemplified copies over office copies.[3]

public, or justice of the peace out of this State, or other officer"; the return "shall be accompanied by a certificate of his official character, under the great seal of State, or under the seal of the proper court of record of the county or city where the deposition shall be taken"); 1900, Scott *v.* Bassett, 186 Ill. 98, 57 N. E. 835 (foreign deposition before a notary public; the certificate of the notary's official character need not "accompany" the deposition under R. S. c. 51, § 30, but may be produced at the trial); 1914, Tompkins *v.* Tompkins, 257 Ill. 562, 100 N. E. 965 (officer taking a deposition without the State of Illinois acts by virtue of Illinois authority to prepare the testimony for use in an Illinois court, and not by virtue of the foreign State's authority, hence the authority of the foreign State need not be shown; see comments on this case in Illinois Law Review, IX, 61).

Compare § 2165, *post*.

§ 1677. [1] The distinction between "certified" or "office" copies and "sworn" or "examined" copies has already been stated (*ante*, §§ 1648, 1273).

[2] Some account of this spirit and its illustrations may be seen in A Century of Law Reform, London, 1901, *passim*, and Charles Dickens' Bleak House.

[3] Mr. (afterwards L. C. J.) Denman, on coming in 1826 to preside at the Old Bailey Criminal Court, found that in certain indictments for larceny the punishment was capital on certain facts, but these facts though alleged in the indictment were in mercy never proved; "on inquiring into the reason for thus charging in the indictment a graver crime than is intended to be established in proof, I find that *there is a higher fee for drawing an indictment for a capital offence!*" (Arnould's Life of Denman, I, 212). "A striking illustration of the brevity which lawyers *could* attain, there being no interest to be verbose, is the judgment of death upon a felon, which, as there was no fee according to the number of words contained in it, was thus recorded: '*Sus. per coll.*'" (Campbell, Lives of the Chancellors, VI, 118).

"As the costs were in proportion to the length of the pleadings, it will readily be seen that the solicitors had every temptation to prolixity. Thus, a witness testified before the Chancery Commission of 1852 (First Report of the Commission, App. A, p. 180): 'If I draw a document of 120 folios, I get £6, and if I compress that into 30 folios I get only 30 shillings. In fact, the worse the business is done, the better it is paid for';

Whatever the policy, the theory of the rule was perfectly clear: it was merely the general one, already noticed (*ante*, § 1674), that *an authority to certify copies would not be implied from the nature of the office of a custodian* of documents,[4] and therefore that an *express authority was necessary*, either by means of a special order in each instance or by a general order or statute. This theory is expounded in the following passages:

1767, BULLER, J., Trials at Nisi Prius, 229: "Here a difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof; and a copy given out by an officer of the court who is not trusted for that purpose, which is not evidence without proving it actually examined. The reason of the difference is, that where the law has appointed any person for any purpose, the law must trust him as far as he acts under its authority; therefore the chirograph of a fine is evidence of such fine, because the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record. So where the deed is inrolled, the indorsement of the inrolment is evidence without further proof of the deed, because the officer is intrusted to authenticate such a deed by inrolment; [5] but if the officer of the court make out a copy, when he is not intrusted to that purpose, they ought to prove it examined, because being no part of his office, he is but a private man, and a private man's mere writing ought not to be credited without an oath. Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the Treasury, because it is no part of the necessary office of clerk, for he is only intrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them. So if the deed inrolled be lost, and the clerk of the peace make out a copy of the inrolment, that is no evidence without proving it examined; because the clerk is intrusted to authenticate the deed itself by inrolment, and not to give out copies of the inrolment. The office copies of depositions are evidence in chancery, but not at common law without examination with the roll; for though that Court have, for their own convenience, impowered their officers to make out such copies as should be evidence; yet the particular rules of their Courts are not taken notice of by the Courts of common law, and therefore they are not evidence in those courts. Where the fine is to be proved with proclamations (as it must be to bar a stranger) the proclamations must be examined with the roll, for though the chirographer is authorized by the common law to make out copies to the parties of the fine itself, yet he is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding." [6]

1816, BAYLEY, J., in *Black* v. *Braybrook*, 2 Stark. 8; *Appleton* v. *Braybrook*, 6 M. &. S. 37 (a copy of a Jamaica judgment by a clerk of court, without the seal of the Island or of the court, was rejected): "Mr. Erskine [of counsel] has put the question on the proper ground, that it is the act of an officer appointed to authenticate copies. But the facts do not support the position. There are some officers whose duty it is to deliver out copies, and who have not discharged their duty until they have delivered out copies to persons whose title is concerned. The chirographer of a fine, till this is done, has not performed his duty. There is a distinction between such acts and the making copies of

a folio being, as I believe, 15 lines of 6 words each. . . . Then again, every party had to take office copies of every paper filed, or at least pay for them, on penalty of incurring the displeasure of the officials" (John Marshall Gest, The Lawyer in Literature, 1913, p. 23). Illustrative details of the unconscionable and intolerable conditions are given in Holdsworth's History of English Law, vol. I, 3d ed. 1922, p. 441; also *post*, § 1845, par. (B).

[4] Except for the ancient instance of the chirographer of a fine, which was perhaps not an exception.

[5] See *ante*, § 1650.

[6] This passage was founded closely upon Gilbert, Evidence, 24 (1726), and served to phrase the law for a century after its original framing; for it reappears also in substance in Peake, Phillipps, and Starkie.

records by an officer who has the custody of them. . . . Therefore the receiving authenticated copies in evidence must be confined to cases where the officer would not have performed his duty until he had delivered out a copy of the record." HOLROYD, J.: "'The distinction is plain between that which proceeds from the officer in the course of his duty in the office, and that which he is not specially authorized by his office to do. . . . An exemplification is under the seal of the court, which shows it to be the act of the Court, and it is equivalent when the act is done by an officer who has a duty cast on him for the express purpose."

This was for England the settled theory of the common law; and it naturally was found persisting, in some jurisdictions at least, in this country.[7] But in the United States the Federal Supreme Court early broke away from this tradition. It is not necessary to suppose that there was a professional inclination any the less strong to prefer the orthodox rule; it is probable that the conditions of the newer country, less fixed by tradition, merely made it easier for the enlightened proposition of Chief Justice Marshall to find acceptance. Under him was laid down by the Court the general principle that *the lawful custodian of a public record has, by implication of his office, and without express order, an authority to certify copies:*

1804, MARSHALL, C. J., in *Church* v. *Hubbart*, 2 Cr. 186, 236: "The sanction of an oath is required for their establishment [foreign laws], unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. In this case the edicts produced are not verified by oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations and are entrusted with high powers. This is very true; but they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit than would be assigned to their certificates of any other fact."

1833, MARSHALL, C. J., in *U. S.* v. *Percheman*, 7 Pet. 51, 86: "The counsel for the claimant offered in evidence a copy, from the office of the keeper of public archives, of the original grant on which the claim is founded. . . . We think that on general principles of law a copy given by a public officer whose duty it is to keep the original ought to be given in evidence."

With the influence of the Federal Supreme Court thus early enlisted in support of this innovation, it soon found favor. The occasion for invoking a common-law principle arose comparatively seldom, for statutes early began to correct the English rule, and to deal in multiplicity with specific kinds of records; and subsequently in many jurisdictions a statute sanctioned the principle in

[7] 1852, Stewart *v.* Swanzey, 23 Miss. 505, *semble;* 1839, New Jersey R. & T. Co. *v.* Suydam, 17 N. J. L. 25, 60; 1854, State *v.* Cake, 24 N. J. L. 516 ("Where an officer is merely entrusted with the custody of records or papers, and is not authorized by statute to make copies, he has no more authority for that purpose than any other person"); 1894, West Jersey Traction Co. *v.* Board, 57 id. 313, 316, 30 Atl. 581. See also under New York and North Carolina, *post*, § 1680, for other indications of the same sort.

general form. But the principle laid down by Chief Justice Marshall may be said to have become the orthodox common law of the United States; [8] and it still occasionally serves in practice where no statute has anticipated its need.

Certain deductions from the general principle may now be examined:

(1) *Existence and scope of the authority.* The certifier must be the lawful official custodian of the particular document; his authority, then, is to be sought in the administrative law which declares the duties of the various officers; the application of this principle to specific kinds of documents, under statute and precedent, is later examined (*post*, §§ 1680–1682). (*a*) It is this lawful custody which implies the authority to certify, and therefore the certificate need on principle merely state that the paper bearing it is a *copy of a specified document existing in the certifier's custody.* But where a statute has expressly made certain certified copies admissible, some Courts are found treating this statute as supplanting the common-law principle and as furnishing a definite rule which must be formally and precisely followed. Whether, for example, *the certificate must predicate* a "*correct*" or "complete" or "true" *copy*, is a question frequently considered, depending much on the wording of local statutes.[9] The technical treatment of the subject shown by some Courts is unjustifiable. Whether a *single certificate* suffices to cover *copies of several documents* is a mere matter of the mechanical unity of the papers

[8] 1850, New York Dry Dock *v.* Hicks, 5 McLean 111, 113; 1827, Thomas *v.* Tanner, 6 T. B. Monr. Ky. 52, 53; 1879, Board *v.* Hernandez, 31 La. An. 158, 159; 1882, Shutesbury *v.* Hadley, 133 Mass. 242, 247; 1827, Bettis *v.* Logan, 2 Mo. 2; 1852, Childress *v.* Cutler, 16 Mo. 24, 44; 1853, Soulard *v.* Allen, 18 Mo. 590, 595; 1855, Charlotte *v.* Chouteau, 21 Mo. 590, 596; 1897, Banking House *v.* Durr, 139 Mo. 660, 41 S. W. 227; 1858, Ferguson *v.* Clifford, 37 N. H. 85, 95 ("the weight of authority seems to have established the rule"); 1896, Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124 (and here that official custody was allowed to be shown from the fact of deposit with the officer as a record, without proof of the statute prescribing his duty); 1847, Bryant *v.* Kelton, 1 Tex. 436.

[9] A few may be noted as illustrations: Cal. C. C. P. 1872, § 1923 (when certified copies of writings are used, "the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be"); 1881, Painter *v.* Hall, 75 Ind. 208, 214; 1883, Anderson *v.* Ackerman, 88 Ind. 481, 490; 1887, Yeager *v.* Wright, 112 Ind. 230, 234, 13 N. E. 707; 1896, Naanes *v.* State, 143 Ind. 299, 42 N. E. 609 (the statute authorized the custodian of a public record to certify that the copy was "true and complete," and he certified only to "a true copy"; excluded); 1839, Doe *v.* King, 3 How. Miss. 125, 136 (certificate that "the above is a correct representation," etc., not sufficient as a copy of a map); Mont. Rev. C. 1921, § 10573 (like Cal. C. C. P. § 1923); Or. Laws 1920, § 771 (like Cal. C. C. P. § 1923); 1915, Evans *v.* Marvin, 76 Or. 540, 148 Pac. 1119 (certified copy of Justice's judgment, excluded because Lords Or. L. § 771 provides that a certificate of copy must recite a comparison with the original and this certificate did not; unsound, for the provision should have been treated as directory only; the Courts are so meek in wearing their self shackled intellectual chains); 1825, Edmiston *v.* Schwartz, 13 S. & R. Pa. 135 (a certificate that a record is "truly copied" imports a copying of the whole); 1883, Bonesteel *v.* Sullivan, 104 Pa. 9, 13 (copy of a record of a domestic State, certified as true, will be assumed to be complete); Philippine Islands: C. C. P. 1901, § 318 (like Cal. C. C. P. § 1923); Porto Rico: Rev. St. & C. 1911, § 1439 (like Cal. C. C. P. § 1923); 1843, Treasurers *v.* Witsall, 1 Speer S. C. 220, 222 (under a statute admitting an "exact copy," a certificate of a balance struck in Treasury books is not a copy of entries therein); 1830, Burton *v.* Pettibone, 5 Yerg. Tenn. 443 ("truly copied from the records" is not equivalent to a full transcript); 1871, Johnson *v.* Bolton, 43 Vt. 303, 304 (adjutant-general's copy of a general order certified merely "official," not sufficient to show a "true copy").

Compare the citations *post*, § 1678 (certifying the effect of the document), and § 2108 (proving the whole of a document).

bearing the copies, and thus depends upon the circumstances of each case; [10] for there is no reason why the certificate should be formally repeated for every copy forming a part of a series of papers inherently apparent to be one legal whole. (*b*) The authority must of course exist *at the time of certifying;* a certificate, for example, from one whose office had expired would have no standing.[11] The office and authority existing, it is immaterial that the act of certifying is done after trial begun.[12] (*c*) That a *deputy* officer may properly certify for the chief officer nominally having custody has already been noticed (*ante*, § 1633, par. 8).

(2) *Genuineness of the original.* The officer's authority rests on his custody of the original; this custody, however, enables him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, as already noticed (*ante*, § 1648), to the use of a register as evidence of a recorded private deed, was the registrar's inability to speak to the genuineness of the deed; and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record; for it is both originally prepared and thereafter preserved in the office; and although it may not have been prepared by the chief officer or custodian himself, still his knowledge of the affairs of the office as transacted by his subordinates is sufficiently direct to suffice as personal knowledge (*ante*, § 1635, par. 2):

1840, CATRON, J., in *U. S.* v. *Wiggins*, 14 Pet. 334, 346: "[A certified copy of an original in a public office] proves 'prima facie' the original to have been of file in the public office when it was made; and for this plain reason, the officer's certificate has accorded to it the sanctity of a deposition; he certifies 'that the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge.'"

This result is clear enough for documents actually having their inception within the office, such as a book of accounts, a court roll, or an ordinary official register. But many kinds of documents, preserved in official custody, are *prepared without the premises of the office* by private persons and are then *filed or deposited in the office* under a requirement of law, — such as bonds or affidavits of various sorts. In some of these instances, no doubt, the document is customarily acknowledged before the officer or otherwise verified by him before filing; in others — affidavits, for example — there has been already a due verification certified by some other officer (*ante*, § 1676).

[10] 1855, Pike *v.* Crehore, 40 Me. 503, 513 (copies of papers of record in a bankruptcy case; most of the papers, offered in a mass but separate, were not certified; on one of them was a proper certificate; all were held properly excluded); 1860, Com. *v.* Ford, 14 Gray Mass. 399 (one attestation at the end of all the documents on one paper, sufficient).

[11] 1850, Brown *v.* Scott, 2 Greene Ia. 454 (certificate of a justice of the peace after office expired, excluded).

Whether the second certificate of the officer authenticating the copying officer's certificate need state that his term exists, is a different question, considered *post*, § 1679.

[12] 1870, Rogers *v.* Stevenson, 16 Minn. 68, 70.

The mere fact of an *erasure* in the copy is not fatal: 1864, Johnston *v.* Ewing Female University, 35 Ill. 518, 528 (certificate of incorporation); 1864, Holbrook *v.* Nichol, 36 Ill. 161, 164 (power of attorney).

Nevertheless, many instances remain, *e. g.* chattel mortgages, in which the document, though required to be filed, has no means provided for the authentication of its genuineness before filing. Is the custodian's certified copy evidence of the genuineness of such documents? Singularly enough, no clear distinction on this point seems to have been generally taken by the Courts. They have definitely put on one side the case of a recorded deed (including under that term mortgages, powers of attorney, and the like), and have established the principle (*ante*, § 1648) that the registrar's certified copy shall not suffice where no means was provided for the registrar to inform himself of the deed's genuineness before recording. But, instead of classing with recorded deeds all other documents of private extra-official origin which were not authenticated before the filing, they have inclined rather to include all such documents indiscriminately with public or official records generally, as capable of being proved by a certified copy, in respect to genuineness as well as to contents. The question has rather been ignored than settled. In the few instances in which it has been dealt with, the rulings have been divided.[13]

[13] With the following cases compare those cited *post*, §§ 2158, 2159 (official custody as sufficient evidence of the genuineness of *original* documents produced from that custody); compare also the statutes cited *post*, §§ 1680, 1681, which often cover the point, and the statutes and cases cited *ante*, § 1651 (recorded conveyances).

ENGLAND: 1807, Duncan *v.* Scott, 1 Camp. 100, 102 (certified copy of a deposition of G., admitted, with no further evidence; Ellenborough, L. C. J.: "If it is suspected that some one personated G., and that his signature is forgery, I will send to Chambers for the original examination; otherwise, the copy so attested and delivered [by the clerk] must be received and relied on").

CANADA: 1877, R. *v.* Wright, 17 N. Br. 363, 369 (under a statute making admissible certified copies of documents filed in a foreign court, a duly certified copy of an affidavit so filed is evidence of the affidavit's execution).

UNITED STATES: *Federal:* 1806, U. S. *v.* Johns, 4 Dall. 412, 415 (cited *post*, § 1680); *Alabama:* 1869, Monts *v.* Stephens, 43 Ala. 217, 222 (constable's bond; a probate judge's certified copy is evidence only of the bond's being in his office, not of its execution, approval, or due filing); 1882, Martin *v.* Hall, 72 Ala. 587 (cited *post*, § 1680); 1887, Stevenson *v.* Moody, 85 Ala. 33, 4 So. 595 (cited *post*, § 1681); *Connecticut:* 1901, Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758 (certified copy of a judicial record containing an assignment of a judgment, admitted as proving the purporting paper's presence in the court files; the effect left undecided); *Georgia:* 1881, Jackson *v.* Johnson, 67 Ga. 167, 180 (cited *post*, § 1680); 1897, Reppard *v.* Warren, 103 Ga. 198, 29 S. E. 817 (certified copy of State plat and grant, receivable to show execution, but *semble* only as preliminary to accounting for the absence of the State seal from the original, when, as here, in court); *Indiana:* 1842, Steel *v.* Pope, 6 Blackf. 176 (justice's certificate that a warrant is on file in his office, sufficient to authenticate); *Kentucky:* 1903, Burkhardt *v.* Loughridge, 116 Ky. 604, 76 S. W. 397 (a title-bond recorded; the record held not evidence of its execution); *Maine:* 1847, Hammatt *v.* Emerson, 27 Me. 308, 337 (copy of a document on file in court, sufficient if its signature is otherwise evidenced); *Massachusetts:* 1886, Com. *v.* Richardson, 142 Mass. 71, 73, 7 N. E. 26 (if a duly certified copy, made evidence by statute, of a lease in official custody, had been offered, "it may be that no proof would have been necessary of the signatures or handwriting of those commissioners who had executed the original lease or of the town officers [signing it]; such a duly authenticated copy of a public document showing an official act done by commissioners in discharge of a lawful duty and produced from proper custody having been made competent evidence, proof of handwriting or signatures is necessarily dispensed with; such proof would indeed be impossible in relation to a copy"); 1900, Smith *v.* Paul Boyton Co., 176 Mass. 217, 57 N. E. 367 (certified copies of a filed certificate of corporate organization, etc.; "the fact that they purported to be made and filed in pursuance of the law made it right to infer, from the copies themselves, that they were genuine"; no authorities cited); *Michigan:* 1878, Lee *v.* Wisner, 38 Mich. 82, 87 (bond filed in court; certified copy suffices); *New Mexico:* 1897, Field *v.* Cain, 9 N. M. 283, 50 Pac. 327 (an assignment of a judgment filed nearly seven years later; certified copy not evidence of genuineness); *New York:* 1803, Miller *v.* Livingston, 1 Cai. 349, 356 (letters deposited in a foreign Admiralty Court; whether assumed

But the general tendency is illustrated in the statutes dealing with certified copies of official documents (*post*, §§ 1680, 1681), which often declared the certified copy admissible, "without further proof," for "all records, papers, and documents lawfully on file" in the office, and thus apparently authorize the certified copy to evidence the genuineness of documents filed with the custodian without any guarantee of their genuineness; although by some statutes (as in Kentucky) this consequence is avoided and other evidence of execution is expressly declared to be necessary.

(3) The question is closely connected with another one, namely, the *presumption of identity* of person from identity of name (*post*, § 2529), and yet it is different; for the present difficulty is that the custodian filing a document bearing J. S. as signature cannot ordinarily know that any J. S. at all actually signed it; but, even supposing him to know that a J. S. did sign it, the question still remains whether that J. S. is the same person as the J. S. in the suit at bar. Thus this question of the presumption of identity arises equally for an adequate certified copy as well as for an inadequate one. The necessity of offering evidence of identity for affidavits, answers in chancery, marriage certificates, and other kinds of documents is considered under the presumption of identity of person (*post*, § 2529).

(4) Merely satisfying the rule of *producing the original*, by showing the original lost or otherwise unavailable, will not justify the use of a certified copy not made under due authority.[14] But where the certified copy is thus not usable as such because of lack of authority in the certifier, the *defective copy* may of course be *proved in the ordinary way* (*ante*, §§ 1277–1281) by a competent witness making it a sworn copy.[15] Obviously, however, no certified copy whatever may be used where the original record itself is not admissible under the rules of evidence for the purpose in hand.[16]

genuine on production of copies deposed to by a registrar of court, undecided); *North Carolina:* 1845, Butler *v.* Durham, 3 Ired. Eq. 589 (certified copy of a bond filed in court; the bond's execution required to be shown); 1860, Short *v.* Currie, 8 Jones 42, *semble* (certified copy of a clerk's bond, registered after due probate, sufficient to prove execution, at common law and under statute); *Pennsylvania:* 1856, Hartz *v.* Com., 1 Grant Pa. 359 (bond of a justice, certified by the clerk of Court where approved, receivable); *Tennessee:* 1879, Amis *v.* Marks, 3 Lea 568, 570 (cited *post*, § 1680); *Vermont:* 1831, Robinson *v.* Gillman, 3 Vt. 163, 165 (attested copy of a land-warrant proves "the existence of the original," while it is "a part of the files"); 1836, Mattocks *v.* Bellamy, 8 Vt. 463, 467 (certified copy of a 'habeas corpus' writ, admissible; the rule applying to copies "not only of records, technically so called, but also of all papers, files, rolls, etc., legally deposited in his office and there required to remain"); 1870, Benedict *v.* Heineberg, 43 Vt. 231, 235 (certified copy of a county-clerk's record of execution, showing the return of the officer and the certificate of the town-clerk as to the fact of record with the town-clerk, is evidence of that fact).

Distinguish the following: 1877, Aldrich *v.* Chubb, 35 Mich. 350, 362, 364 (part of a record in one court introduced in evidence in another; whether a transcript of the latter record authenticates the former, undecided); 1897, Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48 (a copy of a recorded attachment does not prove due issuance of it).

For the question whether the certified copy must show or state the *existence of a seal* on the original, see *post*, § 2105.

[14] 1872, Musick *v.* Barney, 49 Mo. 458, 461. Compare § 1188, *ante* (that proof of loss does not dispense with proof of execution).

[15] 1877, Post *v.* Rich, 36 Mich. 16; 1872, Groff *v.* Ramsey, 19 Minn. 44, 60; 1872, Musick *v.* Barney, 49 Mo. 458, 460.

Compare § 1226, *ante*. Note that a certified copy is *not preferred to a sworn copy* (*ante*, § 1273).

[16] 1842, State *v.* Wells, 11 Oh. 261; 1871, Armstrong *v.* State, 21 Oh. St. 357, 360;

(5) Of course, the *original itself* always suffices; the statutory permission for copies is not meant to be exclusive (*ante*, § 1186).

§ 1678. **Same: Certificate as to Effect or Non-Existence of Original; Certificate of Search.** The authority to certify a copy implies that the terms set forth by the officer as representing the original in his custody must be a *literal copy, not merely the substance* or the effect, of the original's terms:

1833, MORTON, J., in *Oakes* v. *Hill*, 14 Pick. 448: "Clerks of religious and other corporations, and other recording officers, may make and verify copies of their records, and in so doing act under the obligation of their oath of office. Of the verity of such copies their certificates are evidence. But it is no part of their duty to certify facts, nor can their certificates be received as evidence of such facts."

1850, METCALF, J., in *Greene* v. *Durfee*, 6 Cush. 362, 363: "As a general rule an official certificate of what is contained in a record, deed, or other instrument is not admissible in evidence, any further than it is made so by statute."

1872, WELLS, J., in *Wayland* v. *Ware*, 109 Mass. 251: "The certificate . . . that it so 'appears from the records of this office' was improperly admitted. To prove a fact of record by a record not produced requires a duly authenticated copy of the record itself or of so much thereof as relates to the fact in question."

1885, RUGER, C. J., in *Wood* v. *Knapp*, 100 N. Y. 114, 2 N. E. 632: "[The officer] has power to certify to the correctness of official papers . . . , but beyond that his certificate has no more effect than the opinion of any other person."

The policy of conceding to a custodian of documents no further authority than this rests on the common-law doctrine of Completeness (*post*, § 2108), which requires that the whole of a document be shown forth, in proving any part of it, so that the tribunal may judge better of the significance of the whole and the precise interpretation of any part. At common law, therefore, it was entirely settled that no custodian had authority to certify any less than the entire and literal terms of the original, — in short, a copy in the strict sense of the word; and the rule was applied to all varieties of documents.[1]

1899, Heintz *v.* Thayer, 92 Tex. 658, 50 S. W. 929 (overruling Ammons *v.* Dwyer, 78 Tex. 639).

Compare § 1226, *ante*. The statutes making certified copies admissible have sometimes expressly conditioned them as usable "equally with the original," to avoid this doubt. But no such doubt need ever have been suggested.

§ **1678.** [1] Compare the cross-reference given in note 2, *infra*, and the cases cited *ante*, § 1677, note 9; and distinguish the question treated in § 1244, *ante* (testimony on the stand, summarizing the tenor of a series of documents): *Federal:* 1832, Leland *v.* Wilkinson, 6 Pet. 317 (Secretary of State's certificate as to the effect and tenor of certain laws, excluded); 1917, U. S. Slicing Machine Co. *v.* Wolf Sayer & Heller Co., D. C. N. D. Ill., 243 Fed. 412 (English official certificate of change of corporate name, excluded; the opinion admits that the ruling is "largely technical"; a pity that the judiciary binds but cannot loose itself!); *Alabama:* 1884, Bonner *v.* Phillips, 77 Ala. 427, 428 (a certificate that the land-office "records . . . show that," etc., excluded); *Arizona:* 1901, Brill *v.* Christy, 7 Ariz. 217, 63 Pac. 757; *Arkansas:* 1842, Taylor *v.* Auditor, 4 Ark. 574 (auditor's certificate that his books showed a sheriff indebted in certain sums, excluded); 1842, Mays *v.* Johnson, 4 Ark. 613, 616 (land-officer's certificate that certain land-claims had been rejected by his office, inadmissible); 1848, Johnson *v.* Mays, 8 Ark. 386, 388 (same); 1905, Kelley *v.* Laconia, L. Dist., 74 Ark. 202, 85 S. W. 249 (U. S. land office commissioner's letter as to entries in the office, excluded); *Columbia (Dist.)*: 1902, U. S. *v.* Lew Poy Dew, D. C., 119 Fed. 786 (U. S. Commissioner's certificate of adjudication of a Chinese immigrant's status, excluded as not being a copy); *Connecticut:* 1851, New Milford *v.* Sherman, 21 Conn. 101, 112; 1896, Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818 (a certificate by a State adjutant-general that a certain name was on a regiment muster-roll, etc., excluded); *Georgia:* 1855, Miller *v.* Reinhart, 18 Ga. 239,

But here the rigid logic of the Courts was inconsistent with good sense. The result was a rule too strict for practical convenience. In a vast number

245 (clerk's certificate of the import of a naturalization record, excluded); 1857, Dillon *v.* Mattox, 21 Ga. 113, 116; 1892, Lamar *v.* Pearre, 90 Ga. 377, 381, 17 S. E. 92 (clerk's certificate that a cause was dismissed; excluded); 1901, Daniel *v.* Braswell, 113 Ga. 372, 38 S. E. 829; *Illinois:* 1840, Greenwood *v.* Spiller, 3 Ill. 503 (certificate of heirship by a judge of probate, excluded); 1859, Morgan Co. Bank *v.* People, 21 Ill. 304 (bank report filed with a State auditor; letter of the auditor summarizing the contents, excluded); 1883, Golder *v.* Bressler, 105 Ill. 419, 424 (certificate by a Secretary of State, of the fact of an officer's appointment, excluded); 1905, Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757 (tax judgment; the clerk's certified copy of the proceedings "so far as relates to the premises described" held sufficient, where the only material part was in fact included; the clerk's conclusion being thus immaterial); *Iowa:* 1868, Goodrich *v.* Conrad, 24 Ia. 254, 256; *Kentucky:* 1828, Bowlin *v.* Polock, 7 T. B. Monr. 26, 43 (register's certificate of dates, quantities, etc., of recorded warrants, excluded); 1848, Cornelison *v.* Browning, 9 B. Monr. 50, 51 (clerk's certificate of the fact of proof of a foreign will, not received instead of copy of record); *Louisiana:* 1812, Kersham *v.* Collins, 2 Mart. 245; 1823, Smoot *v.* Russell, 1 Mart. N. S. 522, 526; 1827, Balfour *v.* Chew, 5 Mart. N. S. 517, 520; 1841, Taylor *v.* Jeffries, 1 Rob. 1; 1841, Briggs *v.* Campbell, 19 La. 524, 526; 1842, Judice *v.* Chretien, 3 Rob. 15; 1858, Wiggins *v.* Guier, 13 La. An. 356, 357; *Maine:* 1838, Owen *v.* Boyle, 15 Me. 147; 1842, McGuire *v.* Sayward, 9 Shepl. 230, 233 (certificate that a militia company "is designated in the records of this office as the B company," excluded); 1851, English *v.* Sprague, 53 Me. 440, 442 (a justice's certificate as to a particular fact in a record, excluded); *Massachusetts:* 1833, Oakes *v.* Hill, 14 Pick. 442, 448; 1838, Robbins *v.* Townsend, 20 Pick. 351; 1850, Greene *v.* Durfee, 6 Cush. 362; 1872, Wayland *v.* Ware, 109 Mass. 251; 1874, Hanson *v.* S. Scituate, 115 Mass. 340; *Michigan:* 1894, Tessman *v.* United Friends, 103 Mich. 185, 61 N. W. 261; 1911, General Conference Ass'n *v.* Michigan S. & B. Ass'n, 166 Mich. 504, 132 N. W. 94 (probate register's certificate to an administrator's appointment "as appears by the records," held inadmissible); *Mississippi:* 1839, Doe *v.* King, 3 How. 125, 135; 1849, Cockerel *v.* Wynn, 12 Sm. & M. 117, 123 (land-officer's certificate that a patent for C. was in his office, etc., excluded); *Missouri:* 1840, Gurno *v.* Janis, 6 Mo. 330, 333 (certificate of confirmation of land-title, received, though not a copy, because expressly authorized by statute); 1853, Soulard *v.* Allen, 18 Mo. 596, 595, *semble* (same); 1862, Cutter *v.* Waddingham, 33 Mo. 269, 282 (certificate of official surveyor as to the identity of a lot, excluded); 1874, Washington Co. *v.* R. Co., 58 Mo. 372, 377 (State auditor's certificate of valuation of property by Board of Equalization, excluded); 1878, Wilhite *v.* Barr, 67 Mo. 284 (certified "abstract" of land-office records, received as a copy); *Nebraska:* 1909, Sampson *v.* Northwestern Nat'l L. Ins. Co., 85 Nebr. 319, 123 N. W. 302 (State auditor's certificate of securities on file, etc., excluded); *New Jersey:* 1896, Francis *v.* Mayor, 58 N. J. L. 522, 33 Atl. 853 (certificate of the adjutant-general summarizing a soldier's record, excluded); *New York:* 1885, Wood *v.* Knapp, 100 N. Y. 114, 2 N. E. 632; *North Carolina:* 1796, Wilcox *v.* Ray, 1 Hayw. 410 (certificate that a judgment had been entered for so much and execution had issued; excluded); 1895, State *v.* Champion, 116 N. C. 987, 21 S. E. 700 (certificate of a record of property listed with the tax-register, excluded); *North Dakota:* 1903, Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844 (certificate of a true copy of "all that pertains to the county tax levy," etc., excluded); *Ohio:* 1832, Bank of U. S. *v.* White, Wright 51 (clerk's certificate that a sale order had issued on a judgment, excluded); 1867, Davis *v.* Gray, 17 Oh. St. 330, 345 (certificate that a patent was issued, excluded); *Pennsylvania:* 1795, Talbot *v.* Jansen, 3 Dall. 133, 137 (certificate of a collector of port that his book-entry showed payment, excluded); 1823, Jones *v.* Hollopeter, 10 S. & R. 328; 1826, Vickroy *v.* Skelley, 14 S. & R. 372, 374 (certificate by a surveyor-general of a "connected draft of eleven tracts of land," though not a copy of any particular draft, received for convenience' sake, where not used to show title); *Rhode Island:* 1868, Hopkins *v.* Millard, 9 R. I. 41; *Tennessee:* 1808, Barry *v.* Rhea, 1 Overt. 345 (historical statement of judicial proceedings by a clerk, excluded); 1834, Simmons *v.* Wood, 6 Yerg. 518, 522 (clerk's certified statement that writs recorded were served, insufficient); 1849, Harris *v.* Anderson, 9 Humph. 779 (clerk's certificate of probate of a foreign will, not copying the probate, excluded); *Texas:* 1877, State *v.* Cuellar, 47 Tex. 295, 302; 1882, Buford *v.* Bostick, 58 Tex. 63, 67; 1886, Allen *v.* Read, 66 Tex. 13, 19, 17 S. W. 115 (recorder's certificate of the existence of a lost deed, admitted, but not to prove execution or contents); *Vermont:* 1867, Barnet *v.* Woodbury, 40 Vt. 266, 268 (clerk's certificate of extracts from grand lists of assessment, insufficient); *West Virginia:* 1874, Hubbard *v.* Kelley, 8 W. Va. 46, 53; 1899, Roe *v.* Philippi, 45 W. Va. 785, 32 S. E. 224; *Wisconsin:* 1853, Gates *v.* Winslow, 1 Wis. 650, 657; 1881, Cornelius *v.* Kessel, 53 Wis. 395, 401, 10 N. W. 520; 1864, Bigelow *v.*

of cases, the tenor of a record or an entry is quickly ascertainable, is open to no difference of opinion, and can be summarily stated without a literal transcription; the possibilities of harm are further diminished by the publicity of the record and its easy access for the detection of error. Accordingly, by statute, the use of certificates of the effect or substance of a document has been widely sanctioned.[2] Some of these statutes deal with specific classes

Blake, 18 Wis. 520 (land-office receiver's certificate that A. B. appeared as purchaser, excluded); 1867, Farrand *v.* R. Co., 21 Wis. 435, 438 (similar); 1879, Culbertson *v.* Coleman, 47 Wis. 193, 2 N. W. 124 (similar certificate admitted, under a statute cited *infra*, note 2); 1888, Reed *v.* R. Co., 71 Wis. 399, 402, 37 N. W. 225 (similar certificate by a clerk of land-commissioners, excluded as not covered by statute).

Compare the cases cited *post*, §§ 2109, 2110.

[2] Besides the following statutes, compare those cited *ante*, under § 1674 (Sundry Certificates), § 1659 (Land-Office Registers), § 1675 (Notaries' Certificates), § 1676 (Certificates of Execution), § 1238 (Letters of Administration), and *post*, § 1705 (Abstracts of Title); the ambiguity of nomenclature renders it difficult to classify some of them: *Alabama:* 1901, First National Bank *v.* Lippman, — Ala. —, 29 So. 18 (certificate of clerk of Supreme Court, admitted under Code § 3860, cited *ante*, § 1674); *Arizona:* § 1742 (delinquent official accounts; official custodian's transcript showing statement of accounts, admissible); Rev. St. 1913, Civ. C. § 1752 (clerk's certificate under official seal that letters have issued to executor, administrator or guardian, admissible); *Colorado:* Comp. St. 1921, § 6540 (official certificate of the U. S. land-office register or receiver "to any act or matter on record in his office," admissible); § 6551 (certificate of the head, etc. of any executive department of this State "as to the contents of or any fact or matter shown by the records in his department as well as to facts not shown by the records," etc., admissible); *Florida:* Rev. G. S. 1919, § 1036 (State comptroller's certificate of balance due, admissible in suit against persons delinquent in payments to State treasury); § 5480 (liquor offenses: U. S. internal revenue collector's certificate that records show a revenue license issued, admissible); *Georgia:* 1854, Henderson *v.* Hackney, 16 Ga. 521 (certificate of data in records, admitted, though not a copy, under St. 1830, Code § 5211, cited *post*, § 1680); *Idaho:* Comp. St. 1919, § 7539 (appointment of executor or administrator is provable by the clerk's certificate under court seal, that he has given bond and is qualified, and that letters unrevoked have issued, together with a copy of the minute of appointment); *Illinois:* Rev. St. 1874, c. 51, § 20 ("the official certificate of any register or receiver of any land-office of the U. S., to any fact or matter on record in his office," is admissible, in particular, "of the entry and purchase of any tract of land within his district"; the Secretary of State's certificate under seal is receivable to prove the genuineness of the signature of the register or receiver); *Iowa:* Code 1897, § 4641, Comp. Code § 7348 (land-office receiver's certificate that the books show a sale, is proof of title against all but a holder of an actual patent); § 4642 Rev. Code § 7349 (land-office receiver's or register's certificate of entry of land, admissible); *Louisiana:* St. 1908, No. 40 (U. S. internal revenue collector's certificate showing that a permit for liquor-sale was issued to a person, admissible as 'prima facie' evidence); 1917, State *v.* Wilson, 141 La. 404, 75 So. 95 (certificate of U. S. internal revenue collector showing issuance of liquor license, under La. St. 1908, No. 40; held admissible, but not 'prima facie' evidence in a criminal case, on the principle of § 1398, *ante*); *Maine:* Rev. St. 1916, c. 87, § 134 (adjutant-general's certificate as to the facts of service of a person from Maine enlisting in the Federal service, as found upon his records, admissible); *Maryland:* Ann. Code 1914, Art. § 20, § 16 (Court clerk's certificate of the securities on constable's bond and the time of becoming such, admissible); Art. 93, § 48 (court clerk's certificate that letters testamentary have been granted to a party, admissible); *Minnesota:* Gen. St. 1914, § 8452 (certificate of an officer or acting officer of any department of the U. S. government, "to any fact appearing of record in his department," authenticated by official seal, if any, admissible); § 8455 (certificate by the register of a land-office of a survey, etc., "or other facts in relation to such lands, taken from the books of such land-office," or from a certificate indorsed on the original filed plat, admissible); 1867, Dorman *v.* Ames, 12 Minn. 451, 454 (land-office register's certificate of the filing of a declaration, admitted under statute); *Missouri:* Rev. St. 1919, § 13026 (State board of equalization's proceedings in assessment of railroads; State auditor's certificate of board's action, to be evidence, without producing the record, etc.); *New York:* C. P. A. 1920, § 390 (State comptroller's certificate of extract from records, stating that it contains all relating to a certain piece of land, admissible); *Tennessee:* Shannon's Code 1916, §§ 5363, 5364 (clerk's certificate of the effect of a record, in certain actions against public officers, admissible); *Texas:* Rev. Civ. St. 1911, § 3696

of documents only, while others (not so numerous as they should be) are broadly inclusive in their terms. The policy of this innovation, when judiciously applied, cannot be doubted (*ante*, § 1636).

(7) Upon the common-law principle closely related to that just stated, a custodian of documents equally lacked authority to certify that a specific *document did not exist* in his office or that a particular entry was not to be found in a register. Whether a Court would go so far in a given instance as to require a copy of the entire group of entries or integral series of documents was not entirely settled; but it was certain that the only evidence receivable would be the testimony on the stand of one who had made a search (usually of the custodian himself), and that the custodian's certificate of *due search* and *inability to find* was not receivable under the present Exception.[3] But this rule, too, partook of an excess of formality, and imposed inconvenience

(certificate under official seal "to any fact or facts contained in the papers, documents, or records of their offices," by the officers enumerated *post*, § 1680, admissible); § 3711 (appointment and qualification of an executor, administrator, or guardian, provable by the proper clerk's certificate under official seal; so also id. § 3327, for an executor or administrator); § 1132 (Secretary of State's certificate of filing of a charter, admissible); 1906, Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 (State land commissioner's certificates of contents of his records, admitted under the statute; but the precise distinctions taken are not clear); *Virginia:* Code 1919, § 1612 (State board of medical examiners; clerks of court's certificate of lack of record of license, to be evidence); *Washington:* 1911, State *v.* Polk, 66 Wash. 411, 119 Pac. 846 (certificate of result of local option election, admitted under Rem. & Bal. Code, § 6297); *Wisconsin:* Stats. 1919, §§ 4166-6168 (provision made for certificates by the Secretary of State, register of a land-office, etc., to the title to lands as appearing from their books); § 4170 (adjutant-general's certificate as to "any facts which appear from the books, files and records in his office," admissible); § 4171 (certificate of transcript, by a county clerk or treasurer, of tax records, admissible).

Compare the citations *post*, §§ 2109, 2110 (completeness of documents).

[3] Compare with the following the cases cited *ante*, § 1244 (testimony to the non-existence of a record or entry, without producing the entire book or files); *Arkansas:* 1878, Hendry *v.* Willis, 33 Ark. 833, 834, 838 (letter from a U. S. land-office commissioner, stating that a location was not among the records, excluded); *Florida:* 1896, Parker *v.* Cleaveland, 37 Fla. 39, 19 So. 344 (statement that no record existed, excluded); *Georgia:* 1857, Martin *v.* Anderson, 21 Ga. 301, 308 (certificate that no entry of a name appears, excluded); 1898, Greer *v.* Fergerson, 104 Ga. 552, 30 S. E. 943 (certificate that no commission of a judge was on record, excluded); *Illinois:* 1855, Cross *v.* Pinckneyville M. Co., 17 Ill. 54 (certificate by the Secretary of State that no organization-papers had been filed, excluded); 1876, Beardstown *v.* Virginia, 81 Ill. 541, 544 (certificate of a clerk that no record of naturalization existed, excluded); *Indiana:* 1855, Stoner *v.* Ellis, 6 Ind. 152, 161 (certificate of the patent-commissioner that no such patent had issued, excluded; deposition required); 1858, Wright *v.* Bundy, 11 Ind. 398, 407 (certificate of the Secretary of State that there was no other notary named S. S. but one, excluded); 1871, Lacey *v.* Marnan, 37 Ind. 168, 171 (Stoner *v.* Ellis, approved); *Iowa:* 1906, Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (a certificate of the lack of a record of a particular document is inadmissible without statute); *Kentucky:* 1913, Com. *v.* O'Bryan, U. & Co., 153 Ky. 406, 155 S. W. 1126 (official certificate that a document is not on file, excluded); *Louisiana:* 1842, Exchange & B. Co. *v.* Boyce, 3 Rob. La. 308 (Morphy, J.: "Notaries can only legally certify copies of proceedings in their offices; any other fact within their knowledge must be disclosed on oath"; rejecting a notary's certificate that no protest had been filed); *Porto Rico:* 1919, Cerecede *v.* Medina, 27 P. R. 750 (tax deed; treasurer's certificate of non-entries in records, excluded); *Tennessee:* 1796, Wilcox *v.* Ray, 1 Hayw. 410 (certificate of loss, excluded, "the clerk not being appointed by law to certify the loss of a record"); 1806, Ayres *v.* Stewart, 1 Overt. 221 (certificate of a grant-custodian that no record could be found, excluded); *Vermont:* 1843, Hill *v.* Bellows, 15 Vt. 727, 734 (clerk's certificate that no conveyance was on record, excluded).

Contra: 1826, Vickroy *v.* Skelley, 14 S. & R. Pa. 372, 374 (certificate from a surveyor-general, etc., that a document was not in his office, receivable); 1848, Apperson *v.* Ingram, 12 Mo. 59, *semble* (certificate by a justice of the loss of his predecessor's records, sufficient).

and expense where it was unnecessary. The certificate of a custodian that he has diligently searched for a document or an entry of a specified tenor and has been unable to find it ought to be usually as satisfactory for evidencing its non-existence in his office as his testimony on the stand to this effect would be; and accordingly by statute in a few jurisdictions custodians' certificates of this sort have been expressly made admissible.[4]

§ 1679. **Same: Authentication of the Copy.** Suppose the law, in a given case, clearly to permit the use of a certified copy; it remains for the offeror to establish that the paper offered by him is indeed the certified copy allowed by the law, — in short, to *authenticate* it. For example, let it be settled that a custodian's certified copy is admissible, and let the public document whose contents are to be proved to be an order of survey by the county commissioners of highways; and let a paper be offered purporting to be a certified copy, by J. S. the county clerk, of the original warrant lawfully in his custody. Here it still remains to be ascertained that the county clerk is in fact the lawful custodian of that class of documents, that the person J. S. is in fact the county clerk, and that the signature J. S. was in truth placed there by the genuine J. S. (or, if there is a seal, that the seal was genuinely his seal placed there by him).

These three elements are necessarily involved in the admission of the paper offered, — the *authority* of the county clerk, the *incumbency* of J. S. as clerk,

[4] Compare the statutes cited *ante*, § 1674 (sundry certificates); and § 1633, n. 6 (absence of an entry in an official record, as evidence of the facts not having occurred); *Colorado:* Comp. L. 1921, § 6551 (quoted *supra*, n. 2); 1921, Lamping *v.* Lamping, — Colo. —, 199 Pac. 418 (chattel mortgage); *Iowa:* Code 1897, § 4640, Comp. Code § 7347 (like Nebr. Rev. St. § 8916); *Michigan:* Comp. L. 1915, § 12510 (legal custodian's certificate that a paper, etc., after diligent examination cannot be found, admissible); *Minnesota:* Gen. St. 1913, § 8429 (certificate under official seal by the legal custodian of a document that "he has made diligent search in his office for such instrument, and that it cannot be found," admissible); *Mississippi:* Code 1906, § 1972, Hem. § 1632 (certificate under official seal by an officer having legal custody of a record or paper "that he has made diligent search in his office for the record or paper, and that it cannot be found therein," admissible "as if the officer personally testified"); 1882, Tigner *v.* McGehee, 60 Miss. 185, 192 (chancery clerk's certificate of inability to find a document, admitted under statute); *Nebraska:* Rev. St. 1922, § 8916 (public officer's certificate of "diligent and ineffectual search" for a paper in his office, admissible); *New York:* C. P. A. 1920, § 366 (official custodian's certificate that a paper cannot be found after diligent search, admissible); *North Dakota:* Comp. L. 1913, § 513 (cited *ante*, § 1674, n. 7); *Ohio:* Gen. Code Ann. 1921, § 12694 (practicing medicine without a license; certificate by secretary of State medical board that the records show "no such certificate to practice. . . has been issued," admissible); *Rhode Island:* Gen. L. 1909, c. 178, § 4 (pharmacy-board secretary's certificate as to a matter of record or the "non-existence of any matter in the record," admissible); *South Dakota:* Rev. C. 1919, § 7749 (State board of dental examiner's records; secretary's certificate under official seal "that any person is or is not a legally licensed or registered dentist," admissible); *Tennessee:* Shannon's Code 1916, § 5578 (certificate of "diligent and ineffectual search" for a paper in his office, by a public officer, receivable); *Texas:* Rev. St. 1911 § 1321 (foreign corporation's permit to do business; State secretary's certificate that none has been filed, admissible); *Vermont:* Gen. L. 1917, §§ 1050, 1051, 1061 (secretary of State's certificate of no record of a corporate organization, admissible to show expiration of charter for non-payment of license tax); *Wisconsin:* Stats. 1919, § 4163 (legal custodian's certificate, under official seal, if any, "that he has made diligent examination in his office for such paper, instrument, or document, and that it cannot be found," admissible; so, also for a certificate by a chief of the commissioners of public lands under their official seal); 1905, State *v.* Rosenthal, 123 Wis. 102, 442 N. W. 49 (the foregoing statute is not exclusive of the method of proof noted in § 1244, *ante*).

and the *genuineness* of the signature or seal. The establishment of these three elements is commonly spoken of as Authentication. Perhaps they may be assumed without evidence; or perhaps slight evidence will suffice, or perhaps definite kinds of evidence may be formally prescribed; but their establishment in some manner is inevitable. These elements are logically involved in the offer of evidence. Doubtless many who meet in practice the formalities of authentication, and do not attempt to analyze the principles involved, are apt to regard them as merely encrusted traditions or obnoxious technicalities having no reason for existence. But it is not so. Whatever the variety of mode or the seeming technicality of detail, these rules exist because there is an inherent element of fact that must somehow be met and disposed of.

(1) *Authentication by seal or by a second official certificate.* It is of course possible to meet this triple element of fact in the ordinary way, namely, by summoning competent witnesses to the stand, who will testify (in the above example) that the county clerk is the lawful custodian of the county commissioners' highway warrants, that J. S. is county clerk, and that this is J. S.'s signature or seal. But this summoning of witnesses is precisely the inconvenience which the use of officially certified copies is designed to avoid; and accordingly the policy of the principle would be in danger of substantial defeat if there were not other more convenient means of meeting the requirements of these elements involved in authenticating the copy itself. These other means are furnished by three well-established doctrines, which combine in various ways every expedient that is resorted to for the purpose, — the doctrine of *authentication* (*post*, §§ 2161–2169), the doctrine of *judicial notice* (*post*, § 2576), and some additional applications of the present Exception for *official statements*. By the doctrine of authentication, the existence, upon the document, of a purporting impression of a certain seal or signature is taken as sufficient evidence that the seal or signature is genuinely all that it purports to be. By the doctrine of judicial notice, no evidence need be offered that the local law prescribing the authority is as alleged, nor that certain persons are the officers they are alleged to be; these facts, being in theory known to the Court, may be assumed without evidence. By the doctrine of the present Exception, the hearsay statement of a higher officer, made in the shape of an official certificate, may be receivable to evidence the authority and the incumbency and the seal or signature of a lower officer; at common law, the Executive (represented by the great seal of State), as the source of all lower offices, was alone recognized as having authority to make such a certificate; but by statutes the certificate of numerous other kinds of superior officers have been expressly recognized for specific purposes. By combining these three doctrines, then, the authentication of a certified copy can be easily accomplished. This may be illustrated by following out the application of these doctrines to the instance taken above, tracing it first as a domestic certificate, and then as a foreign one.

(*a*) Suppose a paper purporting to be a certified copy by J. S., as clerk of a *domestic* county, of a highway warrant lawfully within his custody. The three elements to be supplied are the authority of such clerks to be custodians of such documents, the incumbency of J. S. as clerk, and the genuineness of the signature and seal. Here, (*a'*) by the doctrine of judicial notice, the domestic law fixing the custody need not be evidenced, for the Court knows it; (*a''*) the incumbency of J. S. as clerk need not be evidenced, for the Court knows and therefore notices judicially the incumbencies of the principal domestic officers, and this would probably include the case of a county clerk (*post*, § 2576); (*a'''*) the genuineness of the seal is presumed without other evidence (*post*, § 2166), though whether this would be done for the signature alone, lacking a seal, would be doubtful. The three elements are thus disposed of. For certified copies by other officers the result might or might not be the same; but the same processes and doctrines would be involved. The statutes often make express provision; yet they all involve some mode of employing the same processes. But for domestic certificates there has been little real need for express statutes.

(*b*) Suppose now a similar certificate purporting to come from the clerk of a county in a *foreign* State. Here the foreign law regulating the custody of such documents cannot be judicially noticed without evidence, for the Court in theory does not know it (*post*, § 2573). For the same reason the incumbency of J. S. as clerk cannot be judicially noticed; the Court in theory not knowing who are officers of a foreign State. So also, finally, the genuineness of the seal or signature of a foreign subordinate officer cannot be presumed; of foreign officers not representing the State (*post*, § 2163), the notary (*post*, § 2165), and perhaps the Supreme Court (*post*, §§ 1681, 2164), are the only ones whose seals may be presumed genuine. There is thus a halt in the process. Yet if possible a way must be found to authenticate the document without calling witnesses. Is there no other application of the doctrines in question which can be invoked to answer the purpose? Does the Court know nothing and can it presume nothing that will suffice? The Court knows at least that the Executive (represented, in the English theory of the common law, by the King) is the source of office, the appointive and supervising functionary for all other officers; the symbol of this supreme executive authority is the great seal of State, the affixing of which is itself always an act of State; therefore, the statement of the King, or other supreme Executive, as to the proper custody of official documents, and as to the incumbent of a particular office, would be admissible testimony under any conditions; and the official certificate of this supreme Executive (unattainable in person) would be properly receivable under the present Exception as an official statement fulfilling its requirements. If such a certificate can be obtained, it will suffice. Now the affixing of the great seal of State has always been regarded as equivalent to such a certificate, whether words of certifying are expressly set forth or not; the act of affixing it is itself an Executive act, having such

an import.[1] Moreover, the genuineness of a foreign seal of State is always assumed (*post*, § 2163); *i. e.* the fact of the presence upon a document of an impression purporting to be that of the seal of State is sufficient without other evidence. With these two doctrines in combination, then, the purpose is attained. The impression of the foreign great seal of State is presumed genuine; being genuine, it is equivalent to a certificate by the Executive that the custody of the document in question is lawfully with the officer in question, that J. S. is that officer, and that the seal or signature of that officer (which must of course in theory be sufficiently known to the Executive or appointing power) is genuinely upon the certified copy. — Such is the mode in which a certified copy by a foreign officer can be adequately authenticated, without calling witnesses and merely by resort to doctrines of law otherwise well accepted.

Suppose, however, that the certifying officer is a clerk of court, not an ordinary administrative officer; here, working through the same process, the result can be obtained with slightly different formalities. The clerk of court, by the English common law (*post*, § 1681), is not authorized, merely as custodian, to certify copies, but must receive a special order in each instance; the seal of his court (presumably affixed by the judge) is equivalent to such an order; consequently his authority is sufficiently shown by the affixing of the court seal. Now if the seal of a foreign court can be presumed genuine, the end is gained; for if the seal is genuine, then we have an order by the Court, borne upon the certified copy itself, authorizing him to make out this very paper, and in effect stating that this copy was genuinely made out by a person having authority to do so. Whether the seal of a foreign court would be presumed genuine was perhaps doubtful at common law (*post*, §§ 1681, 2164), but if it would be so presumed, the purpose of authentication, for that class of documents, was accomplished in this special way.

The numerous varieties of statutes, then, which sanction some form of authentication, all have the common purpose of meeting these unavoidable elements and of furnishing a definite, simple, and convenient method of authentication. The statutes aim sometimes merely to declare the common law and to make certain that which was unsettled. Sometimes they go further, and endeavor to lessen the supposed inconveniences of the common-law requirements; for example, they may accept the certificate of a foreign city mayor or of a county clerk as to the authority, incumbency, and genuineness of seal or signature of a subordinate official, and may presume the genuineness of the seal of the mayor or county clerk, instead of requiring the certificate of the supreme Executive under the seal of State and of presuming this seal genuine; the object being to forestall the inconvenience of going a long distance from a local district to a central office of government to obtain the affixing of the seal of State. There was certainly room for reform in this respect in the rules of the common law; and experience seems not to

§ 1679. [1] The authority for this can be sufficiently seen in §§ 1680, 1681, *post*.

have indicated that the reforms were too radical. But, however these statutory modes may differ in detail from the common-law rules, the process involved is the same, and rests upon the inherent necessity of dealing in some manner with the logical elements of the proof. These statutory provisions, it may be remarked, though dealing thus in effect with the widely separated doctrines of judicial notice, presumed genuineness, and hearsay official statement, are nevertheless usually associated in enactment with the statutory provisions authorizing certain kinds of officers, or custodian-officers in general, to furnish certified copies to be admissible. It was natural, when declaring certified copies admissible, to provide in the same place for a definite mode of authenticating them; and hence the two sets of rules — the admissibility of certified copies, and the proper modes of authenticating such copies — are customarily provided for at the same time by the same statutory act.[2]

(2) *Authentication by other testimony.* The whole purpose of the process of authentication by presumed genuineness, judicial notice, and certificates of authority, is to avoid the inconvenience and expense of calling witnesses in the ordinary way to prove that which is seldom fairly disputable. The formalities so available by the common law or by statute are thus clearly not prescribed for their own sake, as being a necessary accompaniment of the process of authentication, but merely as substitutes for a more tedious and undesirable method. If, then, a party wished to resort to the more cumbrous method which would otherwise be necessary, the law will interpose no obstacle. It has merely endeavored to facilitate his proof; if he chooses to repudiate this assistance and proceed by the other method, he is at liberty to do so. It follows that if he attempts to avail himself of the more convenient method specially furnished, and fails to employ it properly, he may then nevertheless fall back upon the more cumbrous method which would have been open to him in the beginning had he chosen. In other words, he may *supply by other testimony the defects of a certificate of authentication.* This as a general principle of evidence is clear enough; it is a corollary of common sense, for no doctrine of evidence penalizes the failure to use properly one kind of evidence by forbidding the unfortunate party thereafter to use any other kind of evidence for the same purpose. The party may not be ready with any other sort; but if he happens to be, he cannot be prevented from availing himself of it. This is illustrated (*ante*, § 1677, par. 3) by the principle that a party offering a certified copy which is inadmissible because made by an unauthorized officer may nevertheless employ it by calling a witness to prove it an examined copy; by the principle (*ante*, § 1226) that a party not able to exempt himself from producing a recorded deed, because the record was unlawful, may nevertheless account for it by proving it lost or destroyed; by the practice under the Hearsay Exceptions, in which

[2] Such statutes are therefore placed in the ensuing §§ 1680–1682; while statutes and decisions dealing solely with the presumed genuineness of seals and signatures in general and with the judicial notice of officers in general are considered under the appropriate heads, *post*, §§ 2163–2168 (authentication), §§ 2174–2178 (judicial notice).

a statement offered under one Exception, but not fulfilling its requirements, may be received under any other exception whose rules it satisfies; and by many other unquestioned instances.[3] The doctrine in its present application, that the defects of a certificate of authentication may be supplied by other testimony, seems equally unquestioned as a general rule.[4]

There are, however, instances in which this rule of Evidence may give way to some mandatory policy of substantive law involved in the use of the document. For example, where a statute provides that a deed, in order to be recorded, must be authenticated in a specific way, and a deed is recorded without fulfilling the required forms of probate, the evidential permissibility of supplying the defects of the register-proof may be made to yield to a policy of substantive law which denies to a record of such a deed any validity by way of notice or the like.[5] The general rule, and the reason for this apparent exception to it, are well set forth in the following passage:

1895, HOLT, P., in *Lockhead* v. *Berkeley Springs W. & I. Co.*, 40 W. Va. 553, 21 S. E. 1031 (refusing to allow other proof of the official character and signature of a foreign officer certifying a jurat of an affidavit of a mechanic's lien required to be recorded, the jurat not being itself authenticated, as provided by statute, by a certificate from a clerk of court under seal): "[The Courts of this State would take judicial notice that the class of officers here concerned had authority to administer an oath.] But they would still need to be certified in some way that the officer in question belonged to such class, and that his signature was genuine. . . . [The counsel, however, argues as follows:] 'To authenticate a writing is to perform certain acts upon it for the purpose of rendering it admissible as being what it purports to be, without proof by witnesses that it is such; authentication is, then, merely a convenient method of furnishing proof of certain things. When, therefore, the section in question says an affidavit will be sufficiently authenticated in a certain form, verifying the genuineness of the signature and the authority of the person administering the oath, it simply means [that] this is one method of making the affidavit admissible in evidence without other proof of such genuineness and such authority; it does not purport to be the only or an exclusive method. Nor does it follow that, if the oath was in fact lawfully administered, if the affidavit was in fact duly made, it shall be of no effect because the officer has neglected to avail himself of the most convenient method of making it admissible in evidence without other proof. Consequently, parol evidence might be introduced at the hearing both as to the genuineness of the signature of the clerk (or the assistant clerk), and of his authority to administer the oath.' . . . Such contention rests, I think, upon a misconception of the purpose of authentication, the persons it is intended to satisfy, and the reason of the selection of the method which requires it to appear written upon the face of the claim authorized to be made a lien on being admitted to record. It is intended as a notice of a lien — a creature of the statute — to all whom it may concern. . . . Where the statute prescribes no method of verification of the signature of the officer before whom the affidavit is made, or if, when a method is mentioned, it does not appear to be restrictive or exclusive, the common-law method must be, in the one case, may be, in the other, resorted to. . . . [But here] the party whom it may concern, to whom the

[3] Compare the general principle of *multiple admissibility* (*ante*, § 13).

[4] 1838, Bennet *v.* Payne, 7 Watts 334; 1839, Van Ness *v.* Bank of U. S., 13 Pet. 17, 21; see also precedents in § 1681, *post*, about proving a foreign judge's seal, and in § 2165, concerning authentication of a notary's seal.

[5] Compare what is said *ante*, § 1649, note, and *ante*, § 1653, par. (4), § 1635, n. 4.

The precedents on this subject are so involved with doctrines of substantive law that it is impossible to give them here.

statute requires the notice to be given, wishes to know now the present actual fact of lien or no lien, as already accomplished; and the lawmaker . . . prescribed a method of authentication which he was to look for, and must find admitted to record if it exist at all; and he is required to look there, and nowhere else, for all the essential, determining factors of ascertainment. . . . Here the statute prescribes a method of giving notice to all whom it may concern, by requiring it to be in writing and made matter of record, so that the lien created may not be secret; and the inherent nature of the transaction necessarily implies that such method is intended to be exclusive."

(3) So far as the question is involved of the presumed genuineness of a certified copy *not purporting to be authenticated by another certificate*, or of the other modes of proving its genuineness, — for example, whether a clerk's certified copy not signed by him may be authenticated by proving his handwriting in the certificate, — the rules are considered under the general principle of Authentication (*post*, §§ 2161–2168).

§ 1680. **Certified Copies of Miscellaneous Public Documents.** The application of the foregoing principles to certified copies of the various kinds of documents is to-day a composite matter of common-law precedent and of statute. Any more detailed generalizations are impossible. The authorities may, however, be grouped under three heads, — miscellaneous administrative documents, judicial records, and registered deeds.

In dealing with the first group, *miscellaneous documents*,[1] it is to be kept

§ 1680. [1] In the following list both statutes and common-law precedents are collected; where a ruling appears to have been made under a statute, it is so noted; but statutory changes have outlawed many of the earlier rulings; a detailed analysis of the statutory history is here impossible. The statutes affecting the use of documents of the *government land-office* have been given *ante*, § 1239, for the reason stated there and in § 1659, but they are noted here, together with such rulings as seem to involve the present principle; the table of cross-references in § 1659 should also be consulted for authorities on special kinds of land-office documents; for *notarial copies* of deeds under the continental system, see *ante*, § 1681, notes; for *judicial records*, the authorities are given in the next section, § 1681; for *registered deeds*, they have been given *ante*, § 1651, with which should be compared those cited in § 1225 (concerning the rule for producing the original); for *telegraphic copies*, see *post*, § 2154; for *quasi-official copies*, see *post*, § 1683; for copies of other kinds of documents, the preceding sections of this Chapter may be found to contain material, though the effort has been made to place here all that properly involves the present principle; for the use of copies as *secondary to the originals*, see *ante*, §§ 1192–1230, and as affected by other principles, see in general, *ante*, §§ 1231–1241, 1264–1280; for *authentication by seal* and signature, see *post*, §§ 2161–2168; no attempt is made in the following list to collect fully the rulings interpreting the local statutes:

ENGLAND: 1799, Moises *v.* Thornton, 8 T. R. 303 (a diploma of medicine at a foreign university; if treated as a copy of the corporation records, the legal authority in the Faculty to certify copies must be shown); 1838, St. 1 & 2 Vict. c. 94 (certified copy of records in custody of the master of the rolls, by one of his officers under seal of the office, admissible); 1851, St. 14 & 15 Vict. c. 99, § 7, Lord Brougham's Act (acts of State in a foreign State or a British colony, provable by copy under seal of the State or colony); § 14 ("Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice . . ., provided it be proved to be an examined copy or extract, or provided it purport to be signed or certified as a true copy or extract by the officer to whose custody the original is intrusted"); 1865, St. 28 & 29 Vict. c. 63, § 6 (certified copy of a colonial law, by the clerk or other proper officer of the legislative body, admissible); 1868, St. 31 & 32 Vict. c. 37, § 2, Documentary Evidence Act ("any proclamation, order, or regulation" issued by Her Majesty or the Privy Council, or by authority of any Government department or officer as specified in the schedule, is provable by certified copy by the clerk of the

Privy Council or one of its members, or by the departmental officers specified in the schedule, without proof of the handwriting or official position of the person certifying); British N. Amer. Act, 1867, § 143 (records of the old province of Canada, delivered to Ontario or Quebec, provable by the custodian's certified copy); St. 1882, 45 & 46 Vict. c. 50, § 24; Municipal Corporations Act (a written copy of a by-law of a municipal council "authenticated by the corporate seal" is admissible); 1905, Robinson *v.* Gregory, 1 K. B. 534 (statute applied); St. 1905, 5 Edw. VII, c. 15, § 50 (trade-marks; the registrar's certified printed or written copies of the register, under seal of the patent-office, to be admissible "without further proof of production of the originals"); ib. § 51 (the registrar's purporting certificate of an entry, admissible); St. 1907, 7 Edw. VII, c. 29, § 79, Patents and Designs Act (certified copies of registers, patents, etc., kept under this Act, under seal of the patent office and certified by the comptroller, admissible); St. 1908, 8 Edw. VII, c. 67, § 88 (reform school certificate, and rules; certified copy by chief inspector, admissible); there are also scores of minor acts affecting various classes of public documents; the provisions of the Documentary Evidence Act, 1868, were extended to cover various war departments of Government in the following Acts: St. 1917, 7 & 8 Geo. V, c. 44, § 4 (Ministry of Reconstruction); c. 51, § 10 (Air Council).

CANADA: *Dominion:* St. 1893, c. 31, § 8, Evidence Act, R. S. 1906, c. 145, § 21 (proclamations, etc., of the Governor-General or Governor in council or a minister or head of department of the government of Canada are provable by certified copy as in Ont. R. S. c. 76, § 23); § 22 (proclamations, etc., of a Lieutenant-Governor or Lieutenant-Governor in Council or head of department of a Provincial government are provable by certified copy by the clerk or assistant clerk of the Council or head of department or his deputy or acting clerk or deputy); § 20 (Imperial records, documents, etc., are provable as in England); § 24 ("any official or public document of Canada or any province" is provable by certified copy by the custodian; and any document or book-entry of a corporation in Canada or a province is provable by certified copy of the presiding officer or clerk under corporate seal, without proof of seal or signature or official character); § 25 (like Ont. R. S. c. 76, § 29, where no other statute "renders its contents provable by means of a copy"); § 31 (no proof of handwriting or official position of any person certifying a copy under this statute shall be required, and the copy may be written or printed); § 26 (any entry in a book kept in a department of the government of Canada is provable by copy under oath or affidavit of an officer of the department); § 28 (reasonable notice, not less than 7 days, required for copies under §§ 24, 25, 26, 31); c. 37, §§ 68, 69 (railway act; regulations, documents, etc., provable by certified copy); c. 85, § 64 (certified copy, by the deputy minister of commerce or by a justice of the peace, of the oath of a grain inspection officer, admissible); c. 113, § 112 (certain certified copies of certificates of shipmasters, etc., to be admissible and to be presumed genuine); c. 48, § 162 (certified copies of official customs papers, under seal of "any of the principal officers in the United Kingdom" or a colonial collector or a British consul or vice-consul, admissible); c. 77, §§ 40–44 (certified copies of naturalization documents, provided for).

Alberta: St. 1906, c. 3, § 7, par. 55 (a regulation or order in council is provable by copy attested by "the signature of the clerk of the executive council; an order in writing signed by the council member acting as provincial secretary and purporting to be by command of the Lieutenant-Governor shall be received as his order"); ib. § 9 (acts of the Legislative assembly are provable by clerk's certified copy under seal of the Province, etc., as in Yukon Consol. Ord. 1914, c. 1, § 10); St. 1906, c. 57, § 535 (certificate of registration of veterinary surgeon, "purporting to be signed and issued by the registrar and under the seal of the association," admissible); c. 28, §§ 64, 65 (provision for proof of registration as a medical practitioner, by certificate); St. 1910, 2d sess., Evidence Act, c. 3, § 24 ("Letters patent under the Great Seal of the United Kingdom" or any British dominion, provable by "exemplification thereof, or of the enrolment thereof, under the Great Seal under which the same may have issued"); ib. § 26 (substantially like Ont. R. S. 1914, c. 76, § 23); ib. § 29 (like Dom. Evid. Act § 24, but restricted to documents in Alberta and corporation, chartered in Alberta and carrying on business therein); ib. § 32 (like Eng. St. 1851, c. 99, § 14, omitting the clause "and no statute exists," etc.); ib. § 34 (like Dom. Evid. Act § 31).

British Columbia: Rev. St. 1911, c. 78, § 28 (like Dom. Evidence Act, § 21); § 29 (like ib. § 22); § 31 (like ib. § 23); § 32 (like ib. § 24); § 33 (like ib. § 25); § 34 (like ib. § 31); § 35 (like ib. § 26); § 39 (like ib. § 28; but applying only to Quebec notarial acts); c. 22, § 11 (register of births, etc., provable by certified copy); c. 151, § 22 (same for marriage-certificates by a clergyman or registrar); St. 1912, 2 Geo. V, c. 17, § 93 (certificate of timber mark registration, by Minister of Lands Department, to be evidence, without proof of signature).

Manitoba: Rev. St. 1913, c. 65, § 9 (substantially like Dom. Evidence Act, § 21, but omitting departmental documents); § 10 (like ib. § 22, but limited to the province of Manitoba); § 11 (substantially like ib. § 22, but applying to other provinces than Manitoba); § 12 (proclamations, orders, regulations, or appointments, by a minister or head of department of Canada or Manitoba or any other province are provable by certified copy of the

minister or deputy or acting deputy or chief clerk); § 14 (like Dom. Evidence Act, § 20); § 15 (substantially like ib. § 24); § 16 (documents, etc., belonging to or deposited in any department of the government of Canada or Manitoba, are provable by attested copy of the head or deputy head or chief clerk of the department; and documents, etc., in any Dominion lands or surveys office in Manitoba, by attested copy of the agent, inspector, or other officer in charge); § 17 (like Dom. Evid. Act, § 26, applying also to any province of Canada); § 25 (like ib. § 31); § 20 (like ib. § 31); § 22 (like ib. § 28, applying to §§ 15, 17, 19, 20, *supra*); c. 133, § 371 (municipal by-law, provable by certified copy, under corporate seal, of the clerk or acting clerk or secretary-treasurer, without proof of seal or signature, unless forgery of the seal or signature is specially pleaded); c. 163, § 36 (park board by-law, provable by the secretary's certified copy, without proof of signature, unless forgery of the signature to the original is specially pleaded); c. 71, § 7 (farmers' benefit association declaration, provable by county clerk's certified copy); c. 35, § 129 (provincial Secretary's or deputy's certificate of issuance of license of foreign corporation, admissible); c. 89, § 2 (certain survey-plans of Hudson's Bay Co.; certified copy under Lieutenant-Governor's signature and Manitoba great seal, admissible); c. 89, § 6 (so for a copy of the register-book of surveys, with the addition of the affidavit of the clerk or other person examining the original); c. 117, § 196 (like Ont. R. S. c. 215, § 96); § 197 (liquor commissioners' regulation, provable by certified copy by one of them, without proof of signature, unless forgery of the signature to the original is specially pleaded); c. 126, § 51 (official medical register, provable by registrar's certified copy); c. 153, § 23 (same for pharmaceutical register); c. 143, §§ 12, 14 (certified copy of newspaper publisher's affidavit of ownership, admissible); c. 170, § 61 (certain railway plans, provable by certified copy of commissioner or registrar); c. 155, § 55 (documents belonging to or deposited in the lands department, provable by the commissioner's attested copy); c. 157, § 10 (any copy, signed by the provincial Secretary, "of any document, shall be equivalent to the original instrument itself," without proof of signature); c. 162, § 18 (public officer's bond, provable by certified copy); c. 167, § 29 (documents, etc., in the public works department, provable by certified copy of the minister); c. 198, § 10 (in part repeats c. 65, § 10); c. 203, § 53 (certain religious bodies' records deposited in the department of vital statistics, provable by certified copy); c. 194, § 22 (telephones and telegraphs; certified copy of documents in the Department, by the Minister, to be evidence); c. 121, § 12 (magistrate's oath, provable by provincial Secretary's attested copy).

New Brunswick: Consol. St. 1903, c. 127, § 28 (any record or document recorded or deposited "in any public office in this Province" is provable by examined copy, or by certified copy of the custodian "without proof of the official character or handwriting of such officer or deputy"); § 58 ("All proclamations, treaties, and acts or statutes of any legislature or other governing body of any foreign State, Canadian province, or British colony, and all written enactments or laws of the same, and all other acts of state" of the same, are provable by examined copy, or by copy under seal of State, province, or colony, without any proof of the seal, signature, or truth of the attestation); § 39 (British ship register and appurtenant documents are provable by custodian's certified copy); § 46 (British bankruptcy proceedings are provable by office copies purporting to be by the commissioners and registrar under court seal) § 51 (proclamations, etc., of the Province like Ont. R. S. 1914, c. 76, § 23); § 52 (proclamations, etc., of the Dominion; like ib. § 23); § 53 ("no proof shall be required of the handwriting or official position of any person" thus certifying; and the copy may be printed or written); § 40 (registered marriage-certificate, provable by certified copy of the clerk of the peace or the registrar); § 41 (letters patent, certificate of incorporation, or other document "purporting to incorporate any joint-stock company under any law" of the United Kingdom or a British colony or the Dominion or a province of Canada, or a State of the United States, is probable by a certified copy by a notary public under official seal, certifying to a comparison with the original, verified by affidavit, provided a copy of the certified copy and affidavit is served on the opponent six days before offering; the notary to certify, for a certificate of incorporation, that the copy is of a certificate duly filed or of a certificate "purporting to be that of the Secretary of State" "under what purports to be the seal of office"); § 61 (letters patent of any of British Dominions, provable by exemplification under the great seal); § 72 (municipal by-law, provable by the secretary-treasurer's certified copy, without proof of official character or handwriting); § 73 (municipal record-book, provable by the secretary-treasurer's certified copy); § 76 (by-law of provincial board of health, provable by the secretary's certified copy); c. 166, § 65 (similar, for town clerk's copy of by-law); c. 54, § 19 (register of marriage, etc., provable by the registrar's certified copy); c. 144, § 29 (county registrar's certified copy of the registry of a certificate of partnership, admissible); c. 159, § 14 (county secretary's certified copy under official seal of a certificate of return of election of sewer commissioners, admissible); 1917, Ex parte Thomas, 38 D. L. R. 716, N. B. (extradition; Massachusetts statute held sufficiently evidenced by copy under the great seal of the State certified by the State secretary under N. B. Consol. St. 1903, c. 127, § 58).

Newfoundland: Consol. St. 1916, c. 91, § 16 ("all proclamations, treaties, and other acts of State of any foreign State or British colony" are provable as in N. Br. Consol. St. c. 1271, § 58); § 18 (like ib. § 39); § 19 (like Dom. Evid. Act, § 25); c. 127, § 17 (filed certificate of incorporation, provable by registrar's certified copy); c. 3, § 131 (similar, for lists of voters, etc., except counterfoils, in election inquiries); c. 69, § 6 (certain documents concerning newspaper publication, provable by the colonial secretary's certified copy); c. 121, § 5 (celebrant's register, provable by his attested copy, "the handwriting of the attesting minister being duly proved"); c. 121, § 9 (marriage registers, provable by the colonial secretary's certified copy of entry, "the handwriting of the said secretary being duly proved"); c. 13, § 22 (maps, etc., in custody of secretary of department of public works; provable by certified copy); c. 22, § 170 ("certificates and copies of official papers" under seal of any principal customs officer in the United Kingdom or possessions, or of any British consul, or made pursuant to this chapter in this colony, admissible); St. 1919, c. 21, Evidence Act, § 1 (re-enacts substantially the provisions of Cons. St. 1916, c. 91, § 19); § 2 (like Dom. Evid. Act, § 26).

Northwest Territory: Consol. Ord. 1898, c. 9, § 3 (documents belonging to or deposited in the department of public works are provable by attested copy of the commissioner or his deputy); c. 23, § 25 (Territorial secretary's certified copy of sheriff's bond, admissible); c. 14, § 20 (registry of births, etc., provable by the registrar's certified copy); c. 70, § 100 (municipal by-law, provable by certified copy of the secretary-treasurer and any member of the council under corporate seal); c. 76, § 11 (recorder's certificate of record of stock-brand shall be evidence of ownership of the brand).

Nova Scotia: Rev. St. 1900, c. 19, § 51 (inspector's certified copy of mining rules to be admissible); c. 73, § 63 (clerk's certified copy of assessment roll of municipal corporation, under corporate seal, admissible, without proof of seal or signature); c. 99, § 127 (registrar of deeds' certified copy of railway plans, etc., filed, to be admissible); c. 100, § 155 (council resolution concerning intoxicating liquors is provable by clerk's certified copy, without proof of signature's authenticity, unless the original is expressly denied as a forgery); c. 163, § 4 (like Dom. Evid. Act, § 20); § 5 (like ib. § 21); § 6 (like ib. § 22, especially mentioning the province of Nova Scotia, and including also any territory of Canada); § 9 ("proclamations, treaties, and other acts of State of any foreign State, or of any British colony," are provable by copy under the seal of the State or colony); § 11 (like Dom. Evid. Act, § 24, applying the first portion to any "grant, map, plan, report, letter, or official or public document belonging to or deposited in any department," etc.); § 13 (like ib. § 26, including also the books of a department of Nova Scotia); § 14 (like ib. § 25); § 17 (substantially like N. Br. Consol. St. c. 127, § 39); § 19 (certain filed or registered township plans and allotments, provable by certified copy, after notice in certain cases); § 31 (like Dom. Evid. Act, § 31).

Ontario: Rev. St. 1914, c. 28, § 30 (documents in the public lands department are provable by copy certified by the Minister, agent, etc.); c. 76, § 23 (proclamations, orders, regulations, or appointments by any chief executive officer or head of department of the Government of Canada are provable by copy purporting to be certified by a clerk of the Council or by the minister or deputy or head of the department, or by such acting officer; similar, for copies of such documents, from an Executive Council or department of a province or territory of Canada); § 26 (whenever the original record is admissible, "any official or public document in this province" is provable by a copy "purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document is placed," without further proof); § 28 (entry in a regular book kept in a government department is provable by copy under oath or affidavit of an officer of the department); § 29 ("whenever a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody today," a copy "purporting to be signed and certified as a true copy or extract by the office to whose custody the original has been entrusted" is admissible); c. 192, § 258 (municipal by-law may be proved by certified copy by the clerk under corporate seal, "without proof of the seal or signature,"); § 357 (by-laws of board of police commissioners may be proved by copy certified by any member, "without proof of such signature," unless it is specially alleged that the signature to the original is forged); c. 215, § 97 (resolution of board of liquor-license commissioners); § 96 (inspector's certificate of a liquor license to be evidence of the facts stated and of the authority of the inspector "without proof of his appointment or signature"); c. 76, § 21 (letters patent under the Great Seal of the United Kingdom or any other of the British Dominions are provable "by exemplification thereof, or of the inrolment thereof," under the Great Seal under which the same may have issued); c. 192, § 258 (original by-law of a municipal corporation, when produced by the clerk or any officer, shall be received "without proof of the seal or signatures" unless one or more of them is specially alleged to be forged).

Prince Edward Island: St. 1889, c. 9, § 21 (like Newf. Consol. St. c. 91, § 16, but including acts in Great Britain, Ireland, the Dominion and the provinces of Canada); § 22 (register of marriages, etc., out of the Province is provable by the legal custodian's certified copy); § 27 (like Dom. Evid. Act,

§ 25; public documents in general); § 26 (like N. Br. Consol. St. c. 127, § 39; ship's registers); § 28 (record of a vote, etc., of the Executive Council concerning land titles is provable by certified copy purporting to be by the clerk of the Council); § 30 (proclamations, etc.; like Dom. Evid. Act, § 21); § 31 (like ib. § 31; limited to the foregoing P. E. I. § 30); St. 1898, 61 Vict. c. 3, § 1 (Provincial treasurer's certificate of a commercial traveller's license, admissible); St. 1906, 6 Edw. VII, c. 6, §§ 25, 30 (certified copies, by the registrar-general or his assistant, of the records of birth, marriage, and death, admissible); St. 1909, 9 Edw. VII, c. 6, § 1 (repeals St. 1898, c. 3).

Saskatchewan: Rev. St. 1920, c. 18, § 40 (records, documents, etc., in the department of public works, are provable by copy attested by the signature of the minister or deputy); c. 135, §§ 62, 63 (provision for certified copies of the official register of the medical profession); c. 44, Evidence Act, § 11 (like Dom. Evid. Act, § 24); ib. § 17 (like Eng. St. 1851, 14–15 Vict. c. 99, § 14); ib. § 12 (like Dom. Evid. Act, § 26); c. 1, § 54 (orders in council; like c. 44, § 7); c. 1, § 59 (acts of the Legislature Assembly provable by the clerk's certified copy); c. 76, § 21 (registrar's certified copy of certificate of incorporation, under seal of office, admissible); 1913, R. *v.* Hutchins, Sask. S. C., 12 D. L. R. 648 (certified copy of clerk's records of marriage license, etc., in Minneapolis, admitted under Can. Evidence Act, § 23).

Yukon: Consol. Ord. 1914, c. 1, § 8, par. 54 (Commissioner's regulation or order, provable by written copy attested by the Territorial secretary); ib. § 10 (Territorial secretary's certified copies of ordinances, under Territorial seal, "shall be held to be duplicate originals and also to be evidence, as if printed by lawful authority, of such ordinances and of their contents"); c. 6, § 20 (registry of vital statistics, provable by certified extract); c. 64, §§ 10, 20 (provision for certified copies of the official registry of medical practitioners); c. 84, § 11 (certified copy, by the clerk of the territorial court or his deputy, of a filed declaration of benevolent incorporation, etc., admissible); c. 56, § 103 (provision for chief inspector's certificate of a license, in liquor cases); ib. § 104 (provision for certificate of a regulation, in liquor cases); c. 30, § 5 (proclamation, etc., of Governor-General; like Dom. Evid. Act, § 21); ib. § 6 (proclamation, etc., of a Lieutenant-Governor, etc., or of the Yukon Commissioner; like Dom. Evid. Act, § 22); ib. § 9 ("Proclamations, treaties, and other acts of state of any foreign State or of any British colony may be proved by the production of a copy purporting to be sealed with the seal of the foreign State or British colony to which the original document belongs"); ib. § 11 (like Dom. Evid. Act § 24, inserting "grant, map, plan, report, letter" and "belonging to or deposited in" for the first class, and "or of this Territory or of any province or Territory of Canada" for the second class); ib. § 13 (official books; like Dom. Evid. Act, § 26; adding "or of this Territory"); ib. § 14 (like ib. § 25); ib. § 31 (like ib. § 31, inserting "grant, map, plan, will, deed"); ib. § 17 (shipping register; like N. Br. Consol. St. c. 127, § 39).

UNITED STATES: FEDERAL: Rev. St. 1878, § 882, Code 1919, § 1385 (books, papers, etc., "in any of the executive departments," provable by copy under seal of department); R. S. § 883, Code § 1386 (books, papers, etc., in the office of the solicitor of the treasury, provable by certified copy under official seal by himself or the acting solicitor); R. S. § 884, Code § 1387 (papers in the office of the comptroller of the currency, provable by his certified copy under official seal); R. S. § 885, Code §1388 (organization certificate of a national banking association, provable by the comptroller of currency's certified copy under official seal); R. S. § 886, Code § 1389 (in suits for delinquency of money officials, transcripts of books, etc., of the treasury department, certified by the secretary or assistant secretary under department seal, are admissible; bonds, etc., relating to an account between the U. S. and an individual, provable by certified copy by such officer under department seal; if execution is denied by verified plea or motion, the Court, "if it appears to be necessary for the attainment of justice," may require the production of the original); R. S. § 888, Code § 1397 (contract returned to returns-office of the interior department, provable by clerk's certified copy under department seal, in a prosecution for false swearing to a return); R. S. § 889, Code § 1391 (copies of quarterly returns of postmasters and of account-papers in the Treasury auditor's office, and of money-order account-books of the post-office department, admissible, when certified by the auditor under official seal); R. S. § 890, Code § 1392 (certified copy, under the Treasury auditor's seal, of a certificate of demand upon a delinquent postmaster, admissible); R. S. § 891, Code § 691 (books, papers, etc., in the general land-office, provable by certified copies by the commissioner under official seal); R. S. § 893, Code §1394 (such certified copies of "the specifications and drawings of foreign letters-patent," to be evidence of their granting, date, and contents); R. S. § 894, Code § 1395 (printed copies of specifications and drawings, distributed by the patent-commissioner by law and deposited in State capitols, etc., admissible when certified by him under official seal); R. S. § 895, Code § 1398 (House journal and Senate journal and executive journal, provable by copies certified by the House clerk or Senate secretary); R. S. § 896, Code § 1399 (official documents and records in the office of a U. S. consul, vice-consul, or other consular officer, provable by his certified copy under seal); R. S. § 905, Code § 1409 (St. 1790, May 26; "The acts of the Legislature of any State or Territory, or

of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto"); R. S. § 906, Code § 1410 (St. 1804, March 27; "All records and exemplifications of books which may be kept in any public office of any State or Territory or of any country subject to the jurisdiction of the United States, *not appertaining to a court*, shall be proved or admitted in any court or office in any other State or Territory or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the Governor, or Secretary of State, the Chancellor or keeper of the great seal, of the State or Territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made"; compare the Federal statute *post*, § 1681, and see the citations in notes of § 1680*a*, *post*); R. S. § 907, Code § 1408 ("It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agent, relating to the title to lands claimed by or under the U. S., on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general land-office, to authenticate copies thereof under his hand and seal"; these, on being certified under official seal, by an American minister or consul, shall be sent to the solicitor of the treasury and recorded by him; "a copy" of this record is admissible "equally with the originals"); Code § 659 ("any official books, records, papers, documents, maps, plats, or diagrams," in custody of any officer of the Interior Department, provable by "authenticated copies" under the officer's official seal); § 683 (original application for entry of land, etc., in general land-office, when called for by subpœna duces tecum, is to be forwarded under seal of "general land-office commissioner, and "shall be received in evidence"); § 700 (public documents, records, books, maps, or papers, in office of commissioner of Indian affairs, provable by copy authenticated by the commissioner under official seal); § 1393 ("official books, records, or papers, documents, maps, plats, diagrams, drawings, specifications, or letters patent," in Interior Department or any bureau, etc., thereof, provable by copy authenticated by seal of department, bureau, office, or institution, and certified by the head of such department, etc., or "by any officer thereof authorized by law to certify thereto"; § 1396 (public documents, etc.; in office of commissioner of Indian affairs, provable by copies "authenticated by the seal of such office and certified by the commissioner" or by an officer acting "as or for such commissioner"); § 4528 (certified transcripts, by registers and receivers of U. S. land-offices, of "records in their offices," admissible); § 6187 ("written or printed copies of any records, books, papers, or drawings relating to trademarks belonging to the patent office, and of certificates of registration," certified by the commissioner, under patent office seal, admissible); § 8145 (U. S. collector of the port's certified copy of list of ship's crew, admissible); St. 1906, June 29, § 5, c. 3591, Code § 7039 (contracts, reports, schedules, etc., of common carriers, preserved as public records by the Interstate Commerce Commission, shall be "received as 'prima facie' evidence of what they purport to be"; and a copy certified by the secretary of the Commission under its seal is receivable); St. Mar. 19, 1920, § 7 (written or printed copies of records of the Patent office relating to international registered trademarks, admissible wherever the originals could be, when certified by the commissioner of patents under seal of office); 1795, Talbot *v.* Jansen, 3 Dall. 133, 137 (collector of the port cannot certify copies of his book-entries); 1804, Church *v.* Hubbart, 2 Cr. 186, 236 (quoted *ante*, § 1677); 1806, U. S. *v.* Johns, 4 Dall. 412, 415 (certified and sworn copy of a custom-house record of a ship's manifest, admitted without other evidence of the shipmaster's signature); 1833, U. S. *v.* Percheman, 7 Pet. 51, 85 (quoted *ante*, § 1677); 1840, U. S. *v.* Wiggins, 14 id. 334, 346 (certified copy of a Spanish land-grant, by the custodian, received); 1896, Smith *v.* U. S., — Ariz. —, 45 Pac. 341 (Treasurer's transcript, admitted under Rev. St. § 886); 1873, First Nat'l Bank *v.* Kidd, 20 Minn. 234, 237 (comptroller's certified copy under seal of a bank's organization certificate, admitted under Rev. St. § 885); 1905, Howard *v.* Perrin, 200 U. S. 71, 26 Sup. 195 (certified copy of land-office papers, admitted under Rev. St. § 891); 1906, U. S. *v.* Pierson, 145 Fed. 814, C. C. A. (effect of a certified transcript of Treasury department records, in an action for official delinquency, under U. S. Rev. St. 1878, § 886); 1915, Hanish *v.* M. S., 7th C. C. A., 227 Fed. 584 (incorporation of an express company, proved by Interstate Commerce Commission records, under St. 1887, Feb. 4, c. 104, § 16, as amended by St. 1906, June 29, c. 3591, § 5).

For the rulings interpreting Rev. St. § 906, see note to § 1680*a*, *post*.

ALABAMA: Code 1907, § 3978 (custodian's certificate of register of marriage, etc., kept

by law or church rule, received as "presumptive evidence" of the law or rule for keeping and of the authority to certify); §§ 3980, 3981 (certified copies, by the register of a land-office in the State, of "any official book, official entry, or other document pertaining to" such an office, admissible; also of a deed or written instrument of conveyance in such land-office, either by register's copy or by copy of transcript in probate office); § 3982 (U. S. surveyor-general for the State; certified copies, by the Secretary of State, of his books, maps, and field-notes deposited in the Secretary's office, receivable); § 3983 (books or papers "required by law to be kept in the office of any public officer," including a book which is a copy of U. S. office-books, provable by certified copy by "the proper custodian thereof"); § 3984 (field-notes of original government-surveys, furnished by Secretary of State or by the U. S. to a judge of probate, provable by the latter's certified copy); § 3985 (certificate of "the head of any bureau or department of the general government is sufficient authentication of any paper or document appertaining to his office"); § 3986 ("official bonds or other instruments or papers required to be kept by any officer of this State," and "books and proceedings required to be kept by any sworn officer of this State," provable by certified copy or transcript by the custodian, with the "same effect as if the original were produced"); § 3988 (Federal, State, or Territorial statute; transcript certified by the Secretary of this State as deposited in his office or the Supreme Court library, receivable); § 3989 (certified book of ordinances, etc., or copy of a specific ordinance, of a municipal corporation in the State, by the clerk or recording officer, receivable as evidence of "due adoption and continued existence" of the ordinances, etc.); § 5170 (certified copy of deceased notary's acts by probate judge or other notary the depositary of the registers, receivable); §§ 4886, 4887 (certified copies of the probate judge's record of marriage licenses and certificates, admissible); § 2310 (books and records of tax-collector or probate judge, in an issue of sale of realty for taxes provable by certified copy); § 573 (Secretary of State's certified copy of books, etc., of late U. S. surveyor-general, admissible); § 26 (certified copy of commissioner's record of fertilizer-license, admissible); § 2731 (recorded refunding bonds, provable by certified copy); § 48 (official analysis of fertilizer or chemical, provable by copy under seal of department of agriculture); § 5943 (certified copy of books of auditor or of superintendent of education, admissible in action for default against county superintendent); § 2546 (recorded bond of executor or administrator, provable by certified transcript); § 5987 (clerk of Supreme Court's certified copy of its opinion, to be "legal evidence"); § 2310 (tax records, provable by certified copy); § 2358 (papers, etc. the office of the State "auditor or treasurer, provable by certified copy under seal," in suits against sundry tax officials, unless the defendant denies the execution on oath); 1830, Hamner *v.* Eddins, 3 Stew. 192, 197 (certified copies of field-notes in the surveyor-general's office, excluded, as not authorized); 1840, Johnson *v.* McGehee, 1 Ala. 186, 192 (certified copy of assignment of Indian land, the original being kept in the War Department, admissible); 1851, Phillips *v.* Poindexter, 18 Ala. 579, 582 (notary's certified copy of his entry of protest, receivable); 1854, Stephens *v.* Westwood, 25 Ala. 716, 719 (certified copy of land-patents, etc., from the U. S. land-office and U. S. Indian bureau, certified by an "acting commissioner," sufficient); 1882, Martin *v.* Hall, 72 Ala. 587 (certified copy of the record of an official bond, required to be filed but not to be recorded, excluded); 1888, Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 437 (same, for copy of U. S. land-patent); 1889, Hawes *v.* State, 88 Ala. 37, 69, 7 So. 302 (the statute as to marriage registers applies to registers kept out of the State; certificate of such a custodian is evidence of his authority to certify copies); 1890, Robinson *v.* Cahalan, 91 Ala. 479, 481, 8 So. 415 (U. S. "patent," admitted without proof of its execution); 1904, Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350 (certified transcript of a constable's bond recorded with the probate judge, admitted under Code § 1816); 1917, Windham *v.* Newton, 200 Ala. 258, 76 So. 24 (personal injury; to evidence the defendant's ownership of an automobile, a certified copy of an application for a State license, admitted under Code § 3983, even though the application was not verified as required by law).

ALASKA: Comp. L. 1913, § 1871 (like Or. Laws 1920, § 739); § 1872 ("a judicial, legislative, or executive record of said district [of Alaska], or of any State or Territory of the United States, or of any foreign country, or of any political subdivision of either, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof, with the seal of the court or the official seal of such person affixed thereto, if it or he have a seal, or otherwise authenticated as required by §§ 905, 906, and 907 of the Revised Statutes of the United States").

ARIZONA: Rev. St. 1913, Civ. C. 1732 (Secretary of the Territory's certified copy, under seal, of an act in "any of such printed statute books deposited in his office, or of any law or bill, public or private, deposited in his office in accordance with law," admissible); § 1739 (records of "all public officers" of the Territory, provable by certified copy, under seal, by the "lawful possessor of such records"; so also § 1870); § 1740 (certified copies of "records and official papers" of notaries public, admissible); § 1742 (in suits by the State against a delinquent officer or agent, a

transcript under official seal of the lawful possessor's books, etc., containing statements of accounts, and certified copies annexed thereto, under official seal of the lawful possessor, of "bonds, contracts, or other papers relating to" the account and filed in the office, are admissible; but in such suit on a bond or other written instrument, whose execution is denied by sworn plea, production of the original shall be required); § 1745 (certified copy by a State or county officer under official seal of "all notes, bonds, mortgages, bills, accounts or other documents, properly on file with such officers," admissible); § 1761 (certified copy of a duly recorded domestic marriage certificate, receivable); § 3764 (certified copy of the official record of live-stock brands is admissible); §§ 187, 192 (official bonds provable by certified copy of State secretary or other officer with whom filed); § 2332 (State corporation commission; all official documents in its office provable by certified copy by commissioner or secretary under commission seal); § 1735 (municipal ordinances, etc., provable by certified copy by mayor or president of council and clerk under city or town seal); § 1738 (State librarian's certified copy of any papers or documents in State library, admissible); § 1748 (documents or records belonging and being in "any of the governmental departments of the U. S." are provable by copy authenticated so as to be receivable in U. S. court).

ARKANSAS: Dig. 1919, § 4117 (Secretary of State's certified copy under seal of an act, etc., in a printed statute book of a U. S. State or Territory, purporting to be printed by authority and deposited and required by law to be kept in his office, admissible); § 4121 (Secretary of State's certified copy under official seal of an act, etc., of the General Assembly, official acts of Governor, and "of all rolls, records, documents, papers, bonds, and recognizances" deposited and required by law to be kept in his office, admissible); § 4122 (certified copy under official seal by the State treasurer or auditor of documents legally deposited in his office, admissible); § 4123 (public auditing officer's certified copy of a balance of debt due to the State, admissible); § 4124 (superintendent of public instruction's certified copy under official seal of a document deposited or filed in his office, admissible); § 4127 (records of auditor and of commissioner of State lands, provable by certified transcript); § 4129 (city or incorporated town ordinance, etc., provable by certified copy of "the proper officer" under corporate seal); § 4130 (official bonds of all officers, provable by the legal custodian's certified copy); § 4132 (official bond of an executor, administrator, guardian, or commissioner, or of principal and security as required in a judicial proceeding, provable by the legal custodian's certified copy under official seal); § 4131 (contracts with the State or an officer or with a county or for a county's benefit, made under legal authority, and kept in official custody, provable by the custodian's certified copy under official seal, or, if he has no seal, by affidavit-copy); § 4133 (production may be required, in cases of the three preceding sections, if defendant in an action on such a bond, etc., denies under oath the execution); § 1692 (State corporation commission; clerk's certified copies of its recorded determinations, admissible); § 1711 (State secretary's certified copy of business corporation's articles of incorporation, admissible); § 1748 (similar for navigation company, adding "or his deputy"); § 1897 (county surveyor's record, provable by certified copy); § 4746 (U. S. survey records, on file in State land office, provable by certified transcript); § 7497 (municipal corporation records, provable by clerk's certified transcript); § 8421 (State secretary's certified copy of railroad company's articles of association admissible); § 8817 (documents in office of State superintendent of public instruction, provable by his copy authenticated by official seal); § 10297 (State secretary's copy under official seal, of registered trademark, admissible); St. 1921, No. 238 ("Copies of any record, book, report, paper or other document on file with, or of record in, the office of any public officer or commission of the State, or of any county officer, or any excerpts from such record, book, report, paper or other document, when duly certified by the officer or the secretary of the commission in whose custody such record, book, paper or other document is found, shall be received in evidence in any court of this State with like effect as the originals thereof").

CALIFORNIA: C. C. P. 1872, § 1893 (certified copy by "every public officer having custody of a public writing which a citizen has a right to inspect," admissible "with like effect as the original writing"); § 1901 (certified copy of a "written law or other public writing of any State or country," by "the officer having charge of the original," under the public seal of the State or country, receivable); § 1918 ("Other official documents may be proved as follows: 1, Acts of the Executive of this State, by the records of the State department of the State; and of the United States, by the records of the State department of the United States, certified by the heads of those departments respectively. . . . 2, The proceedings of the Legislature of this State, or of Congress, by the journals of those bodies respectively, or either House thereof, or by published statutes or resolutions, or by copies certified by the clerk. . . . 3, The acts of the Executive, or the proceedings of the Legislature of a sister State, in the same manner; 4, The acts of the Executive, or the proceedings of the Legislature of a foreign country, . . . by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the Executive of the United States; 5, Acts of a municipal corporation of this State, or of a

board or department thereof, by a copy, certified by the legal keeper thereof. . . . 6, Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof; 7, Documents of any other class in a sister State, by the original, or by a copy certified by the legal keeper thereof, together with a certificate of the Secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original; 8, Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody; 9, Documents in the departments of the United States government, by the certificate of the legal custodian thereof"); § 1919 ("A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record"); § 1923 (certificate with a copy must state "that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court"); § 2011 (county clerk's or judge's certified copy of filed affidavit of publication of notice, etc., admissible); Civ. C. 1872, § 297 (Secretary of State's or county clerk's certified copy of articles of incorporation, admissible); § 2471 (county clerk's certified copies of entries of a partnership register, admissible); § 2472 (Secretary of State's certified copy of foreign partnership's designation of agent to accept service, admissible); Pol. C. 1872, § 1117 (entry in the great register of elections, provable by certified copy); § 3083 (State registrar's record of marriage or death, provable by certified copy); § 2984 (same provision applied to record of death); § 3789 (same for assessment books and delinquent list); 1857, McFarland *v.* Pico, 8 Cal. 626, 635 (notary's certified copy of his record, receivable); 1866, Doherty *v.* Thayer, 31 Cal. 140, 143 (certified copy of official survey, excluded as not conformable to statute); 1872, Himmelman *v.* Hoadley, 44 Cal. 213, 225 (municipal officer's record, authenticated by certificate of the officer having the duty to make it); 1886, Alameda M. Co. *v.* Williams, 70 Cal. 534, 538 (same, under statute; applied to a city assessment-book); 1896, Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172 (certificate of correctness of a copy of a map by a colonel of engineers, the legal custodian, admitted).

COLORADO: Comp. Laws 1921, § 6541 (Secretary of State's exemplification of "the laws of the several States and Territories which may be transmitted by order of the Executives or Legislatures of such States to the Governor of this State and by him deposited" in the Secretary's office, admissible); § 6542 (papers, etc., "appertaining to transactions in their corporate capacity of any town or city" incorporated provable by the clerk's or keeper's certified copy under corporate seal, or, if no public seal, under the certifier's private seal, the certifier also stating that he is intrusted with the original's safe keeping); § 5562 (recorder's certified copy under official seal of an entry in a register of marriages, admissible); § 2323 (charter, etc., of a foreign corporation filed in the office of the Secretary of State, provable by his certified copy under official seal); § 2246 (articles of incorporation, provable by certified copy under great seal of State); § 8741 (recorder of deeds' certified copy of "all papers filed" and of records, admissible); § 8834 (all papers duly filed or deposited with a county judge, clerk or treasurer, and all record-books there kept, provable by certified copy under official seal); § 5042 (county clerk's certified copy of recorded field-notes, etc., of the general government survey, admissible); § 9105 (recorded municipal plats, provable by certified copy of county recorder); § 9167 (municipal ordinances etc., "may be proven by the seal of the corporation"); § 4015 (Secretary of State's certified copy of a recorded trademark, admissible); § 1762 (recorded certificate of irrigation-decree, provable by certified copy); § 1649 (irrigation claim; certified copy of map and statement filed with State engineer, admissible); § 3303 (recorded survey-plat of mining claim, provable by county recorder's certified copy); § 2245 (corporations formed to do business without the State, certificate provable by State secretary's certified copy under State seal); § 2721 (State bank commissioner's reports and records, provable by his certified copy); § 4331 (State industrial Commission; records provable by certified copy under seal); § 990 (State register, certified copy of register of birth or death, admissible); §§ 3117, 3125, 3126 (record of stock-brand, provable by copy certified by State board of stock inspection commissioners) C. C. P. § 391 (a copy is allowable, "when the original is a record or other document in the custody of a public officer"); § 459 ("any record, or document, or paper, in the custody of a public officer of this State, or of the United States, within this State," is provable by officer's copy certified under official seal or verified by his oath).

COLUMBIA (*Dist.*): Code 1919, § 1295 (marriage license and certificate, provable by the Supreme Court clerk's certified copy of record under court seal); § 1575 (District surveyor's records, provable by his certified transcript); § 1070 ("An exemplification of the record under the hand of the keeper of the same, and the seal of the court or office where such record may be made, shall be good and sufficient evidence to prove any record made or entered in any of the States

or Territories of the United States; and the certificate of the party purporting to be the keeper of such record, accompanied by such seal, shall be 'prima facie' evidence of that fact").

CONNECTICUT: Gen. St. 1918, § 126 (Secretary of State's certified copies, under seal of State, of records, etc., in his custody, admissible); § 5725 (Secretary of State's exemplified copy of a law of another of the United States officially deposited with the Secretary or in the State library, admissible); § 5728 ("entries or records of all corporations and all public offices" "made of their acts, votes, and proceedings, by some officer appointed for that purpose," provable by certified copy under hand and official seal); § 3510 (Secretary of State's certified copy under seal of a stock corporation's certificate of organization, admissible); § 5731 (recording officer's certified copy of a memorandum of revenue stamps affixed to a recorded document, admissible); § 5733 (clerk's certified copy of records of proceedings of town boards of health, common proprietors, ecclesiastical society, or religious corporation, admissible); § 5124 (town clerk's certified copies of common proprietors' records, admissible); § 4811 (Secretary of State's certified copy, under seal of State, of a recorded certificate of trademark, admissible); § 2826 (State chemist's certified copies of his official analyses, admissible); § 2916 (same, for pharmacy commissioners' certified copies of proceedings); § 3991 (certified copy of a lost bond of the treasurer of a savings bank, recorded with the Secretary of State, admissible); § 4194 (State insurance commissioner's certified copy of recorded certificate of fraternal benefit society, admissible); § 5729 ("any order or regulation made by a State official in the performance of his duties," provable by copy certified by legal custodian); § 5730 (State secretary's certified copy under seal of any certificate filed by any corporation pursuant to law, admissible); 1876, Wilson *v.* School District, 44 Conn. 160 (rejecting a town-clerk's certified copy of a vote passed at a meeting the legality of which was in question); 1901, Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758 (cited *ante*, § 1676).

DELAWARE: Rev. St. 1915, §§ 4223, 4224 ("all records, surveys, patents, deeds, or other instruments of writing" kept in a Maryland public office and affecting lands in Delaware, provable by attested copies of custodian under seal; also by the record of the same or a certified copy when recorded in any Delaware county); § 4229 ("any record or paper belonging to a public office or legally in the custody of a public officer," provable by custodian's certified copy under seal); § 1388 (county recorder's record, or a certified copy, of any instrument "authorized by law to be recorded," admissible); § 100 (State secretary's certificate under official seal of filing of charter of foreign corporations, to be 'prima facie' evidence); § 384 (certified copy of State treasurer's bond, or record thereof, admissible); § 427 (State secretary's copies of records, etc., authenticated by his seal of office or the great seal of State, admissible); § 579 (State insurance commissioner's copies of records, etc., under his official seal, admissible); § 1920 (corporation charter; county recorder's certified copy under seal, or State secretary's certified copy under seal with recorder's certificate of record, admissible); § 1988 (similar for renewal of charter).

FLORIDA: Rev. G. St. 1919, § 1036 (in suits for moneys owed by officers to State, certified copies by State comptroller of "bonds, contracts, or other papers," admissible; but in suits on bonds or other sealed instrument, with plea of non est factum, etc., the Court may require production of original, "if it shall appear necessary for the attainment of justice"); § 2720 (any instrument of writing, lawfully filed or recorded in a public office of this State or a county, is provable by the custodian's certified copy, under seal of office, but if none exists, under private seal; 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 administration of justice"); § 3675 (county judge's certified copy under court seal of a bond of an executor or administrator, admissible); § 4053 (letters patent of a corporation, provable by the Secretary of State's certified copy under the great seal; a charter, by his certified copy of record); § 4997 (State secretary's certificate of record of trade-mark, etc., admissible); 1896, Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992 (exemplification of a patent-record by the land-commissioner under seal, admissible); 1902, Florida C. & P. R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424 (a municipal ordinance is provable by the clerk's certified copy, apart from statute).

GEORGIA: Rev. C. 1910, § 206 (State governor's bond, provable by certified copy by "one of the Governor's secretaries under the seal of the executive department"; a singular method); § 220 (State treasurer's bond, provable in the same way, or by certified copy from the State secretary's office); § 1747 (records of State board of dentistry, provable by certified copy); § 5798, P. C. § 1041 (certificate of any public officer of the State or county "shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in the respective offices, or pertaining thereto, to admit the same in evidence"); Rev. C. § 5799 (this certificate is to be "primary evidence" of documents, etc., required by law to remain in the office, but "secondary evidence" of those which by law properly remain in the party's possession); § 5803 (municipal corporation's records, provable by the keeper's certified copy under seal, like judicial records); § 5819 ("foreign laws and judgments must be

authenticated under the great seal" of State); § 5824 (laws of State, etc., of the U. S. are proved by copy under seal of State, etc.); § 5827 (records in a public office of a State, etc., of the U. S., not appertaining to a court, are provable by the keeper's attested copy under official seal, certified by the presiding justice, Governor, Secretary of State, Chancellor, or keeper of the great seal; if by the first named, then to be authenticated by the clerk under official seal; if by one of the last four, then to be under the great seal); 1869, Brakehill *v.* Leonard, 40 Ga. 60, 62 (Confederate military orders, proved by certified copy); 1881, Jackson *v.* Johnson, 67 Ga. 167, 180 (certified copy of a bond filed in the Probate Court of Alabama, admitted, under Ala. Code, § 2695, giving a certified copy the same force "as if proved," and though execution is specially denied); 1900, Central of G. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299 (certified copy, not under municipal seal, of town records, excluded); 1903, McLanahan *v.* Blackwell, 119 Ga. 64, 45 S. E. 785 (U. S. bankruptcy referee's certified copy of proceedings, admissible).

HAWAII: Rev. L. 1915, § 261 (Territorial instruction department's records, provable by superintendent's certified copy, attested by secretary under department seal); § 1161 (Territorial treasurer's certified copies of under department seal of documents deposited, admissible); § 2593 ("All proclamations, treaties, and other acts of state of this Republic or of any foreign State, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any part of this Territory, or in any foreign State, and all affidavits, pleadings, and other legal documents, wills, and codicils filed or deposited in any such court, may be proved, . . . either by examined copies or by copies authenticated as hereinafter mentioned (that is to say), if the document sought to be proved be a proclamation, treaty, or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the great seal of this Territory, or of the foreign State to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any court in this Territory, or in any foreign State, or an affidavit, pleading, or other legal document, will, or codicil filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of such court or (in the event of such court having no seal) to be signed by the judge or (if there be more than one judge) by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal. But if any of the aforesaid authenticated copies shall purport to be signed or sealed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement; and every such copy shall be 'prima facie' evidence of the original thereof, in like manner as if such original were produced and proved in due course of law"); § 2595 ("Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no law exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in any court, . . . provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted"); § 1140 (certified copy of records of birth, etc., kept by Board of Health, furnished by its secretary, admissible); § 2596 (any book or document "deposited in the building set apart for public archives," provable by certified copy by Secretary of Territory or by Librarian); St. 1921, No. 132 (adding § 2593*a* to Rev. L. 1915; ordinance of any city or city and county is provable by clerk's certified copy under seal).

IDAHO: Comp. St. 1919, § 7941 (certified copy by "every public officer having the custody of a public writing, which a citizen has the right to inspect," admissible like the original); § 7945 (like Cal. C. C. P. § 1901, inserting "Territory"); § 7952 (like id. § 1918, substituting "another State or Territory" for "a sister State," and inserting "District [Court]" in cl. 7); § 7953 (like Cal. C. C. P. § 1919); § 7957 (like id. § 1923); § 7970 (the writing itself must be produced, except "when the original is a record or other document in the custody of a public officer," or when it is recorded and a certified copy is made evidence); § 4703 (certified copy of articles of incorporation by the Secretary of State or a county recorder, admissible); § 3671 (county surveyor's certified copy of recorded plats and field-notes of the U. S. surveyor-general, admissible); § 4617 (certified copy, under the county recorder's official seal, of county books of marriages, admissible); § 175 (State treasurer's certified copy under official seal of all papers "lawfully deposited in his office," admissible); § 2227 (State secretary's certified copy of architect's license or revocation thereof, admissible); § 2484 (State public utilities commission; commissioner's or secretary's certified copy under commission seal of "official documents and orders filed or deposited according to law," admissible); § 3757 (new county records transferred from old county, admissible like

the others); § 3793 (first class city's existence provable by city clerk's or State secretary's certified copy of Governor's proclamation); § 3859 (second class city's existence provable by copy of county commissioners' order, etc.); § 4608 (county recorder's record of marriage certificate, provable by his certified copy).

ILLINOIS: Rev. St. 1874, c. 51, § 11 (Secretary of State's exemplification of laws of other States and Territories, transmitted to the Governor by order of their Executive or Legislature, and deposited in Secretary's office, admissible); § 14 (papers, ordinances, etc., of "any city, village, town, or county," are provable by the clerk's or keeper's certified copy, under corporate seal, or, if none, under the certifier's private seal); c. 24, § 65 (municipal ordinances, provable by the clerk's certificate under corporate seal); c. 79, § 15 (county clerk's certified copy of a record of swearing, etc., of justices and constables, admissible); c. 130, § 5 (State treasurer's certified copy under official seal of records, documents, etc., legally in his keeping, admissible); c. 133, § 7 (county recorder's or surveyor's certified copy of a survey-record, admissible); § 10 (State auditor's certified copy under official seal of the U. S. surveyor-general's field-notes, admissible); c. 99, § 14 (notary's record, provable by certified copy under official seal of the notary or of a county clerk having custody); c. 139, § 112 (town-clerk's certified copies of papers duly filed in his office and of town record admissible); c. 125, § 5 (county clerk's certified copy of sheriff's bond, and county court clerk's certified copy of its record, admissible); c. 31, § 5 (same for coroner's bond); c. 89, § 12 (county clerk's certified copy under county seal of a marriage certificate or register, admissible); c. 19, § 11 (books, etc., of sale of land by trustees of Illinois and Michigan canal, or canal commissioners, provable by the secretary's certified copy under official seal); c. 121, § 172 (district clerk's certified copy of papers duly filed in his office and of district records, admissible); c. 32, § 128 (certified copy of articles of incorporation and changes thereof, under the great seal of Illinois, admissible); c. 124, § 7 (documents legally deposited in the office of the Governor or Secretary of State, provable by the Secretary's certified copy under official seal); c. 15, § 6 (records and documents, legally in the keeping of the State auditor, provable by his certified copy under official seal); 1843, Morrison *v.* Hinton, 5 Ill. 457, 459 (a certificate to official character must assert it as of the time of the official act); 1844, Frazier *v.* Laughlin, 6 Ill. 347, 359 (certified copy of an illegally recorded school commissioner's bond, excluded); 1864, Waterman *v.* Raymond, 34 Ill. 42 (certified copy of an official survey, admitted under statute); 1870, Seely *v.* Wells, 53 Ill. 120 (certified copies of records of the U. S. land-office, admitted); 1885, Lindsay *v.* Chicago, 115 Ill. 120, 123, 3 N. E. 443 (certified copy of a city ordinance is evidence not only of contents but of passage and publication, under statute); 1894, Chicago B. & Q. R. Co. *v.* Jones, 149 Ill. 361, 373, 37 N. E. 247 (railroad commissioners' schedule of rates, certified by the commissioners admissible as genuine); 1904, Tifft *v.* Greene, 211 Ill. 389, 71 N. E. 1030 (copies of records of tax-sales, etc., held inadmissible because certified by the clerk of the county court, instead of by the proper custodian the county clerk, though the same person filled both offices); 1910, Prairie du Rocher *v.* Schoening K. M. Co., 248 Ill. 57, 93 N. E. 425 (the certified copy under the statute is evidence that the ordinance has been duly passed); 1913, Decatur *v.* Barteau, 260 Ill. 612, 103 N. E. 601 (city ordinance provable by the city clerk's certified copy under seal, under Rev. St. c.24, § 65, *supra*).

INDIANA: Burns' Ann. St. 1914, § 470 (legislative acts of any State, etc., of the U. S., to be "authenticated by having the seals" thereof affixed); § 471 (records and books, not judicial, "in any public office" of any State, etc., of the U. S., are provable by the keeper's attestation under official seal, if there be one, with a certificate of due attestation by the presiding justice of the court of the county, or of the Governor, Secretary of State, Chancellor or keeper of the great seal; if certified by a presiding justice, the clerk of the court shall also certify under official seal that the justice is qualified; if certified by one of the others, the great seal shall be annexed); § 473 (copy of a statute certified under the State seal by the Secretary of State to be taken from a statute-book deposited in his office or the State library and "by him believed to have been received under the authority" of another State or Territory, admissible); § 478 (records, office books, and official bonds kept in a public office in the State provable by the keeper's attestation under official seal, and, if no seal exists, certified by the clerk of court of the county under official seal); §§ 482, 484, 491 (records of the U. S. land-office and office for sale of canal or Michigan road lands, provable by the keeper's or State auditor's or Secretary's certified copies); § 490 (legislative act of a U. S. State or Territory, provable by the Secretary of State's certified copy under seal); § 493 (record of a land-patent, certificate, etc., provable by certified copy); § 5633 (street-railway corporation's articles of association, provable by certified copy by the Secretary of State or deputy); § 5817 (same for water-works company); §§ 10443, 10455 (recorded trade-mark, etc., provable by certified copy); § 5177 (railroad corporation's articles of association, provable by Secretary of State's or deputy's certified copy); § 8314 (affidavit of lien of a mechanic, etc., provable by the county clerk's attested copy under seal); § 3331 (banking corporation's articles of association, provable by the Secretary of State's certified copy under seal); § 9115 (official bond, prova-

ble by certified copy); § 8902 (recorded plat of city, provable by certified copy); § 8570 (official mine-map, provable by the mine inspector's certified copy under seal); § 5983 (county commissioner's records, provable by the auditor's certified copies under seal); § 9193 (records, paper, etc., lawfully in the office of the Secretary of State, provable by his certified copy under State seal); § 4174 (detective association's articles, provable by the county recorder's certified copy); § 3907 (same for an express company); § 4591 (same for consolidated hydraulic companies); § 8374 (recorded marriage certificate, provable by the county clerk's certified copy); § 8654 (municipal ordinance provable, by certified copy); § 10347 (tax-payment entry on the book of a treasurer, receivable when the treasurer's receipt is lost or destroyed); § 5549 (railroad commission's certified or printed copies or rates, regulations, etc., admissible); § 4469 (religious corporation's articles, provable by certified copy by State secretary or corporate secretary); St. 1917, May 31, p. 82, § 3 (certified copy of record of trademark, etc., to be evidence of various items recorded); 1876, Nelson *v.* Blakey, 54 Ind. 29, 36 (certified copy, by the Secretary of State, of articles of association, excluded on the facts); 1881, Ansley *v.* Meikle, 81 Ind. 260, 262 (the statutory proof by certified copy of a printed statute book is not exclusive; a certified copy from the original here admitted).

Iowa: Comp. C. 1919, § 7342 ("duly certified copies of all records and entries or papers belonging to any public office or by authority of law required to be filed therein," admissible); § 7346 ("maps, official letters, and other documents" in the office of the U. S. surveyor-general, provable by his certified copy); § 7357 (legislative journals, provable by an "officially certified" copy by the clerk of the appropriate House); § 7359 (like Nebr. Rev. St. § 8927); § 7360 (ordinances, acts, etc., of a municipal corporation, provable by the clerk's certified copy); § 107 (Secretary of State's certified copy, under official seal of land office documents and records, admissible); § 3389 (survey field-notes and plat, provable by certified copy of the surveyor or of the county auditor under seal); § 4686 (certified copies of records in the offices of the county auditor and treasurer, admissible); § 6448 (certified copy of a recorded notice and return of service as to terminating an easement, admissible); § 7331 (notary's certified copy of protest-record, admissible).

Kansas: Gen. St. 1915, § 7273 (papers required or authorized to be filed or recorded in "any public office," or a record required to be made or kept there, provable by certified copy of the legal custodian under seal, when such "original is not in the possession or under the control of the party desiring to use the same"); § 7286 (books or filed papers in "any of the departments of the government of the United States," provable by attested exemplification of official custodian); § 5160 (Indian census-roll and allotment-roll, provable by certified copy); § 7275 (Secretary of State's certified copy under official seal of the statute-book of a U. S. State or Territory purporting to be printed by authority and lawfully deposited in his office, admissible); § 7280 (ordinances, etc., of a city or town, provable by certified copy under corporate seal by the "proper officer"); § 6005 (transcript of county records, lost, stolen, or destroyed, made from documents of the State Historical Society and certified by the secretary under its seal, to be admissible); § 1414 (ordinances of first class city, provable by city clerk's certificate, under city seal); § 1681 (ordinances of second class city, similar); § 1893 (similar for third class city); § 2109 (State secretary's certified copy under official seal, of corporate charter, admissible); § 2708 (county register of deed's certified copy of U. S. field notes, etc., admissible); § 2705 (county surveyor's field-notes, etc., provable by his certified copy); § 6152 (probate judge's certified copy, under official seal, of "books of record of marriage licenses," admissible); § 8404 (State railroad board's records, provable by secretary's certified copy under board seal); § 10553 (document or record in custody of State historical society, provable by the secretary's certified copy under the society's seal); § 11649 (State secretary's certified copy of recorded trademark, etc., admissible); § 10772 (records and files of State superintendent of public instruction, provable by his certified copy).

Kentucky: Stats. 1915, § 1627 (record or paper properly in the office of the Secretary of State, treasurer, register or auditor, county surveyor, or assessor, provable by the custodian's attested copy, "upon proof of the execution of the original"); § 1629 (official book or ordinance of a mayor, town, or religious society, provable by the custodian's attested copy); § 1636 (books of "any public office of the U. S. or of a sister State," not appertaining to a court, provable by the keeper's attested copy under official seal); § 1637 (books or papers of an executive department of U. S. provable by the President's or department-chief's attested copy; of "any State or Territory," by the Governor's or Secretary of State's attested copy under official seal); § 1638 (a law or ordinance of any State, nation, province, colony, city, or town out of the U. S., a register of births and marriages, or a duly registered instrument, is provable by the keeper's attested copy certified under official seal by a U. S. consul, charge, or minister); § 1642 (a law of the U. S. or a State or Territory thereof is provable by the Secretary of State's certified copy of an authoritative printed volume received by him); § 3723 (notary's protest-book, provable by his certified copy

under seal, or, after his decease, by the custodian's certified copy); § 4545 (Secretary of State; "copies of records and papers in his office, certified by him, shall in all cases be evidence equally with the originals," and when presented, "the same shall be 'prima facie' evidence of their contents, and the personal presence of the Secretary of State as a witness in such case shall be dispensed with, provided that such records shall be mailed under seal to the circuit court clerk" like depositions); § 540 (articles of incorporation; State secretary's or county clerk's certified copy, admissible in action by or against such corporation); § 579 (same, for banking company); § 604 (same, for trust company); § 619 (same, for insurance company; the State insurance commissioner also may certify); § 727 (same, for real estate title insurance company); § 749 (State insurance commissioner's certified copy under department seal of all papers in the office, admissible): § 766 (railroad corporation; articles provable by State secretary's certified copy, for or against the corporation); § 2775 (all "official papers," etc. of municipal corporations, provable by "official copies thereof"; city ordinances, until biennial publication in print, provable by comptroller's certified copy); 1827, Dudley *v.* Grayson, 6 T. B. Monr. 259, 262 (clerk of town trustees, not authorized to give copies of minutes); 1910, Henderson M. & M. Co. *v.* Nicholson, — Ky. —, 126 S. W. 139 (assistant mine-inspector's report, under Stats. § 2739, admitted).

LOUISIANA: R. S. 1915, § 1457 (State secretary's certified copy of register of laws, to be "evidence of the publication of the laws"); St. 1914, No. 254, § 2 (articles of incorporation provable by copy duly certified by officer where recorded); for other statutes, see under this State, note 5, § 1651, *ante*; the French system of documentary evidence here obtains: 1836, Montreuil *v.* Pierre, 9 La. 356, 371 (notary's certified copy of Spanish public "acts," admitted); 1843, Rosine *v.* Bonnabel, 5 Rob. 163 (certified copy, dealt with under statute); 1841, Millaudon *v.* McDonough, 18 La. 102, 115 (certified copy by the register of the land-office of plats there filed, excluded); 1842, Boatner *v.* Scott, 1 Rob. La. 546, 552 (survey-copy certified by the register of the land-office, admitted); 1857, Lawrence *v.* Grout, 12 La. An. 835, 836 (same, excluded); 1847, White *v.* Kearney, 2 La. An. 639 (certified copy of a ship's clearance by the deputy-collector under custom-house seal, admitted); 1879, Board *v.* Hernandez, 31 La. An. 158, 159 (school-board treasurer's certified copy of their records, admitted).

MAINE: Rev. St. 1916, c. 53, § 63 (Secretary of State's certified copy of an insurance company's certificate of organization, admissible); c. 87, § 133 (certified copies under seal of documents or books of a consular officer or custom-house including register of vessels, admissible); c. 44, § 19 (State Secretary's certified copy under seal of State of registered trademark or assignment thereof, admissible); c. 49, § 39 (union trade-label recorded with State secretary, provable by secretary's "attested certificate"); c. 55, § 61 (State public utilities commission; copies of its orders, certified by the secretary under commission seal, admissible); c. 58, § 5 (State secretary's certified copy of record of organization of street railroad corporation, admissible); c. 64, §§ 12, 15, 37 (town marriage records, etc., provable by certified copy; cited more fully *ante*, § 1644); c. 85, § 18 (State treasurer's attested copy of sheriff's bond, admissible, but if execution is disputed, Court may order production of original).

MARYLAND: Ann. Code 1914, Art. 35, § 42 (any instrument "lodged for safe keeping in any office or court" by the law of a State or country, provable by certified copy of the keeper under seal of the court or office); § 55 (clerk of Court of Appeals' certified copy of extracts from proceedings of conventions and the General Assembly in his custody, admissible); § 59 (Secretary of State's copy under seal of books, papers, etc., in his custody or office, admissible); § 60 (treasurer's attested copy of books, papers, entries, and proceedings, admissible); § 61 (same for comptroller); § 62 (tobacco inspector's sworn copy of manifest or entry in his possession, and certified to be complete, admissible); § 65 (State tax commissioner, books, etc. belonging to his office, provable by his attested copy); Art. 18, § 6 (Governor's certificate under seal of State of a record of appointment of a commissioner to take acknowledgments, admissible); Art. 33, § 29 (clerk's certified copy of entries in a registry of voters or a poll-book, admissible); § 43 (incorporation of a foreign corporation, provable by a copy, certified in a specified manner, of its record or register recorded agreeably to law); §§ 141, 142, 172 (election contests; certain certified copies of records admissible); Art. 19, § 5 (State comptroller's bond, provable by certified copy under court seal by clerk of court of appeals); Art. 23, §§ 5, 25 (certificate of incorporation, provable by certified copy by State tax commissioner or clerk of circuit or superior court).

MASSACHUSETTS: Gen. L. 1920, c. 3, § 22 (certified copies of legislative journals and papers, by the clerk of the Senate or House or the secretary of the Commonwealth, admissible); c. 9, § 11 (State Secretary's certified copy under State seal of records and papers in his department, admissible); c. 37, § 10 (sheriff's bond, provable by the treasurer's certified copy "in a case relating to the bond," unless the Court requires production of the original, when execution is disputed); c. 159, § 5 (State Secretary's certified copy of a power of attorney of a foreign express carrier, admissible); c. 156, § 12 (State Secretary's certified copy of a record of an incorporation certificate,

admissible); c. 160, § 24, c. 161, § 11 (same for a railroad corporation); c. 168, § 10 (certified copy of a savings-bank incorporation certificate, by the register of deeds or the State Secretary, admissible); c. 233, § 76 (books, papers, documents, and records in "any department of the Commonwealth," or of any city or town, provable by attested copy of the officer in charge; but certain records of public utilities department must be attested by the State secretary under its seal or by the clerk of the city or town); c. 181, § 3 (certified copy of a foreign corporation's appointment of an attorney for service, filed with the corporation commissioner, admissible); c. 175, § 151 (same for a foreign insurance corporation, filing an appointment with the insurance commissioner); c. 176, § 42 (same for a foreign fraternal beneficiary association, filing with the insurance commissioner); c. 233, § 75 (clerk's attested copy of ordinances of a city, by-laws of a town, or regulations of a board of aldermen, admissible); c. 46, § 19 (certificate signed by a town clerk or assistant clerk, admissible to prove the record of marriages, etc.); c. 138, § 43 (liquor license bond, filed with city or town clerk, provable by certified copy); c. 158, § 9 (same, for miscellaneous corporations); c. 170, § 5 (same, for coöperative bank); c. 172, § 10 (same, for trust company); 1850, Com. *v.* Chase, 6 Cush. 248 (clerk of a city or town may certify copies of votes, ordinances, or by-laws); 1895, Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846 (certified copy of a town-clerk's marriage-record, admitted under statute); 1900, Com. *v.* Corkery, 175 Mass. 460, 56 N. E. 711 (corporation commissioner's certified copy of a copy of foreign articles of incorporation filed with commissioner, admitted under statutes); 1913, Com. *v.* Merrill, 215 Mass. 204, 102 N. E. 446 (copy of a constitution of the Order of Owls, signed by the Supreme Secretary, not admitted as a certified copy of the charter of a foreign beneficiary insurance corporation, under the statutes in force at the time).

MICHIGAN: The statutes in this jurisdiction reach the culmination of crude superfluity: Comp. L. 1915, § 12527 (certified copies must be attested by the custodian's official seal, and if a clerk of the county, by the court seal, except for use in the same court, or for use in a circuit court of the Supreme Court's order); § 12525 (affidavit of newspaper notice, provable by the custodian's certified copy); § 12507 (papers, records, etc., lawfully filed or recorded in a public office, provable by the custodian's certified copy); § 12514 (municipal ordinances, provable by the clerk's or recorder's certified copy); § 12521 (documents filed or recorded with the board of control of St. Mary's Falls ship canal, provable by the auditor-general's certified copy); § 12522 (U. S. signal-service record of weather conditions, provable by the custodian's certified copy, in civil causes); § 468 (certified copies of State land-office field-notes, surveys, etc., by the commissioner under seal or by the register of deeds, admissible); § 93 (records, etc., in the office of the Secretary of State, provable, etc., by his certified copy under the great seal of State); § 12712 (register of deed's certified copy of a recorded bill affecting realty, admissible); § 1078 (soldier's discharge, provable by certified copy under seal of the circuit court of county); § 2112 (township supervisor's records, provable by certified copy or abstract); § 2145 (constable's bond provable by certified copy by the township clerk); § 2151 (same for the county clerk's certified copy, under official seal, of a justice's bond); § 2329 (county supervisors' record of boundaries perpetuated, provable by the county surveyor's record); § 2500 (county clerk's certified copy, under seal, of a notary's records deposited with him, admissible); § 2563 (order of village incorporation, provable by a certified copy of the county clerk or Secretary of State); § 2630 (village ordinance, provable by the clerk's certified copy under village seal); § 3004 (same for city ordinance); § 2813 (same for a clerk's certified copy of a judgment in village condemnation proceedings); § 3158 (same for a city); § 2879 (city declaration of incorporation, provable by certified copy of the county clerk or Secretary of State); § 3350 (municipal survey-plat, provable by certified copy of the register of deeds or auditor-general); §§ 3364, 3365 (county supervisors' resurvey of a municipal plat, provable by the register of deeds' certified copy); § 3378 (public-improvement resolution of a municipal council, etc., provable by certified copy); § 3412 (water-introduction proceedings, provable by certified copy); § 4052 (tax-roll, provable by certified copy); § 4760 (separation of grades of highway and railroad: resolution of a board, etc., provable by certified copy); §§ 4349, 4364 (affidavit of notice of election for a county road system, or of laying out of road, provable by the county clerk's certified copy); § 4362 (court certificate of road-proceedings, provable by the register of deeds' certified copy); § 5245 (record of a pauper-settlement decision, provable by certified copy); § 5607 (record or certificate of death, provable by certified copy); § 9090 (papers, etc., in the office of the insurance commissioner, provable by his certified copy under official seal); § 9200 (insurance documents deposited in the office of the Secretary of State, provable by his certified copy); § 6717 (certificate of business of a banker, broker, or exchange dealer, provable by the county clerk's certified copy under circuit court's seal); § 6763 (pharmacy board's records, provable by the secretary's certified copy under seal of the board); § 6980 (township clerk's certified copy of a township resolution licensing peddlers, etc., and of affidavit of notice, admissible); §§ 7092, 7095 (board of supervisors' prohibition, etc., of liquor traffic, provable by certified copy); §§ 8019, 8068 (records, etc., in the office of

the banking commissioner, provable by certified copy under official seal); § 8243 (railroad company's bond filed with the judge of probate, provable by certified copy); § 8566 (street railway and electric light companies' consolidation agreement, provable by the Secretary of State's certified copy); § 8977 (mining company's record of alienation of land, etc., provable by the register of deeds' certified copy); § 10052 (plat, etc., of a summer-resort association, provable by the register of deeds' certified copy); § 9427 (foreign fraternal beneficiary association's power of attorney to accept service, provable by the insurance commissioner's certified copy); §§ 11375, 11385 (county clerk's record of marriage or of license, provable by his certified copy); § 12910 (sheriff's certificate of sale, provable by the register of deeds' certified copy); § 13931 (same for decree of partition, *semble*); § 14042 (same for decree of sale by executor, etc.); § 9284 (foreign insurance company's power of attorney to accept service, provable by certified copy of the insurance commissioner or his deputy); § 15458 (Secretary of State's certificate of recording of a trademark, etc., admissible); § 6351 (certificate of partnership, etc., county clerk's certified copy, admissible); § 2440 (county clerk's certified copy of recorded official bond, admissible; by numerous other sections, a certified copy by the custodian, usually the Secretary of State, is made admissible to prove recorded articles of association of corporations of various sorts; in numerous sections, from § 7617 to § 8139, the same is provided in private acts for specifically named associations); 1869, Gilman *v.* Riopelle, 18 Mich. 145, 158 (certification of U. S. land-office documents depends on U. S. laws, not local laws); 1869, Clark *v.* Hall, 19 Mich. 356 (assignment of a land-office certificate, customarily filed, but not by law, may be proved by certified copy); 1879, Doyle *v.* Mizner, 42 Mich. 332, 338, 3 N. W. 968 (certified copy of defectively acknowledged articles of incorporation, excluded); 1884, Wilson *v.* Hoffman, 54 Mich. 246, 247, 20 N. W. 37 (certificate of the land-office, excluded on the facts); 1906, Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493 (exemplified copy of U. S. pension-vouchers, admitted, under U. S. Rev. St. 1878, § 882, cited *supra*); 1921, Vanderberg *v.* Detroit & C. Nav. Co., — Mich. —, 186 N. W. 477 (carrier's loss of a trunk; to show a rate-tariff schedule filed as required by Federal law, a purporting copy was held insufficient on the facts).

MINNESOTA: Gen. St. 1913, § 8419 (State librarian's certified copy under official seal of any judicial decision or proceeding in any law or equity reports in his office or under his charge, or of "any other papers or documents contained in such library," admissible); § 8421 (certified copy by the official custodian of an affidavit of publication by printer, etc., admissible); § 8423 ("The original record made by any public officer in the performance of his official duty shall be 'prima facie' evidence of the facts required or permitted by law to be by him recorded. A copy of such record, or of any document which is made evidence by law and is preserved in the office or place where the same was required or is permitted to be filed or kept, or a copy of any authorized record of such document so preserved, when certified by the person entitled to the official custody thereof to have been compared by him with the original and to be a correct transcript therefrom, shall be received in evidence in all cases, with the same force and effect given to such original document or record; but if such officer have, by law, an official seal, his certificate shall be authenticated thereby: Provided, that no part of this section relating to the form of certification shall apply to documents or records kept in the departments or offices of the United States government"); § 8424 ("Section 8423 shall not be construed to require the affixing of the seal of the court to any certified copy of a rule or order made by such court, or to any paper filed therein, when such copy is used in the same court or before any officer thereof"); § 8430 (copies of records or documents "belonging to and being in any of the governmental departments of the U. S., authenticated as such, and in accordance with the laws of the U. S. to entitle" them to admission in U. S. courts, admissible); § 8453 (certified copies of Federal census reports filed in the office of the Secretary of State, admissible); § 8458 (clerk of a district court's record, or certified copy, of certificates and records of marriage, admissible); § 8138 (certified copies of recorded affidavits of foreclosure sales, admissible); § 689 (copies of county commissioners' proceedings, "authenticated as required by law," admissible); § 2536 (town clerk's certified copy of a highway order, admissible); §§ 5574, 5670 (certified copy of certain orders laying out county or town drains, admissible); §§ 5457, 5461 (record or a certified copy of the record of the surveyor-general's scale-bills of logs, etc., admissible); § 5468 (certified copy by the surveyor-general or deputy of a record in his office, admissible); § 5470 (certificate by the surveyor-general of record of log-marks, admissible); § 5718 (certified copy of a notary's register, admissible); § 2714 (clerk's certified copy of a board of education's records and papers, admissible); § 6110 (certified copy, by clerk of district court, of recorded commercial name, admissible); § 6206 (State secretary's certified copy of foreign corporation's appointment of agent, admissible); § 6951 (recorded trade-mark etc. provable by State secretary's certificate); § 8456 ("all original instruments" authorized by law to be recorded, provable by the record or a "duly certified transcript," without further proof); 1863, Walsh *v.* Kattenburgh, 8 Minn. 127, 132 (certified copy of township plats by the register of a U. S. land-office, not receivable without express statutory authority); 1873, First

Nat'l Bank v. Kidd, 20 Minn. 234, 237(U. S. comptroller's certified copy of an organization certificate of a bank, admitted).

Mississippi: Code 1906, § 1954, Hem. § 1654 ("foreign registers of births, marriages, and deaths," provable by certified copy under official seal "of the officer having custody of the record, and authenticated by the certificate of any public minister, secretary of legation, or consul of the U. S.." but if its execution is disputed under oath, the original must be "produced or its absence accounted for"); § 1960, Hem. § 1620 (copies of "records, books, and files belonging to the offices of the U. S.," certified by the officer having charge, admissible); § 1962, Hem. § 1622 (copies of field-notes of surveys and of certain maps, deposited in the office of the Secretary of State, land-commissioner, "or other public office," certified by the officer having the custody, admissible); § 1966, Hem. § 1626 (copy, under official seal of the clerk having custody, of a certificate of marriage transmitted to a circuit clerk, or of the record thereof, admissible); § 1968, Hem. § 1628 ("all public officers in this State having the charge or custody of any public books, records, papers, or writings, are authorized to certify copies of the same," to be admissible "in all cases where the original or a sworn copy would be evidence"); § 1970, Hem. § 1630 (in an action on bond given under law by an officer, collector, administrator, executor, or guardian, a certified copy by the officer in whose office it is recorded or filed is admissible; but the original must be produced by the custodian if issue is joined on a plea denying execution); § 1979, Hem. § 1639 (copy of record of an officer protesting a bill or note, verified by his oath, admissible); 1848, Wray v. Doe, 10 Sm. & M. 452, 460 (certified copy of a land-office location, admitted); 1854, Hardin v. Ho-yo-po-nubby, 27 Miss. 567, 580 (same); 1856, Davis v. Freeland, 32 Miss. 645, 649 (land-officer's letter filed; certified copy admitted); 1900, State v. Oliver, 78 Miss. 5, 27 So. 988 (board of supervisors' book of entries of duplicate receipts of convict-contractor, admitted under C. § 1791).

Missouri: This State vies with Michigan in cumbering the statute-book: Rev. St. 1919, § 5337 (the law of a U. S. State or Territory is provable by "any printed statute-book" certified as correct under official seal by the Secretary of that State or Territory or of this State, the certificate setting out "in full the title-page of such printed book"); § 5339 (Secretary of State's certified copy under official seal of a law, etc., contained in a book, deposited in his office, and purporting to contain acts of the U. S. Congress and to be published by authority of Congress or the U. S., admissible); § 5344 (certified copies under official seal of papers on file or matters recorded in the office of the State secretary, treasurer, auditor, and register of lands, admissible); § 5345 (entries, etc., in books of a register or receiver, of "any U. S. land-office," provable by his certified copy); § 5346 (so also for any letter received by him by any superior in the U. S. land department); § 5347 (documents lawfully deposited in the office of the State, Treasurer or auditor, provable by his certified copy under official seal); § 5348 ("all records and exemplifications of office books, kept in any public office of the U. S., or of a sister State, not appertaining to a court," admissible if attested by the keeper under official seal if any); § 5349 ("exemplifications from the books of the executive department of the U. S., or any papers filed therein," admissible when attested by the President, or a department chief, and "from any State or Territory, of like books or papers," when attested by the Governor or Secretary of State under official seal); § 5350 (ordinances, etc., of a city or incorporated town in this State, provable by the lawful custodian's certified copy under corporate seal); § 5361 (all papers lawfully kept by a surveyor of U. S. lands in this State, provable by his certified copy); § 5375 (official bond of all State officers required by law to give a bond, provable by certified copy by lawful custodian under official seal); § 5376 (contracts with the State or any officer or with any county or for its benefit, by authority of law or court order, lawfully kept in the officer's custody, provable by custodian's certified copy under official seal, or, if no seal exists, verified by affidavit); § 5377 (bond required by law of executors, administrators, guardians, curators, and commissioners, or taken of principal and surety in judicial proceedings, provable by the lawful custodian's certified copy under official seal); § 5378 (in a suit brought upon a bond or contract of the three preceding sorts, or defendant's sworn denial of execution, the Court may require production of the original "if necessary to the attainment of justice"); § 5392 (recorder's certified copy under official seal of a marriage register, admissible); § 5395 (steamboat enrolment in the office of a custom-house or surveyor and inspector of customs, provable by certified copy "by the proper officer"); § 5508 (certified copies of recorded surveys 'in perpetuam memoriam' admissible); § 293 (public administrator's bond, etc., provable by certified copy under probate court seal); § 9878 (certified copy of corporate articles of consolidation filed with the Secretary of State, admissible); § 6414 (superintendent of insurance's certified copy of a foreign fraternal beneficiary association's power of attorney to accept service, admissible); § 10128 (certified copy under seal of State, by the Secretary of State or deputy, of articles of association of a telegraph or telephone company, admissible); § 9853 (Secretary of State's certified copy of articles of association of a railroad company, admissible); § 13194 (township clerk's certified copy of a constable's bond, admissible); § 11613

(Secretary of State's certified copy under official seal of the General Assembly's acts, Governor's acts, and documents lawfully deposited in his office, admissible); § 13210 (township clerk's certified copies of papers duly filed in his office, admissible); § 7672 (city clerk's certified copy under corporate seal of papers filed in his office, admissible); § 7957 (city ordinances provable "by the seal of the corporation attested by the officer having charge thereof"); § 7984 (cities of the second class; ordinances provable by city clerk's certificate under city seal); § 7807 (city park-commissioners' proceedings, etc., provable by the secretary's certified copy under corporate seal); § 9285 (county recorder's certified copy of highway plats, etc., admissible); § 4720 (State board of pharmacy's books, provable by secretary's certified copy under board seal); § 10265 (State secretary's certified copy of articles of agreement of benevolent, religious, etc. association, admissible); § 10429 (State public service commission; official documents and orders, provable by copy certified by commissioner or secretary under commission seal); § 11922 (State secretary's certified copy of appointment of foreign investment company's attorney, admissible); §§ 12721, 12730 (county-surveyor's records, provable by his certified copy); § 13650 (State workmen's compensation commission; records, files, etc., provable by certified copy under commission seal); 1823, Rector *v.* Welch, 1 Mo. 334 (State surveyor-general's certified copy of a land-warrant, inadmissible apart from statute); 1835, Bryan *v.* Wear, 4 Mo. 106, 110 (land-certificate in a U. S. surveyor's office, proved by certified copy); 1875, Phillips *v.* Robbins, 59 Mo. 107 (auditor's copy of a collector's bond filed, admitted); 1893, Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8 (the city seal on an ordinance raises a presumption of the latter's genuineness, by statute); 1897, Banking House *v.* Darr, 139 Mo. 660, 41 S. W. 227 (sworn tax list; custodian's certified copy, admitted); 1905, Florscheim *v.* Fry, 109 Mo. App. 487, 84 S. W. 1023 (under Rev. St. 1899, § 3098, a certified copy of articles of incorporation in Illinois was excluded because the Illinois law authorizing the Secretary of State to keep or record was not proved; unsound, because the seal of State is of itself an authority for the purpose, *ante*, § 1679, par. *b*, *post*, § 2163); 1906, Stewart *v.* L. B. Land Co., 200 Mo. 281, 98 S. W. 767 (properly certified copies of platbooks admissible under Rev. St. 1899, § 3094, *supra*).

MONTANA: Rev. C. 1921, § 10551 (like Cal. C. C. P. § 1901); § 10568 (like Cal. C. C. P. § 1918, substituting "District" for "Superior" in par. 7); § 10638 (like Cal. C. C. P. § 2011); Civ. C. § 5913 (Secretary of State's certified copy of filed articles of incorporation, admissible); § 8023 (county clerk's certified copies of entries of partnership names, etc., admissible); § 2216 (county assessment books, etc., provable by county clerk's certified copy); § 5909 (county clerk's certified copy of recorded articles of incorporation, admissible); § 6327 (fraternal benefit society; printed copy of constitution, etc., certified by secretary or corresponding officer, admissible); § 10543 (public records; like Cal. C. C. P. § 1893); St. 1921, Sp. Sess., c. 9, § 33 (intoxicating liquors; "all records and reports kept or filed" under this act, provable by the custodian's certified copy).

NEBRASKA: Rev. St. 1922, § 8913 ("duly certified copies of all records or entries belonging to any public office or by authority of law filed to be kept therein," admissible); § 8923 (legislative journals, provable by certified copy by the appropriate clerk); § 8927 ("public seal of the State or county affixed to a copy of a written law or other public writing," makes it admissible); § 1504 (probate judge's marriage record, provable by certified copy); §§ 3525, 3897, 4064, 4330 (municipal ordinance, provable by the clerk's certified copy under city or village seal); §§ 4860, 4882 (same for State treasurer's and auditor's copies of papers lawfully filed); 1905, Rieck *v.* Griffin, 74 Nebr. 102, 103 N. W. 1061 (copy of sections of the Arkansas statutes, under seal of the Secretary of State, admitted).

NEW HAMPSHIRE: Pub. St. 1891, c. 173, § 10 (town-clerk's copy of his records of birth, marriage, and death, or of the officiating person's certificate of marriage, admissible); c. 224, § 23 (certified copy by the proper officer of any document required to be filed in a public office, and the adjutant-general's certified copy of documents in his office, admissible); c. 15, § 5 (Secretary of State's certified copies, under seal of State, of records and papers in his office, admissible); c. 26, § 8 (Supreme Court clerk's certified copy of a sheriff's bond, to be evidence in actions thereon); c. 143, § 4 (copy of fence-viewers' division, recorded in town records, admissible); c. 154, § 23 (Secretary of State's or town-clerk's certified copies of records of common proprietors, admissible); c. 61, § 7 (town-clerk's certified copy of proceedings of sale for taxes, admissible); c. 61, § 7 (same for a copy by the local clerk of the Supreme Court in certain cases); St. 1899, c. 57 (a certified copy under oath of a town-clerk or of the secretary of the State board of health, admissible to prove the existence of the regulations of that board); St. 1899, c. 63, § 3 (province records, provable by State secretary's or deputy's certified copy under seal of State); St. 1911, c. 133, § 24 (Secretary of State's certified copy of motor vehicle registration certificate or license, to have the same effect as the original); 1831, State *v.* Carr, 5 N. H. 367, 369 (the seal of another State suffices for a copy of a statute, just as the English great seal does); 1843, Woods *v.* Banks, 14 N. H. 101, 109 (the copyist must have "the right to the custody of the records" and be "the person who had the

authority to furnish authenticated copies"); 1852, Bowman *v.* Sanborn, 25 N. H. 112 (notary's copy of his records, admissible when made under a duty).

NEVADA: Rev. L. 1912, § 5417 (original need not be produced when it is "a record or other document in the custody of a public officer"); § 2234 (certified copy by recorder under official seal, of recorded mark and brand, admissible); § 1636 (certified copies of mining records deposited with a county recorder, admissible); § 3213 (copy of a paper, plat, etc., "emanating from" the State land-office under its seal, admissible); § 2340 (county recorder's certified copy of a record of a marriage certificate, admissible); §§ 1110, 1221 (certified copy, by the county clerk or deputy or the Secretary of State, of a filed certificate of incorporation, admissible); § 3658 (county auditor's certified copy of a delinquent tax-list, admissible); § 4163 (State comptroller's certified copy of his account, admissible in an action for a debt due to the State); § 2755 (notary's certificate of protest "drawn from his record," admissible); § 793 (city ordinances recorded with city clerk; provable by certified copy under city seal "without further proof"); § 1346 (foreign certificate recorded, provable by county recorder's certified copy); § 1384 (literary society, etc.; certificate of incorporation, provable by certified copy by State secretary or county recorder); § 1437 (W. C. T. U. of Nevada; articles of incorporation provable, by State secretary's certified copy under State seal); § 2754 (notary's certified copy of record; quoted *ante*, § 1675); § 2914 (county clerk's certified copies of record of partnerships, admissible); § 3513 (railroads; articles of association, provable by State secretary's certified copy); § 4565 (State railroad commission; certified copies under commission seal of any order, admissible); § 4699 (State engineer; certified copies under seal of office of "all papers or records," admissible); § 5409 ("the original or a copy of any record, other than a judicial record, document, or paper in the custody of a public officer of this State or of the United States, certified under the official seal or verified by the oath of such officer," is admissible with like effect as the original; "a public record or document in the custody of a public officer of this State in a public office," is provable by the legal keeper's certificate of genuineness under seal); St. 1913, Mar. 22, p. 192, § 15 (State engineer's water-records, provable by certified copy); St. 1915, Mar. 15, p. 72 (articles of incorporation of a corporation sole, provable by State secretary's certified copy).

NEW JERSEY: Comp. St. 1910, Evidence § 27 (a public record in a foreign State, territory, province, county, or city, there admissible, is provable by a copy exemplified according to the laws of the U. S.); § 28 (board of health clerk's certified copy of a recorded return of birth, etc., admissible); Neg. Instruments § 207 (same for a county clerk's copy of the register of a domestic notary dead, removed from State, or not found); Banking and Insurance Dept. § 6 (certified copies under seal of official papers in the commissioner's office, admissible); Corporations § 12 (county clerk's certified copy of a certificate of corporate organization, admissible); Banking § 3 (commissioner's certified copy of a bank's certificate of incorporation, admissible); Benef. Soc. § 15 (banking and insurance commissioners' certified copies of a foreign fraternal society's power to accept service, admissible); Cities §§ 1932, 2065, 2647 (city or city board ordinance, provable by the city clerk's certified copy under seal); Clerks of Courts, etc., § 16 (clerk's certified copy of a sheriff's bond, admissible); Munic. Corpor. § 52 (county clerk's certified copy under seal of the recorded bond of a municipal officer, admissible); Secretary of State § 8 (his certified copies, under seal, of a law, admissible); Railroads, etc., § 2 (certificate of railroad incorporation provable by State secretary's certified copy); Secretary of State § 17 (his certified copy of recorded sale, etc. of corporate franchise, admissible); Statutes, § 25 (State secretary's certified copy of records of "every proof that relates to any such bill as has become a law," admissible); Villages § 38 *b* (village ordinance book, provable by clerk's certified copy under village seal); Motor Vehicles, § 13 (certified copies of acts, etc. of State motor commissioner, or of papers filed in his office, admissible when authenticated under seal of office); in this State the failure to accept the American doctrine as to custodian's authority (*ante*, § 1677, where New Jersey rulings are given) explains the following rulings: 1854, State *v.* Cake, 24 N. J. L. 516 (clerk's copies of surveyors' oaths filed with him, excluded); 1871, Hawthorne *v.* Hoboken, 35 N. J. L. 247, 251 (certified copy of an enlistment record in U. S. War Department, admitted); 1894, West Jersey Traction Co. *v.* Board, 57 N. J. L. 313, 314, 30 Atl. 581 (Secretary of State's certified copy of a railroad route-map lawfully deposited with him, excluded); 1896, State *v.* Mayor, 58 N. J. L. 522, 33 Atl. 853 (an adjutant-general said not to have authority to issue copies of military records).

NEW MEXICO: Annot. St. 1915, §§ 2183, 2184 (records, maps, plats, etc., in the offices of the surveyor-general or Territorial secretary, provable by copy or tracing certified by the secretary under official seal or by the surveyor-general and attested by the secretary under official seal; but the Court for good cause may require production of the original); § 2185 (records, plats, or other writings on file in the U. S. surveyor-general's office in N. M., provable in civil causes by his certified copy); § 520 (certified copy of an officer's bond, in an action at law against the officer, admissible when the bond cannct be produced); § 73 (certified copy of cattle sanitary board's

records by the secretary under his seal, admissible); § 2024 (certified copies of an election certificate, admissible); § 5511 (certified copy of records, lists, etc., of a revenue assessor, clerk, or collector, admissible); § 1294 (certified copy of a county surveyor's survey, etc., admissible); § 4828 (superintendent of public instruction's certified copies of his "official acts," admissible); § 5663 (State engineer's records, provable by certified copy); § 5728 (water-right records; county clerk's certified copies, admissible); § 5647 (State Corp. commission's or county clerk's certified copy of certificate of organization of water user's association, admissible); § 5254 (State land office; commissioner's certified copies of records, admissible); § 122 (certified copy of brand-book entry of brand, by the secretary of the State cattle sanitary board, under the board seal, admissible); § 892 (certificate of incorporation, provable by certified copy from State corporation commission or from county clerk where recorded); § 1028 (similar for public utility companies); § 1050 (articles of association of corporation not for profit, provable by certified copy from county clerk where recorded); § 1621 (certified copy of recorded partido contract *i. e.* for animals held on shares, admissible, on an issue of notice); § 1868 (in prosecutions of defaulting public officers, State auditor's certified copy under seal of the officer's account and other documents, admissible); § 2064 (political committee's accounts; certified copy by secretary of State or county clerk, admissible); § 2963 (Board of County Commissioner's order designating an irrigation district, provable by certified copy); § 5458 (surveyor-general's certified copies of field notes and surveys, furnished to county commissioners, admissible); § 5556 (certified copy, under State great seal, of application for trade-name, trade-mark, or label, admissible as "'prima facie' evidence of the facts therein stated"); St. 1915, c. 67, § 78 (State bank examiner's office; reports and records there filed, provable by his certified copy under official seal); St. 1915, c. 71, § 4 (duly acknowledged and filed chattel mortgage; county clerk's certified copy admissible in evidence "only of the fact that such instrument on copy was received and filed").

NEW YORK: C. P. A. 1920, § 367 (official certificate or affidavit filed, provable by exemplified copy); § 372 (marriage certificate or entry, provable by certified copy); § 382 (papers or records legally in a public office having a seal, or the Legislature, or "any other public body or public board" having a seal, are provable by copy certified by the official custodian or the board's presiding officer or secretary under official seal; but the seal is not necessary in the case of the Legislature); § 383 (paper or record legally in a town-clerk's office, provable by certified copy); § 388 (proceedings, etc., of a local city council, village trustees, board of health or of supervisors, provable by the clerk's certified copy); § 400 (record or paper in a Federal government office, provable by certified copy of the head of the office or of the legal custodian or of the officer federally authorized to certify); § 398 (document in a public office of a foreign country, provable by certified copy under seal of a deeds-commissioner appointed for that country, authenticated by the Secretary of State or by a U. S. consular officer under official seal); § 329 (where no form is otherwise prescribed, the certifier of a copy must state "that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original"); § 377 (exemplified copy of designation of person for service on a corporation, etc.); Cons. L. 1909, Gen. Corp. § 9 (exemplified copy of a certificate of organization of a corporation in another State, etc., made evidence by that State's laws, admissible); Canal, § 80 (county clerk's certified copy of a notice of a public-works appropriation of land, etc., admissible); Canal, § 5 (custodian's certified copy of a filed canal-survey map or field-notes, admissible); Pub. Serv. Com. § 17 (public service commissioners' certified copy under seal of official papers, admissible); Laws Exec. § 108 (commissioner of deeds in another State or country his certified copy under seal of a document there officially filed or recorded, admissible when authenticated by the Secretary of State's certificate); Pub. Health, § 5 (certified copies of records of the State board of health, admissible); Education § 32 (State superintendent of school's certified copies under seal of official papers, admissible); Pub. Health, § 294 (certified copies of licenses, for undertaking and embalming); Sec. Class Cities, § 39 (like C. P. A. § 388); 1816, Mauri *v.* Hefferman, 13 Johns. 73 (foreign notary's copies admissible where a duty exists to certify; see the same case *ante*, § 1676, n. 9); 1817, Coolidge *v.* Ins. Co., 14 Johns. 308, 314 (certified copy of a ship's register, made by a collector of the port of registry, excluded because the collector is authorized to furnish only a copy to go with the vessel, "not to grant copies generally"); 1828, Catlett *v.* Ins. Co., 1 Wend. 561, 578 (certified copy of a ship's register by the register of the U. S. Treasury, where after condemnation the register is filed, received); 1897, People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800 (certificate by a clerk of a commission, failing to state as required by C. C. P. § 957 that the copier has compared the original, admissible under id. § 933, authorizing clerks of public boards generally to certify to copies of records).

NORTH CAROLINA: Con. St. 1919, § 1749 (Secretary of State's certified copy of a law of another State, Territory, or foreign country, from a printed volume filed in his or the Governor's office or the State or Supreme Court library, admissible); § 1747 (Secre-

tary of State's certified copy of a General Assembly's act, admissible); § 1751 (Secretary of State's certified copy of plots, surveys, and abstracts of grant, admissible); § 1779 (keeper's certified copy under official seal, if any, of official bonds or writings recorded or filed in any "public office" or in the office of the Governor, treasurer, auditor, Secretary of State, attorney-general, or adjutant-general, admissible, unless the Court orders the original produced; county board clerk's certified copies under county seal of the records, admissible); § 1017 (register's certified copy of a coroner's bond, admissible); § 973 (constable's bond, provable by register of deed's certified copy); § 1115 (certificate of incorporation, provable by certified copy by State secretary or by clerk of superior court of county where recorded); § 1131 (amendment to such certificate of incorporation, provable by State secretary's certified copy); § 1750 (town ordinance, provable by mayor's certified copy, on appeal from mayor's court); § 1780 (copies of "bonds, contracts, or other papers" concerning the "settlement of any account" between the U. S. and an individual, or "extracts therefrom when complete on any one subject," or copies of "books or papers on file or records of any public office of the State or the U. S.," are receivable when certified under official seal by "the chief officer in said office or department"); § 6272 (papers in the office of the insurance commissioner may be proved by his certified copy under official seal, and conveyances, etc., executed by him under seal may be recorded with like effect as deeds); § 6575 (State librarian's certificate, under his and the official seal, "to the authenticity and genuineness of any document, paper, or extract from any document, paper, or book or other writing which may be on file in his office," is admissible); § 5408 (U. S. liquor license may be proved by "any witness who has personally examined the records," etc.); § 3422 (railroad company's articles of association, provable by State secretary's certified copy); § 3974 (registered trademark; State secretary's certified copy, admissible); 1796, Ellmore *v.* Mills, 1 Hayw. 359 (proving a statute of Virginia; the secretary of the Commonwealth, not the clerk of the House of Delegates, is the proper officer to certify a statute); 1817, Denton *v.* Foute, 4 Hayw. 72 (custodian's copy of enlistment contract kept at the adjutant-general's or treasury, not receivable); 1896, State *v.* Baird, 118 N. C. 854, 24 S. E. 669 (certified copy by a registrar authorized to preserve a clerk's bond, admitted); 1896, Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124 (certified copy of a corporate certificate of organization, by the Secretary of State of Maine asserting his custody of the original as a record, admitted); 1907, State *v.* Dowdy, 145 N. C. 432, 58 S. E. 1002 (illegal sale of liquor; U. S. revenue collector's certified copy of a Federal liquor license admitted, the license being part of a record kept under U. S. Rev. St. § 3240, and the copy being admissible under N. C. Rev. Code 1905, §§ 1616, 1617).

North Dakota: Comp. L. 1913, § 7920 (like Cal. C. C. P. § 1923); §§ 842, 843 (certified copy of a notary's record by the notary under seal or by the clerk of the district court having custody, admissible); § 2596 (commissioner of agriculture or labor's certificate of a recorded stock-brand, admissible); § 3624 (city auditor's certified copy under corporate seal of papers filed in his office and of city council records, admissible); § 4514 (articles of incorporation, provable by the Secretary of State's certified copy); § 5158 (so also for banking articles); § 4839 (insurance commissioner's certified copy of an insurance company's articles, etc., admissible); § 513 (certified copy of the records of the State board of dental examiners, by the secretary under the board's seal, admissible); § 8093 (certified copy of a publication-affidavit recorded with the register of deeds, admissible); § 3931 (village ordinances, provable by "the ordinance-book or the certificate of the clerk of the village under the seal of the village"); § 4367 (county judge's marriage record-book, provable by his certified copy under court seal); § 3373 (county auditor's certified copy under seal of vouchers, etc., filed in his office, admissible); § 6432 (certified copies by the clerk of the district court of a register of partnerships, admissible); § 3596 (city auditor's record of ordinances, or a certified copy, admissible); § 3738 (city auditor's certified transcript of records concerning city improvements, admissible); § 3781 (Secretary of State's certified copy of record of city adopting commission government, to be conclusive); § 7919 (substantially like Cal. C. C. P.; § 1918, but substituting for par. 8, the following: "8, documents in the departments of the U. S. government, by the certificate of the legal custodian thereof"); § 8245 (certified copies of records or papers on file in office of State engineer, admissible); 1912, Peterson's Estate, 22 N. D. 480, 134 N. W. 751 (Norwegian parish records, verified by the keeper, the district judge, the royal minister of religion, and the U. S. consul-general, not admitted; in the absence of statute, the great seal of State alone suffices); 1915, State *v.* Kilmer, 31 N. D. 442, 153 N. W. 1089 (liquor offence; certified copy of U. S. internal revenue license, admitted under Comp. L. 1913, § 7919 and § 7917).

Ohio: Gen. Code Ann. 1921, § 11500 (papers, books, and records lawfully in the office of the Governor or Secretary of State, provable by certified copy of the Secretary under the great seal; in the office of the board of public works, by the board's president; in the auditor's office, by auditor under seal; in office of the surveyor of lands of the Virginia military district, by the surveyor's sworn copy; in the

office of the county-recorder and being entries, etc., of above lands, by the recorder's certified copy; in office of the Union County auditor, being such entries, etc., by the auditor's copy [*semble*]; in the office of any Federal executive department, by copy under the department seal); § 10068 (Secretary of State's certified copy of the record of organization of an anti-cruelty society, admissible); § 8629 (Secretary of State's certified copy of articles of incorporation, admissible); § 9162 (same for union-depot corporation); §§ 2801, 2816 (certified copy of a county surveyor's book of plats, etc., admissible); § 4235 (same for the clerk's certified copy of a municipal ordinance); § 3613 (same for the county recorder's certified copy of a re-survey); § 3306 (same for a township clerk's certified copy of a township-officer's bond); § 145 (same for a certified copy under State seal, by the Governor's private secretary, executive clerk, or commission clerk, of the records of the Governor's office as to pardons, extraditions, etc.); § 624 (same for the insurance superintendent's certified copy under seal of official papers); § 4 (certified copy of a recorded official bond, admissible); § 99 (pardon-documents, provable by copy certified by the warden and attested by the clerk of the penitentiary or Court); § 553 (State utilities commission; certified copy of its order under seal, admissible); § 677-6 (same, for State inspector of building and loan associations); § 710-16 (State superintendent of banks; records, papers, etc., provable by certified copies under seal of office); § 2770 (soldier's discharge, recorded by county recorder, provable by certified copy); § 6222 (State secretary's certificate of record of union label, admissible); § 6240-3 (registered trade-mark, etc.; certified copy by State secretary or clerk of court of common pleas, admissible); § 9032 (consolidated railroad companies; State secretary's certified copy of agreement, admissible); § 10044 (benevolent association, etc.; certificate provable by certified copy by county recorder or State secretary).

OKLAHOMA: Comp. St. 1921, § 638 (copies of "all papers authorized or required by law to be filed or recorded in any public office, or of any record required by law to be made or kept in any such office," duly certified by the legal custodian, under official seal if any, are admissible "when such original is not in the possession or under the control of the party desiring to use the same"); § 640 (State Secretary's certified copy under official seal of a law, etc., contained in "printed statute books of the States and Territories of the U. S., purporting to be printed by authority," and deposited and required by law to be kept in Secretary's office, admissible); § 645 (certified copy by "the proper officer," under corporate seal, of ordinances, etc., of a city or incorporated town in the States, admissible); § 651 (official custodian's exemplification of books or papers in any department of the U. S. government, admissible); § 4028 (recorded brand of stock, provable by the county clerk's certified copy under official seal); § 5784 (county clerk's certified copy under seal of the proceedings of a board of county commissioners, admissible); § 5310 (State Secretary's certified copy of filed articles of incorporation, admissible); § 8145 (certified copies, by the clerk of the district court, of an entry of partnership names, admissible); § 5765 (duly certified copies of a county clerk's road record, admissible).

OREGON: Laws 1920, § 739 ("every public officer having the custody of a public writing which a citizen has a right to inspect" must give a certified copy on demand, which "is primary evidence of the original writing"); § 748 (a law of one of the U. S. or a foreign country, provable by copy under the public seal); § 766 (like Cal. C. C. P. § 1918; but par. 2 adds "or other legal keeper of the originals"; par. 6 inserts "or the U. S."; par. 7 substitutes "judge of a court of record"; par. 8 adds for the certificates, "or under the hand and seal of the American consul" residing nearest; par. 9 is omitted); § 767 (like Cal. C. C. P. § 1919); § 834 (like Cal. C. C. P. § 2011, substituting "duly certified"); § 2752 (State treasurer's certified copies of deeds, papers, etc., filed and records kept in his office, admissible); § 753 (U. S. internal revenue license, etc., provable by collector's certified copy); § 767-1 ("any paper or the record of any instrument filed or recorded" in the office of any U. S. officer or agent or department or bureau admissible, or a copy certified by the legal custodian); § 771 (like Cal. C. C. P. § 1923); § 6857 (articles of incorporation, provable by State secretary's or county clerk's certified copy); 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 (certified copy of New Zealand official registry of death, held properly authenticated under B. & C. Comp. § 755, subd. 8); 1915, State *v.* Locke, 77 Or. 492, 151 Pac. 717 (Indiana marriage record certified by the clerk of the circuit court under seal of court, admitted, under Lord's Or. L. § 766).

PENNSYLVANIA: St. 1823, Mar. 31, § 1 Dig. 1920, § 10333, Evidence (documents in the offices of the secretaries of the Commonwealth and of the land-office, of the surveyor-general, auditor-general, and State treasurer; certified copies receivable); St. 1828, Apr. 15, § 1, Dig. § 10335, Evidence (treasurers' bonds duly recorded, provable by exemplification); St. 1837, Mar. 11, § 20, Dig. § 10351, Evidence (certified copy of an extract from a burial-register of a religious society or corporate town out of the U. S., receivable; the certificate to be authenticated by the U. S. consul); St. 1840, Apr. 11, § 4, Dig. § 10311, Evidence (certified copy of the recorded bond of a justice, receivable); St. 1840, Apr. 11, § 5, Dig. § 10312, Evidence (same for the commission of a justice or alderman); St. 1843, Apr. 19, § 2, Dig. § 10339, Evidence (certified extract from assessment books, receivable); St. 1847,

Mar. 9, § 1, Dig. § 8802, Deeds (record or certified copy of a duly recorded tax-receipt, receivable); St. 1857, Apr. 21, Dig. § 829, Attorney-General (Secretary of Commonwealth's certified copy under seal of an attorney-general's bond, admissible); St. 1859, Jan. 25, § 2, Dig. § 10340, Evidence (certified copies of papers on file and books in the canal commissioners' office, etc. receivable); St. 1907, May 29, § 1, Dig. § 10332, Evidence (certified copy by the health commissioner under seal of all office records, etc., receivable); St. 1866, Mar. 21, § 1, Dig. § 10341, Evidence (certified copies or ordinances, etc., of the Philadelphia Council, receivable); St. 1867, Apr. 11, §1, Dig. § 10342, Evidence (certified copies of provost-marshal's documents at certain places, receivable); St. 1868, Feb. 21, § 1, Dig. § 7619, Court Records (certified copies of official bonds recorded with the Secretary of the Commonwealth, receivable); St. 1840, Apr. 11, § 4, Dig. § 12995, Just. Peace (certified copy by the recorder of the bond of a justice or alderman, receivable); St. 1870, Apr. 14, § 1, Dig. §§ 10321–10323, Evidence (powers of attorney from U. S. residents to obtain payment of money at a government office in Great Britain, receipts there given for money so paid, reports awarding the money; provable by certified copy by special officers under seal); St. 1876, May 13, § 2, Dig. § 1181, Banking Comp. (auditor-general's certified copy under seal of a banking company's certificate of incorporation, admissible); St. 1876, Apr. 27, § 1, Dig. § 10355, Evidence (acts of foreign notaries, to be verified by the appropriate U. S. consul under seal, the consular seal and signature to be presumed genuine, etc.); St. 1889, Mar. 7, § 1, Dig. § 10346, Evidence (certified copies of documents in the office of the insurance department, receivable); St. 1874, May 9, § 4, Dig. § 20158, State Treasurer (State treasurer's office; copies of accounts and documents, under his seal, admissible); ib. § 1 Dig. § 20152 (State treasurer's bond; copy under seal of State secretary, admissible); St. 1913, July 26, Art. VI, § 46, Dig. § 18207, Public Service Com. (public service commission; records, etc., provable by secretary's certified copy under seal of the commission); St. 1917, June 7, Dig. § 18915, Register of Wills (bond of register of wills, recorded with Commonwealth secretary, provable by recorder of deeds' certified copy); St. 1919, May 21, § 11, Dig. 1920, § 1253, Banks (State banking department; all books, etc., filed in office, provable by certified copy under Commissioner's hand and seal, unless Court directs production of original); St. 1921, May 25, No. 422, § 14 (State board of engineers, etc.; records provable by certified copy); St. 1921, May 25, No. 425, § 38 (State board of public welfare; records provable by certified copy); 1811, Young *v.* Com., 4 Binn. 113 (certified copy by the Secretary of the Commonwealth of a coroner's bond not duly recorded, excluded); 1811, Garwood *v.* Dennis, 4 Binn. 314, 325 (certified copy of a land-office entry by one not the proper custodian, excluded); 1832, Oliphant *v.* Ferrant, 1 Watts 57 (St. 1823 applied to admit copies of land-office blotters); 1852, Strimpfler *v.* Roberts, 18 Pa. 283, 297 (same); 1841, Hockenbury *v.* Carlisle, 1 W. & S. 282 ("exemplified copy from the proper office" is the correct mode; here, for tax-books); 1845, Farr *v.* Swan, 2 Pa. St. 245, 255 (maps filed in the land-office, provable by certified copy).

PHILIPPINE ISLANDS: Civ. C. §§ 1216–1224, 1225–1230 (like P. R. Rev. St. & C. §§ 4290–4298, 4299–4304; based on the Spanish documentary system); the following are borrowed from the California Code: C. C. P. 1901, § 313 (pars. 3 to 9; like Cal. C. C. P. § 1918, pars. 3 to 9; pars. 1, 2, as follows: "Official documents may be proved, as follows: 1. Acts of the Chief Executive of the Philippine Islands, by the record of his office, certified by his secretary under the seal thereof, if there be one; acts of the Executive of the United States, by the records of the Departments of the United States Government wherein are contained the records of such acts, certified by the heads of such departments. They also may be proved by public documents, printed by the order of the Chief Executive of the Philippine Islands, or the President of the United States, or by order of Congress, or either House thereof, or by the order of the Philippine Commission, or by the order of any legislative assembly which may be provided for the Philippine Islands. Acts of the Executive of the Philippine Islands under Spanish administration may be proved by the records thereof in the custody of the United States officials, or officials of the Government of the Philippine Islands, certified by the legal keeper of the records. They may also be proved by public documents printed by the order of the Chief Executive of the Philippine Islands. Acts of the Chief Executive of Spain may be proved by the records of any department of that Executive, certified by the head of the department in which the record is; 2. The proceedings of the Philippine Commission or of any legislative body [that] may be provided for the Philippine Islands, or of Congress, by the Journals of those bodies or of either House thereof, or by published statutes or resolutions, or by copies certified by the clerk or secretary or printed by their order: Provided, That in the case of Acts of the Philippine Commission or the Philippine Legislature when there is in existence a copy signed by the presiding officers and the secretaries of said bodies, it shall be conclusive proof of the provisions of such Act and of the due enactment thereof. The proceedings of the legislative branch of the Government of Spain, prior to the eighteenth day of August, eighteen hundred and ninety-eight, may be proved by public documents or statutes or resolutions printed by the order of the executive or legislative

departments of the Government of Spain or commonly received in that country as such, or by copy certified under the seal of either the executive or the legislative branch of the Government of Spain, or by a recognition thereof in some public Act of the Executive of the United States"); C. C. P. 1901, § 299 (like Cal. C. C. P. § 1893); § 301 (like Cal. C. C. P. § 1901); § 314 (like Cal. C. C. P. § 1919); § 318 (like Cal. C. C. P. § 1923); 1916, U. S. v. Zapanto, 33 P. I. 567 (purporting copy of a pardon, bearing executive seal, but unsigned and uncertified, excluded on the facts).

PORTO RICO: Rev. St. & C. 1911, §§ 4290–4298 (public instruments); §§ 4299–4304 (private instruments); these provisions, quoted *ante*, § 1225, being a translation of the Spanish law, Civ. C. §§ 1184–1198, are based on principles different from the Anglo-American law, and their interpretation would not be dependent on the latter's precedents; the following are taken from the California Code of Civil Procedure; § 1416 (like Cal. C. C. P., § 1893); § 1422 (like ib. § 1901); § 1437 (like ib. § 1918); § 1438 (like ib. § 1919); § 1442 (like ib. § 1923); § 1462 (like ib. § 1951).

RHODE ISLAND: Gen. L. 1909, c. 121, § 16 (municipal clerk's record of a birth, etc., provable by certified copy); c. 213, § 15 (Secretary of State's certified copy of documents of organization of corporation, admissible); c. 189, § 3 and c. 300, § 44 (same for a foreign corporation's power of attorney to accept service); c. 225, § 2 (foreign surety company; the insurance commissioner's certified copy of power of attorney to accept service, admissible).

SOUTH CAROLINA: St. 1731, C. C. P. 1922, §§ 716, 717 (exemplifications of records attested under the seal of a mayor, Governor, or notary of a domestic or foreign State, receivable conditionally); St. 1856, C. C. P. § 711 (copy of any entry in the official books of a sheriff, certified by him under oath before a clerk of court, receivable conditionally, on ten days' notice); St. 1866, C. C. P. § 709 (certified copy, "by the officer having the custody," of certain kinds of bonds, and "all other instruments in writing which by law are required or permitted to be in writing, and kept in a public office," receivable, on thirty days' notice); St. 1868, C. C. P. § 705 (attested copy of an act of General Assembly, by the Secretary of State, receivable; so of "all records, signed by the keeper of such records respectively"); St. 1871, C. C. P. § 710 (certified copies of "all papers filed in the office of the State Superintendent of Education, and his official acts," receivable); Civ. C. 1922, § 740 (custodian's certified copy of a public officer's bond, admissible in an action thereon); § 859 (Treasurer's certified copy of an entry from his books, admissible); § 706 (certified copy of an ordinance, resolution, or records of a town or city of the State, by the custodian under corporate seal, admissible on ten days' notice to the opponent); 1906, Montgomery v. Seaboard A. L. R. Co., 73 S. C. 503, 53 S. E. 987 (under Code 1902, §§ 2051, 2888, the Secretary of State's certified copy of a charter of consolidated railroads is not admissible).

SOUTH DAKOTA: Rev. C. 1919, § 2728 (like Cal. C. C. P. § 1923); § 5872 (county auditor's certified copy under seal of the proceedings of county commissioners, admissible); § 8765 (Secretary of State's certified copy of articles of incorporation filed, admissible); § 1339 (certified copies by the clerk of court of a partnership register, admissible); §§ 5241, 5242 (certified copy of a notary's record by the notary under seal or by the clerk of a circuit court having the custody, admissible); § 127 (clerk of court's certified copy of entry in marriage register, admissible); § 5124 (legislative journals provable by copies certified by secretary of Senate and chief clerk of House); § 5241 (notary's certified copy of record of protest, admissible); § 5338 (Secretary of State's certified copies must be countersigned by State treasurer, showing fee charged); § 5389 (State board of charities and correction; certified copies of papers in its possession, sealed and signed by president and secretary, admissible); § 6247 (certified copy of municipal ordinance, admissible); § 6448 (city board of park supervisors; secretary's certified copy of records, admissible); § 7668 (State board of health's regulation, provable by superintendent's certified copy); § 7671 (State board of health's register of licenses to physicians, provable by certified copy); § 7760 (State board of optometry examiner's records of licenses, etc., provable by certified copy); § 7749 (State board of dental examiner's records, provable by transcript under board seal certified by the secretary); § 8080 (State livestock sanitary board's records, provable by superintendent's transcript under board seal); § 8135 (recorded livestock brand, provable by copy certified by State livestock commission's secretary, or prior to Mar. 9, 1897, by county register of deeds); § 8942 (State superintendent of banks; records and papers in his office provable by his certified copy under official seal); § 9913 (record in office of State superintendent of vital statistics, provable by his certified copy under seal of department of history); § 10324 (illegal sale of liquor; "all written or printed papers, orders, statements, prescriptions, affidavits, reports, or records provided for in this article, and certified copies of the same," are admissible).

TENNESSEE: Shannon's Code, 1916, § 5573 (papers "belonging to any public office" or lawfully "filed to be kept therein," provable by certified copies); § 5574 (records, books, and papers of a "county entry-taker's office," provable by certified copies); § 5584 (copy of a legislative journal, domestic or foreign provable by the legal custodian's certified copy); §§ 5587–88 (written law or "other

public writing" of any State, provable by copy under the great seal; document belonging in the office of a department of the general government, provable by certified copy by the head of the department); § 5590 (certified copy by the Secretary of State from statute-books, etc., described in id. §§ 5584–85, in the State library, receivable); § 265 (documents in the comptroller's office, provable by his certified copy under seal); § 1045 (delinquent tax-collector's bond, provable by copy from the comptroller's office, unless the Court requires the original); § 2065 (incorporation-articles, provable by the county register's certified copy); § 7357 (existence of a corporation in a criminal case, provable by the charter's "legally authenticated copy"); § 5588*a*1 (records of U. S. internal revenue collector, showing payment of liquor tax, etc., provable by certified copy); § 3059*a*19 (copy of proceedings or of documents filed with State railroad commission, certified by chairman and secretary, admissible); § 3079*a*329 (U. S. internal revenue collector's certified copy of liquor tax receipt, admissible); § 3369*a*95 (State insurance commissioner's certified copy of recorded certificate of organization of fraternal benefit society, admissible); § 3369*a*104 (similar, for appointment of attorney by foreign society); § 3473*a*18 (registered trademark, provable by State secretary's certificate of record); § 5583 (acts of the Executive "of the U. S. or of this or any other State of the Union, or of a foreign government," provable by "the records of the State department"); 1879, Amis *v.* Marks, 3 Lea 568, 570 (certified copy of a filed constable's bond, received); 1899, State *v.* Cooper, — Tenn. Ch. —, 53 S. W. 391 (entry-taker of Carter Co., authorized to certify a copy of the survey).

TEXAS: Rev. Civ. Stats. 1911, § 3693 (Secretary of State's certified copy under seal of an act in printed statute-book as described *post* § 1684, deposited in his office, or of a law or bill there lawfully deposited, admissible); § 3694 ("copies of the records of all public officers and courts of this State, certified to under the hand and seal, if there be one, of the lawful possessor of such records," admissible; "translated copies of all records in the land-office, certified to under the hand of the translator, and the commissioner of the general land-office, attested with the seal of said office," admissible); § 3695 (certified copies, under a county surveyor's "official signature," of his records of surveys and plats, admissible); § 3696 ("any paper, document, or record" in the offices of the "Secretary of State, attorney-general, commissioner of general land office, comptroller, treasurer, adjutant-general and commissioners of agriculture, and of insurance, and banking, and State librarian," provable by their certified copies); § 3697 (certified copies of notaries' "records and official papers," admissible); § 3698 (in State suits for official money default, the records of the comptroller of public accounts are provable by his transcript under official seal; and bonds, contracts, etc., connected with the account, are provable similarly when annexed to such a transcript, except that when the suit is on the bond, etc., and execution is denied on oath, the Court "shall require the production and proof thereof"); § 3707 ("certified copies, under the hands and official seals of the heads of departments, of all notes, bonds, mortgages, bills, accounts, or other documents, properly on file in any of the departments of this State," admissible); § 1131 (Secretary of State's certified copy, under the great seal of State, of a corporate charter, admissible); § 1321 (foreign corporation's permit to do business, provable by State secretary's certified copy); 1847, Bryant *v.* Kelton, 1 Tex. 436, *semble* (certified copy of a record of a bill of sale, excluded because the certifier was not shown to be required by law to keep the records); 1862, Patrick *v.* Nance, 26 Tex. 298, 301 (certified copy of field-notes, not properly returned to the survey-office, excluded); 1887, Harvey *v.* Cummings, 68 Tex. 599, 603, 5 S. W. 513 (certified copy by the Alabama Secretary of State, from the printed statute-book in his office, admitted); 1906, Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 (State land commissioner's records; certified copy admitted).

UTAH: Comp. L. 1917, § 7084 ("A copy of the written law or other public writing of any other State, or of a Territory, or a foreign country, attested by the certificate of the officer having charge of the original under the public seal of the State, Territory, or country, or attested by the certificate of the keeper thereof and the seal of his office annexed, if there be a seal, together with the certificate of the presiding justice of the county, parish, or district, in which such office may be kept, or of the Governor, Secretary of State, or chancellor, or, if of a foreign country, the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the U. S. in such foreign country," is admissible); § 7091 (like Cal. C. C. P. § 1918, except as follows; in par. 1, omitting the first "of the State department" and changing the second to "the departments"; in pars. 3 and 7, reading "of another State or of a Territory"; in par. 7, inserting "circuit, district"; in par. 8, inserting "or with the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the U. S. in such foreign country"); § 7092 (like Cal. C. C. P. § 1919); §§ 7076, 7097 (like id. § 1923); § 7117 (like id. § 1855, par. 3); § 7156 (certified copy, by the judge or official custodian, of an affidavit of publication of notice, admissible); §§ 3895–3899 (certified copy of an affidavit of mining improvements, mining regulations and records, and mining location-notices, admissible); § 866 (certified copy of the Secretary of

State's certificate of incorporation, admissible); § 867 (certified copy of corporation papers recorded or filed with a county clerk or the Secretary of State, admissible); § 5719 (State auditor's account of money due to the State, provable by copy); § 556 (city recorder's certified copy, under city seal, of record of city ordinance, admissible); § 786, par. 18 (similar to § 556, for towns); § 617 (city recorder's certified transcripts, under corporate seal, of city council records, admissible); § 5058 (State Registrar's record of births and deaths, provable by his copy properly certified); § 3417 (State engineer's maps and records provable by certified copies); § 3356 (liquor offences; U. S. internal revenue collector's certified copy of payment of tax, to be evidence); § 4823 (State public utilities commission; "all official documents or orders" filed therewith, provable by certified copy of a commissioner, secretary, etc., under commission seal).

VERMONT: Gen. L. 1917, § 542 (Secretary of State's certified copy of the State treasurer's bond, admissible); § 557 (State treasurer's certified copy of documents in his office, "belonging to his department" or "lodged there by law," admissible in civil suits); § 1902 (copy of the U. S. weather record, certified under oath by the officer in charge, receivable); § 3839 (county clerk's certified copy of a sheriff's bond, admissible); § 3875 (county clerk's certified copy of a lost or destroyed sheriff's commission, or an accused recognizance, admissible); § 3882 (county clerk's certified copy of a treasurer's bond, admissible); § 3978 (town-clerk's certified copy of the record of a constable's appointment, etc., admissible); § 3958 (town-clerk's certified copies of documents legally filed recorded in his office, admissible); § 375 (Secretary of State's certified copies of township-charters, admissible); § 5096 (Secretary of State's or county clerk's certified copy of a railroad's articles of association, admissible); § 5321 (same for a reorganized corporation); §§ 6032, 6034 (adjutant-general's and inspector-general's certified copies of official papers, admissible); § 3944 (town-clerk's certified copy of the recorded bond of town officer, admissible); § 376 (surveyor-general's books, papers, and records, in possession of the Secretary of State, provable by his certified copy); § 364 (secretary of civil and military affairs, copies, attested under his seal, of records in his office; "full faith and credit shall be given to such copies"); § 368 ("full credit shall be given to certified copies and attestations" under seal of Secretary of State); § 588 (State auditor's certified copy of a "record or paper belonging to his department" or "lodged there by law," admissible); § 969 (tax commissioner's certified copy of papers "belonging to" or "lodged by law" in his department, admissible); § 1903 (certified copy of a record of births, marriages, or deaths, required by law to be kept, admissible); § 3798 (marriage-records; cited more fully *ante*, § 1644); § 3876 (county clerk's certified copy of appointment and bond of chief of police, admissible); § 4968 (corporation law; Secretary of State's certified copy of documents lawfully filed with him, admissible); § 5010 (same for foreign corporations); § 5962 (secretary of State's certified copy of recorded trademark or tradename, admissible to evidence its adoption); St. 1919, Mar. 27, No. 72 (recorded deeds and public records in "another State or foreign county," provable by certified copy; quoted *post*, § 1681); 1867, Barnet *v.* Woodbury, 40 Vt. 266, 268 (town-clerk's copy of a grand list of assessment excluded, because his duty is to certify copies of instruments recorded only, and not merely deposited with him); 1906, Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (St. 1904, No. 24, p. 27, concerning the State auditor's certified copies, considered).

VIRGINIA: Code 1919, § 307 (House clerk's certified copy of the General Assembly's acts and the House's record and proceedings, admissible); § 6193 (clerk's or secretary's certified copy of an ordinance, etc., of a municipal corporation in the State, receivable); §§ 6197–8 (attested copy of "any record or paper in" the office of the Secretary of the Commonwealth, treasurer, register, either auditor, corporation commission, fisheries board, railroad commissioner, agriculture commissioner, State assayer and chemist, board of education or of public works, county supervisors, or county surveyor, receivable "in lieu of the original"; but "for good cause shown" the original records of a county surveyor "may be required to be produced"; attested copy of "any record or paper in" the office of the Secretary of State, treasurer, auditor, or a county surveyor, of West Virginia, receivable); § 6206 (records and office-books, not of a court, "kept in any public office" of the U. S. or a State, provable by attestation by the keeper, under seal of office, if there is one, certified by a judge of an appropriate court of record or by the Governor, Secretary of State, Chancellor, or keeper of the great seal; if by a judge, certified also by the clerk of the court under seal; if otherwise, given under the seal of State); § 6207 (birth-and-marriage register "in any place out of the U. S.,"; attested copy by a notary under seal of office, certified by a court of record or mayor or other chief magistrate or under seal of State of the kingdom, province, etc., receivable); § 1611 (license to practice medicine; certified copy by secretary of State board of medical examiners, admissible); § 1645 (custodian's transcript of State board of dental examiner's record of licenses, admissible); § 3845 (Commonwealth secretary's certified copy of foreign corporation's power of attorney to accept service of process, admissible); § 3868 (similar, for certain charter alterations); 1817, Warner *v.*

Com., 2 Va. Cas. 95, 98 (certificate of the Secretary of State, attested by the Governor of the State, received to show the statute of a domestic State).

WASHINGTON: R. & B. Code 1909, § 1257 ("Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this State, when duly certified by the respective officers having by law the custody thereof, under their respective seals, where such officers have seals," admissible); § 7079 (certified copy, by the State log-scaler or his deputy, of records in his office, admissible); § 9025 (State auditor's certified copy under official seal of documents lawfully deposited in his office, admissible); § 3158 (county auditor's certified copy under official seal of a recorded stock-brand, admissible); § 9030 (copies, authenticated by the State Treasurer's official seal, of documents lawfully deposited in his office, admissible); § 8796 (county auditor's certified copy, under official seal, of instruments, etc., lawfully filed or recorded in his office, and of records of a board of county commissioners, admissible); § 3002 (copies of records of county commissioners, signed and sealed by them and attested by their clerk, admissible); § 8300 (certified copy of a notary's record, by the notary under seal, or by a county clerk having the custody, admissible); § 7356 (certified copies of records of the mining-district recorder, to have the same effect as "similar papers certified by other officers of this State"); § 2153 (certified copy of a recorded marriage-certificate, on a trial for adultery, etc., admissible); § 7364 (certified copy of a recorded affidavit of labor on mining claim, admissible); § 4307 (certified copy of all papers filed and official acts of the superintendent of public instruction, attested by his official seal, admissible); § 3319 (banking corporation articles; "authenticated" copy of record by county auditor, State examiner, or State secretary, admissible, for or against the bank); § 3682 (certificate of incorporation; copy certified by county auditor or deputy or by State secretary, admissible); 1904, James *v.* James, 35 Wash. 650, 77 Pac. 1080 (a public record from another State, is not provided for under the above statutes); 1906, State *v.* Kniffen, 44 Wash. 485, 87 Pac. 837 (deputy county clerk's certified copy of a marriage record in Michigan, excluded, because not certified according to U. S. Rev. St. 1878, § 906).

WEST VIRGINIA: Code 1914, c. 63, § 27 (county court clerk's register of marriages, etc., provable by copy "certified by said clerk lawfully having the custody thereof"); c. 130, § 5 (custodian's attested copy of documents in the office of the Secretary of State, treasurer, auditor, or county surveyor, admissible); § 7 (same for the above officers and the land-register and court clerks of Virginia); § 20 (office books kept in a public office of the U. S. or a State, provable by the custodian's attested copy under official seal, certified by the presiding justice of the county or the judge of a court of record of the county or the Governor or Secretary of State or Chancellor or keeper of the great seal; this to be authenticated by the clerk of court under official seal, in case of a presiding justice, or by the great seal of State, if by one of the last four); § 21 (register of births and marriages out of the U. S., provable by a notary's certified copy under seal, authenticated by a court of record, or chief magistrate of a county or city, or by the great seal of State); c. 54, § 19 (Secretary of State's certified copy of a certificate of incorporation, etc., and a printed copy as provided, to be "as evidence, equivalent to the original"); c. 10, § 4 (recorded official bond, provable by lawful custodian's certified copy, but the Court may require "production of the original bond, unless the same be lost or destroyed"); c. 12, § 13 (house of legislature; journals, etc. provable by clerk's certified copy); c. 12, § 14 (enrolled act or resolution, provable by certified copy by clerk of house of delegates); c. 51, § 8 (notary's records deposited with county clerk, provable by clerk's certified copy); c. 150, § 29 *b* (State board of pharmacy books and register, provable by secretary's certified copy under board seal); St. 1921, c. 112, § 18 (road law; map, etc., required to be filed or recorded, provable by copy certified by clerk of county court or member of State road commission).

WISCONSIN: Stats. 1919, § 4148 (any document "filed, deposited, entered, kept, or recorded," or any lawful record, "in any public office or with any public officer of the U. S. or of this State or of any town, school district, county or municipality herein, or any public body or board created under any statute of the State," provable by certified copy); § 4149 (certified copy must be under the custodian's "official seal, or under the official seal of the court, public body, or board, in his custody," when required by law to have a seal; "any certificate purporting to be signed, or signed and sealed as authorized by law, shall be presumptive evidence that it was signed by the proper officer, and, if sealed, that it has the proper seal affixed, except when the law requires an additional certificate of genuineness"); § 4151 *a* (copy of any record, document, etc., lawfully kept in the office of the public lands commissioners of this State, and certified as in id. § 23.04, admissible); § 23.04 (commissioners of public lands, preserving all records, books, and other papers pertaining to public lands; a certified copy, by the chief clerk under official seal, of injured or lost documents, shall have the same effect as the original and a certified copy from any record required to be kept in the office, by State land-office chief clerk or commissioner under official seal, is admissible with the same effect as the original); § 4176 (certified copy of a recorded

in mind (according to the foregoing principles) that the American common-law rule recognizes the official custodian of documents as having an implied authority to certify copies (so that the decision depends chiefly on the administrative law as to the proper custody of the original); that the certified copy is itself authenticable, for many or most domestic officers, by the seal of his office, and for foreign officers by the seal of State appended to the copy; and that in both of these respects numerous statutes in every jurisdiction now provide specially for certain classes of documents.

These statutes, with their tedious multiplicity of repetition, are for the most part vain and harmful, — a printed monument to the folly of excessive and thoughtless legislation. They are vain, because either they merely state what would by the American common law have been conceded or might have been made certain by a general clause, or they profusely repeat in scores of acts, with culpable forgetfulness, what is already the law by express general statute. They are harmful, because they not only add to the impedimenta of the profession and make necessary the mastery of multifarious petty learning, but they also provide, in many instances, inconsistent formalities of authentication for evidence which could equally well be subjected to a uniform simple rule. Add to this that the tendency of so many and so varying statutory peculiarities of detail is to impress the profession (both on the bench and at the bar) with the false notion that obedience to the precise statutory formalities is the sole means of evidential salvation; and to obscure the simple

affidavit of publication, admissible); § 4181 (corporate charter, certificate of organization, articles of association, and amendments thereof provable by certified copy); § 4202 ("In every action upon any official bond, the original bond, or a certified copy," is evidence of execution); § 14.43 (records of the board of deposit, provable by the secretary's certified copy); § 4474 (certified copy of books, etc., made by court order, usable on a trial for perjury); § 1096 (certified copy of a tax-stub-book, admissible); § 1298 (certified copy of the record of a highway order, admissible); § 1388 (certified copy of the record of a drain order, admissible); St. § 4136 (State librarian's certified copy of any judicial opinion or any statute of a State or Territory or foreign country, "contained in any book in the State library," shall be receivable); 1892, Lally *v.* Rossman, 82 Wis. 147, 150, 51 N. W. 1132 (certified copy of a government plat, etc., by the chief clerk of the land-office, admitted under statute); 1906, Rohloff *v.* Aid Ass'n, 130 Wis. 61, 109 N. W. 989 (certified copy of a death certificate filed in the register's office under Rev. St. 1898, §§ 1024, 1024 *a*, excluded, as "not the best evidence").

WYOMING: Comp. St. 1919, § 4642 (certified copies of recorded foreclosure-affidavits, admissible); §§ 5048, 5060 (certificate of incorporation, provable by State secretary's certified copy under great seal); § 5075 company's road survey, filed with the State secretary, provable by certified copy under State seal); § 5451 (foreign corporation's charter, etc., provable by certified copy by the register of deeds under official seal); § 4970 (certified copy of a marriage record, admissible); § 4378 (copy of mining-district records, filed with the register of deeds, "shall be taken as evidence"; such records heretofore filed, and transcripts thereof, "shall have the like effect in evidence"); § 1383 (documents duly filed in the office of a county clerk or treasurer, and records kept by him, provable by certified copy under seal of office); § 5811 (like Oh. Gen. C. 1921, § 11500, omitting all between "great seal" and "shall be"); § 2893 (certified copy of the records of a clerk of a board of county commissioners and county treasurer, admissible); § 109 (certified copies under official seal, by the Secretary of State, of all records, documents, etc., deposited in his office by law, admissible); § 1495 (county clerk's certified copies under official seal of papers filed and of books of record, admissible); § 1763 (town ordinances provable by clerk's certificate under town seal); § 1827 (first class city ordinances, provable as in § 1763); § 4356 (State secretary's certificate of record of trademark, admissible); § 5249 (State insurance commissioner's certified copy of certificate of incorporation of insurance company, admissible).

general principles which once sufficed and will always remain inherent in the use of this class of evidence. In a few jurisdictions this evil has been avoided; but in most jurisdictions the law has still to be sought in a confused mass of statute and precedent. It is difficult to say which is the more to be lamented, — the unpractical narrowness of the English common-law rule which led to this legislation, or the cumbrous crudeness of the enactments which attempted to remedy the common-law shortcomings. A measure of the scope proposed *ante*, § 1636, would be a boon to our law.

§ 1680*a*. **Same: Federal Statute for 'Documents in any Public Office.'** The *Federal statute* of 1804 (Rev. St. § 906) is of special importance, because it provides a uniform mode which may be availed of in the court of any State or Territory for using certified copies of public documents (not being judicial records) existing in another State or Territory. The principle of a custodian's authority to certify copies is sanctioned, and the authentication of his custody, incumbency, and signature or seal is made by either a judge or an officer representing the supreme Executive, — the former alternative being a practical measure relieving from the inconvenience of resorting to the headquarters of government. The double certificate (of judge and of clerk), required for this form of authentication, seems intended merely to give that additional security which would come from the danger of forging a signature more familiar to the bar.[1]

This Federal statute is *not exclusive* of other rules for certifying copies of public documents in another State or Territory;[2] *i. e.* the offering party may follow either a common-law mode, or the Federal mode, or the local statutory mode, and a certified copy fulfilling the provisions of the one is not excluded for failure to answer the more onerous requirements of another.

Distinguish this statute from the one dealing with *judicial records* (*post*, § 1681*a*).

§ 1680*a*. [1] As to the rulings interpreting this statute the remarks prefacing note 12, § 1681, *post*, are here also applicable. The following are some of the rulings in State courts: 1828, Huff *v.* Campbell, 1 Stew. 543; 1834, Tatum *v.* Young, 1 Port. Ala. 298, 310; 1849, Geron *v.* Felder, 15 Ala. 304; 1851, Smith *v.* Redden, 5 Harringt. Del. 321; 1838, King *v.* Dale, 2 Ill. 513; 1885, Hudson *v.* Green H. & S. Co., 113 Ill. 618, 630; 1822, Henthorn *v.* Doe, 1 Blackf. Ind. 157, 159; 1828, Johnson *v.* Rannels, 6 Mart. N. s. 621; 1869, Rice's Succession, 21 La. An. 614; 1921, Reed *v.* Stevens, 120 Me. 290, 113 Atl. 712 (crim. con.; a purporting certificate of marriage signed only by the city clerk of Dover, N. H., held not sufficient under U. S. Rev. St. § 906); 1849, Routh *v.* Rank, 12 Sm. & M. Miss. 161, 186; 1854, Kidd *v.* Manly, 28 Miss. 156, 159; 1855, James *v.* Kirk, 29 Miss. 206, 210; 1836, Paca *v.* Dutton, 4 Mo. 371; 1841, Rennick *v.* Chloe, 7 Mo. 197, 202; 1805, Richards *v.* Hicks, 1 Overt. Tenn. 207.

[2] 1857, Parke *v.* Williams, 7 Cal. 247, 249; 1889, Hawes *v.* State, 88 Ala. 37, 69, 7 So. 302; 1859, Karr *v.* Jackson, 28 Mo. 316, 318; 1921, Reed *v.* Stevens, 120 Me. 290, 113 Atl. 712 (crim. con.; New Hampshire certificate of marriage); and the more numerous rulings cited in note 2, § 1681*a*, *post*, dealing with the statute about judicial records.

Contra: 1838, Pennel *v.* Weyant, 2 Harringt. Del. 501, 505; 1851, Brown *v.* Edson, 23 Vt. 435, 447 (repudiating Ingersol *v.* Van Gilder, D. Chipm. 59).

Compare the rule for Federal and State jurisdiction (*ante*, § 6).

Yet where the local State has not provided for proof of copies of records in other States, the Federal statute may have to be relied on: 1905, Wilcox *v.* Bergman, 96 Minn. 219, 104 N. W. 955 (North Dakota deed-records, admitted under the Federal statute, though the local statute made no provision for certified copies from other States); 1904, James *v.* James, 35 Wash. 650, 77 Pac. 1080.

This doctrine, however, should not lead us to ignore the common-law propriety of using a copy duly certified according to the laws of the other State (*ante*, § 1633, n. 1, § 1652, n. 4).

§ 1681. **Certified Copies of Judicial Records (including Probated Wills).** Upon the general principle of the common law as recognized in England (*ante*, § 1677) the custodian of records had, as custodian, *no implied authority to certify copies*. Thus the certified copies of a clerk or other custodian of *judicial records* were not admissible apart from an express authority appearing. The application of this principle may be considered, first, at common law, as to domestic records, next, as to foreign records, and, finally, under the statutes.

(1) A clerk's certified copy — or office-copy [1] — of a *domestic* judicial record was at common law in *England* not admissible, without an *express order shown*. Such an order could be either a general one or a special one for each instance. A *special order* was implied in the affixing of the great (or broad) seal, kept in Chancery, or of the court seal in any other court; because the judicial affixing of the seal was in effect a sanctioning of the specific copy to which it was affixed. Of *general orders*, there seem to have been three, — by the Chancery court, authorizing office copies of depositions for use in Chancery; by the other courts, authorizing office-copies of documents in the same court and the same cause; [2] and to the clerk of the rules, in general to certify rules (*i. e.* orders, judgments, and the like) to inferior courts.

The result of these rules, summarized, was practically this: An office-copy (*i. e.* certified merely by the clerk-custodian) was not admissible, except in an inferior court [3] or in the same superior court in the same cause; [4] while an exemplified copy (representing a special court-order) was admissible without limitation. This rule, and the theory upon which it was founded, was simple enough in essence, and was unquestioned. In the following passages its various aspects are expounded; the passage from Chief Baron Gilbert's book was the earliest systematic exposition of the theory, and for a century it served as the foundation for the text of every English writer on Evidence:

1611, Sir EDWARD COKE, Note to Dr. *Leyfield's Case*, 10 Rep. 93 *a*: "A copy of a record, being testified to be true, is permitted to be given in evidence; but the sure way is to exemplify it under the great seal, or at least under the seal of the court."

Ante 1726, GILBERT, C. B., Evidence, 11: "The next thing is the copies of all other records [than statutes] and they are twofold: under seal, and not under seal. First, under seal; and these are called by a particular name, Exemplifications, and are of better credence than any sworn copy; for the courts of justice that put their seals to the copy

§ 1681. [1] "Office-copy" is the original English term for what is with us termed usually "certified copy"; see the definitions *ante*, § 1648; an "exemplification" is a copy under the court seal or great seal.

[2] There probably was no express order; the thing was allowed as a matter of convenience, and explained on the theory of a general authority.

[3] 1699, Selby *v.* Harris, 1 Ld. Raym. 745 (at *nisi prius*, a rule of the C. P. or K. B. signed "by the proper officer," admissible; because, says Peake, Evidence, 33, "the clerk of the Rules is appointed to make out the rules of the court and authenticate them").

[4] 1838, Barron *v.* Daniel, Crawf. & D. Abr. 283 (office-copy from another court, excluded); 1840, Jack *v.* Kiernan, 2 Jebb & S. 231, 237 (office-copy in the same cause and the same court, received); 1844, Pitcher *v.* King, 1 C. & K. 655 (action for a sheriff's false return, in the same court as the original suit; office-copy excluded).

The limitation as to the same cause did not obtain in Chancery.

are supposed more capable to examine and more critical and exact in their examinations than any other person is or can be; and besides there is more credit to be given to their seal than to the testimony of any private person. . . . Exemplifications are twofold: under the broad seal, or under the seal of the court. . . . When a record is exemplified under the great seal, it must either be a record of the court of Chancery, or be sent for by a 'certiorari' into the Chancery (which is the center of all courts), and from thence the subjects receive a copy under the attestation of the great seal; for in the first distribution of the Courts, the Chancery held the broad seal, from whence the authority issued to all proceedings, and those proceedings cannot be copied under the great seal unless they come into the court where that seal is lodged. . . . The second sort of copies under seal are the exemplifications under the seal of the court, and these are of higher credit than a sworn copy. . . . Seals of public credit are the seals of the King and of the public courts of justice, time out of mind. . . . But the seals of private courts or of private persons are not full evidence by themselves without an oath concurring to their credibility. . . . The second sort of copies are those that are not under seal, and these are of two sorts, sworn copies, and office-copies. . . . A copy given out by the officer of the court that is not trusted to the purpose . . . is not evidence without proving it actually examined."

1761, MANSFIELD, L. C. J., in *Denn* v. *Fulford*, 2 Burr. 1177, 1179 (admitting an examined copy of a Chancery bill, and interpreting the stamp law): "How does it appear that it is necessary that a copy of a proceeding in Chancery, given in evidence, must be an office-copy? . . . An office-copy is, in the same court and in the same cause, equivalent to a record; but in another court or in another cause in the same court the copy must be proved."

1767, BULLER, J., Trials at Nisi Prius, 229: "Here a difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof, and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence without proving it actually examined. . . . Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the treasury, because it is no part of the necessary office of clerk; for he is only intrusted to keep the records for all men's perusal, and not to make out copies of them."

1801, Mr. *T. Peake*, Evidence, 31: "Something similar to exemplifications under the seal of a court are what are denominated office-copies of its proceedings granted out and authenticated by an officer appointed by the law for that purpose. There are, however, but few instances in which an officer is so entrusted, and though, in cases where he is, the law on account of the confidence reposed in him receives his copy without further evidence, yet where that trust does not form part of the duty of his office, his certificate is no more than that of any other private person, and gives the copy certified no credit whatsoever. Thus, though in every instance where any copy of a proceeding is granted out by an officer of the court, as copies of proceedings in chancery, in the crown-office, etc., it is popularly called an office-copy, and though such copy is for the sake of convenience permitted to be read in any part of the same cause, it is not legally evidence before another court."

1816, HOLROYD, J., in *Appleton* v. *Braybrook*, 2 Stark. 8, 6 M. & S. 37: "An exemplification is under the seal of the Court; which shows it to be the act of the Court, and it is equivalent when the act is done by an officer who has a duty cast on him for the express purpose."

In the *United States*, the more liberal principle, that a lawful custodian had implied authority to certify documents, was widely accepted (*ante*, § 1677) for public documents in general; and a logical application of it would have sufficed to admit a clerk's certified copy of a domestic judicial

record. But this application seems to have been rarely made.[5] Probably some difficulty was felt about taking judicial notice of the clerk's office and presuming his signature genuine (*ante*, § 1679) for the purpose of authenticating the copy; at any rate, the English rule, requiring the affixing of the court seal, seems to have been generally kept up, apart from statutory modification.[6]

(2) Where the copy was of a *foreign* judicial record, the common-law theory and rule in England was no different from that for a domestic record. There must be an express order of court, and this was indicated by the judicial affixing of the court seal, making an exemplification. It is true that the question might be raised as to the possibility of presuming or judicially noticing the genuineness of the foreign court's seal, and a doubt and uncertainty of practice did exist on this point. But the proper course, if this doubt was sanctioned, was to call a witness and prove the seal genuine, and such was the practice (*post*, § 2164). The inability to notice the seal without proof did not alter the general theory and rule that the seal must be there as embodying an express judicial authority to the clerk to make the copy. This rule and the practice, then, were simple enough (though decidedly inconvenient). The practice probably would never have suffered confusion had not Mr. Peake, in the second edition of his treatise on Evidence, in 1804, made the inappropriate suggestion that the copy should bear the broad or great seal of State:

> 1804, Mr. *T. Peake*, Evidence, 2d ed., 72: "The proof of these proceedings [of a foreign court] has generally been by copies under the seal of the court where they were. There seems no objection to the seal of a court acting on the law of nations [*i. e.* a court of admiralty] being received as evidence of itself. But in my first edition [of 1801] I hazarded an opinion that to prove the seal of a mere municipal court [*i. e.* not of admiralty], some evidence should be given of its authenticity; and a case [Henry *v.* Adey, *infra*] which has since been determined in the King's Bench [in 1803] has confirmed that opinion. . . . It may be observed that the public seal of one State is matter of notoriety, and may be taken notice of by another, as part of the law of nations acknowledged by all; but when only the seal of a foreign court is put to the copy, it should seem that some evidence should be given of that seal being what it purports to be, for the courts of England cannot judicially take notice of the laws of other countries."

If it was here meant that the great seal should be substituted for the court seal, this might leave the copy unauthorized by court order, and still inadmissible; if it was meant that the great seal should be added to the court seal, merely to authenticate the latter, this would be theoretically correct, though practically a cumbering of formalities.[7] The suggestion of Mr. Peake seems not to have been in harmony with the English practice before his time; and it is perfectly clear that thereafter also an exemplification under the

[5] Massachusetts furnishes an instance; but here it was a matter of old tradition.

[6] See the citations in note 12, *infra*.

[7] As in Spaulding *v.* Vincent, 24 Vt. 501, cited *infra*, note 12; see the cases cited *post*, § 2164. In a foreign State not having the peculiar English custom of keeping judicial records in the custody of the holder of the seal of State, or of sending them there to be copied, that seal could hardly of itself import an authority to make a copy.

foreign court seal was treated as the orthodox form of copy, even though occasionally the seal of some obscure court was required to be specially evidenced as genuine.[8]

But Mr. Peake's suggestion, however fruitless in England, is for us noteworthy; for it seems to have had some influence in establishing for the United States a common-law rule differing widely from the English one. Three years after the first publication of Mr. Peake's book, Chief Justice Marshall enunciated the proposition that a copy of a foreign judicial record must properly bear the foreign great seal of State, not the court seal:[9]

1804 (February), MARSHALL, C. J., in *Church* v. *Hubbart*, 2 Cr. 186, 238 (rejecting a copy of a Portuguese judgment of sequestration, "certified under the seal of his arms by D. Jono de Almeida de Mello de Castro, who states himself to be the secretary of State for foreign affairs"): "Foreign judgments are authenticated, [either] 1, by an exemplification under the great seal, [or] 2, by a copy proved to be a true copy, [or], 3, by the

[8] 1658, Olive *v.* Gwin, 2 Sid. 145, *semble* (copy of a record exemplified by a Welsh Court of Sessions, received); 1713, Stennil *v.* Brown, 10 Mod. 108 ("A copy of a rule [order] of court, signed by the officer of the court, is no evidence in any other court, unless the judge of the court set his hand to it himself"; requiring an exemplification of a French decree under the court seal); 1724, Anon., 9 Mod. 66 (exemplification of a decree in Holland, under the seal of the States, received); 1803, Henry *v.* Adey, 3 East 221 (copy of a judgment in the Island of Grenada, certified by the judge under a seal; excluded, because the Court could not judicially notice that the seal was that of the Island, "which was necessary to be shown in order to prove the judgment which it purported to authenticate"); 1807, Buchanan *v.* Rucker, 1 Camp. 63 (copy of a judgment from the court of common pleas in the Island of Tobago, under the chief justice's hand and a seal; the copy authenticated by a witness sworn to the handwriting and to the seal as that of the Island; Ellenborough, L. C. J.); 1811, Flint *v.* Atkins, 3 Camp. 215 (copy of a sentence of condemnation in a foreign court of admiralty; Ellenborough, L. C. J.: "If you would prove the sentence, you must produce it under the seal of the court in the usual way"); 1814, Alves *v.* Bunbury, 4 Camp. 28 (copy of a judgment in the K. B. and C. P. of the Island of St. Vincent, signed by the chief justice and certified under the governor's private seal; Ellenborough, L. C. J., said "it ought either to be proved under the seal of the court, or distinct evidence should be given that the court had no seal and verified its judgments by the signature of the chief justice"; if it were a judgment in a foreign State, he should "require the same evidence"); 1816, Cavan *v.* Stewart, 1 Stark. 525 (if there is a seal of the court, the authentication must be under it, and not by mere certificate with signature and private seal; here the seal of the court of Jamaica had become so worn that it was seldom used, but its absence was held fatal); 1816, Appleton *v.* Lord Braybrook, Black *v.* Lord Braybrook, 2 Stark. 6; 6 M. & S. 34 (copies of a judgment in the supreme court of the Island of Jamaica, the first by the chief clerk, with a certificate of the Island secretary to the clerk's office, and another of the governor under the Island seal to the secretary's office; the second by the clerk of the court under private seal, with similar certificates; both excluded; Ellenborough, L. C. J., said that "an exemplification under the seal of the court is certainly admissible," but he held that the court's lack of such a seal did not justify the use of this paper; Holroyd, J.: "There is nothing equivalent to the seal of the court, and consequently the evidence is inadmissible"; Bayley, J., pointed out that the Island seal would probably have sufficed, had it been appended directly to the copy); 1824, Starkie, Evidence I, 190 ("If a foreign court has an official seal, it ought to be used for the purpose of authenticating its judgments"); 1850, Warener *v.* Kingsmill, 7 U. C. Q. B. 409 (exemplification of a New York judgment, under court seal, received; Robinson, C. J.: "The mere exemplification, without any evidence of examination, would of course be sufficient, if properly proved to be under the seal of the court; that is the common proof given of foreign judgments"; here the witness testified to seeing the seal affixed).

The general question of *presuming the genuineness* of a foreign court seal is examined *post*, § 2163; some of these cases are there again considered from that point of view.

[9] In the argument of the successful counsel, Peake's Evidence was cited; moreover there was no English authority which clearly supported that argument; this seems significant.

certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. . . . If it be true that the decrees of the colonies are transmitted to the seat of government and registered in the department of State, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient evidence of the verity of what was so certified, but the certificate offered to the Court is under the private seal of the person giving it, which cannot be known to this Court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury."

This rule of the great Chief Justice, repeated within the same year by the Court of New York,[10] was widely copied; and served as a model for many of our Courts. Its employment in practice has now been superseded in most jurisdictions by statutory provisions, which in many instances return to the English rule of requiring only the court seal and in some instances are satisfied with even less; but the rule of Chief Justice Marshall may be regarded as distinctively the common-law rule in the United States. Yet it must be noted that the rule as laid down by him for this country was a perfectly logical one, free from Mr. Peake's error; for, by the theory maintained for this country by Chief Justice Marshall (*ante*, § 1677), the custodian of documents had an implied authority of office to certify copies, and thus no express order of court (by court seal) was needed; the only necessity was to authenticate the custodian's authority, incumbency, and signature, and for this purpose the affixing of the great seal of State was the sole appropriate means.[11] The rule of the Chief Justice was therefore a logically correct one under the common-law doctrine of certified copies as maintained by him.

(3) The *statutes* which have since dealt with this subject in almost every jurisdiction present a great variety of provisions. In general, for domestic records, they accept a clerk's certified copy under his seal; for foreign records, they proceed upon the theory that the custodian of the judicial records is the proper officer to certify copies, and that his certificate must be authenticated by another certificate (stating the authority, incumbency, and signature-genuineness) given by some appropriate superior officer sufficiently high to allow the presumption that his seal is genuine. Other States of the United States are treated as foreign States; yet a distinction is usually introduced, as to modes of authentication, between those States and foreign nations. The great seal of State is in general not required, and the court seal (usually required) serves merely as a mode of authentication and not (by the English rule) as an order of court. The practical difference in the latter respect is

[10] 1804 (August), Vandervoort *v.* Thompson, 2 Cai. 155, 163 (copy of a judgment of a ship's condemnation at Para; Thompson, J.: "This document cannot be considered an exemplification of a judgment; *that* should be under the great seal; *this* is only under the seal of arms of the Secretary of State").

The passage on this subject by Chief Justice Swift, of Connecticut, written in 1810 (Evidence, 7), shows the two rules, the old and the new one, stated somewhat confusedly as equally valid, and indicates the then novelty of the Federal rule.

[11] As already explained *ante*, § 1679; the rule and the authorities are considered in detail *post*, § 2163.

that a certified copy by the lawful custodian, but lacking a court seal, could upon the American theory be sufficiently authenticated by calling witnesses to the signature, but by the English common-law rule would be incurably defective.[12] The theory of these various modes of authentication has already been examined (*ante*, § 1679).

[12] In the following list are included *both statutes and judicial rulings*, but only a few of the latter are given, the earlier ones being for the most part now of no force and the others dealing chiefly with the verbal interpretation of local statutes: unless otherwise noted, the ruling concerns a domestic record, and where the terms of a decision are not given, it interprets a local statute. The statute list includes provisions as to copies of *probated wills* and *letters testamentary*, but the judicial rulings on that subject are placed *ante*, § 1658, under Records of Wills; compare also § 1238, for the rule as to producing the original. The statute-list also includes provisions as to copies of *documents filed in a court* and of *depositions* filed anywhere; but statutes dealing with ordinary *registered deeds*, wherever filed, are placed *ante*, § 1651, under Registers of Deeds; the statutes under Miscellaneous Public Documents, *ante*, § 1680, should also be consulted. Provisions dealing with the rule about *producing the original* as a condition of using a certified copy have already been given *ante*, §§ 1215–1217. Provisions concerning *judicial notice of officers* in general will be found *post*, § 2578, and concerned the *presumed genuineness of seals in general*, *post*, §§ 2163, 2164. Distinguish the principles as to *what constitutes a record* (minute-book, judgment-roll, original writ, justice's docket, etc.), briefly noticed *post*, § 2450.

Compare also the rule against merely certifying to the *effect or non-existence* of the record (*ante*, § 1678), and the rule requiring the copy to include the *whole of the record* (*ante*, § 1664, and *post*, §§ 2109, 2110). Note also that in a few jurisdictions (as in England and Delaware) judicial records may be provable without special statute under the general terms of the public-document statute given *ante*, § 1680.

ENGLAND: 1838, St. 1 & 2 Vict. c. 94 (cited *ante*, § 1680); 1851, St. 14 & 15 Vict. c. 99, § 7 (judicial records of a foreign State or a British colony are provable by copy purporting to bear the seal of the court, or if none, to be signed by any judge of the court with a recital that no seal exists; no proof being necessary of the genuineness of seal or signature or the truth of the recital or of official character); § 14 (cited *ante*, § 1680); St. 1908, 8 Edw. VII, c. 67, § 88 (Children Act: clerk's certified copy of court order, admissible); St. 1914, 4 & 5 Geo. V, c. 59, Bankruptcy, § 139 (certified copies of documents in bankruptcy proceedings, admissible); Rules of Supreme Court, 1883, Order XXXVII, Rule 4 ("Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the original would be admissible"); 1918, Permanent Trustee Co. *v.* Fels, A. C. 879 (marriage in Warsaw, Poland, with a marriage settlement; to prove the settlement was offered (1) a notary's copy of the original as prepared and kept by him in his records, this copy was obtained by the wife from the father-in-law to replace the one delivered to the wife by the notary, which she had lost; (2) a copy bearing the seal of the register of the Warsaw Circuit Court and also the certificate of the President of the Court with his seal, and the certificate of the chancery of the Warsaw Governor-General, the notary being dead and his records having been by law deposited in the court; held (1) that the first copy could not be received at common law, the custodian not being authorized to furnish copies, nor could it be received under New South Wales, St. 1898, Evidence, § 21, substantially like Eng. St. 14 & 15 Vict. c. 99; (2) that the second copy was admissible under that statute, being a "legal document deposited in a court," and duly authenticated pursuant to that statute).

CANADA: *Dominion:* St. 1893, c. 31, § 10 Evidence Act, R. S. 1906, c. 145, § 23 (records of any court in the United Kingdom or of Canada, or any court or justice of the peace or coroner of a province of Canada, or any court in a British colony or possession or in the United States or a State thereof or any other foreign country, are provable by exemplification or certified copy under seal of the court or of the justice or coroner, without proof of seal or signature "or other proof whatever"; and if the Court "has no seal or so certifies," then under signature of a judge without proof thereof "or other proof whatsoever"); § 28, as amended by St. 1921, c. 18 (reasonable notice, not less than seven days, required for using such copies); c. 146, Crim. C. § 794 (certified or sworn copy of conviction or dismissal by magistrate, admissible); 1910, Musgrave *v.* Anglin, 43 Can. Sup. 484 (certified copy by a Quebec notary, of a will in his custody held admissible under N. Sc. Rev. St. 1900, c. 163, § 22, and not under § 27; the will had not been probated; affirming N. Sc. decision; the opinions are interesting, but show how the modern judge has lost understanding of the general principles of the law of evidence, and yields intellectual slavery to the statutes on the subject).

Alberta: St. 1910, 2d Sess., c. 3, § 35 (like

Ont. Rev. St. c. 76, § 32); ib. § 43 (like P. E. I. St. 1880, c. 9, §§ 55, 56); ib. § 44 (probate of a will or a copy under seal of the District or Supreme Court, to be evidence); ib. § 45 (like B. C. Rev. St. c. 78, § 42, but substituting "unless the Court otherwise orders" for the proviso); ib. § 46 (like ib. § 43); Rules of Court 1914, No. 390 (custodians' certified copy of any pleading, etc., filed in the court, admissible).

British Columbia: Rev. St. 1911, c. 78, § 30 (like Dom. Evid. Act, § 23); § 20 (depositions provable by certified copy of the officer taking, without proof of his signature); c. 192, § 29 (judicial declaration quieting title, provable by registrar's certified copy "without accounting for the non-production of the original"); c. 78, § 40 (will of real estate is provable by the probate or letters, or a copy thereof, under seal of the court, on at least ten days' notice to the opponent; the same to suffice unless the opponent within four days after receipt gives notice of intention to dispute the will's validity); § 42 (for wills of persons dying in British possessions out of British Columbia, but affecting real estate within it, the probate or a judge's or clerk's certificate of the execution and of the filing of the original in a court of such possessions, suffices, on similar notice; but the probate or certificate "shall not be used" if the Court doubts as to the sufficiency of execution); § 43 (the certificate need not be proved as to the officer's appointment, authority, or signature).

Manitoba: Rev. St. 1913, c. 65, § 13 (substantially like Dom. Evid. Act. § 25); § 22 (like ib. § 28); c. 150, § 25 (office-copy of a judgment of partition, admissible); c. 47, § 77 (official administrator's bond, provable by the provincial Secretary's certified copy under the Great Seal of Manitoba, without proof of seal or signature); c. 65, § 23 (on ten days' notice, the probate or letters *c. t. a.* under seal of the Surrogate Court may be admitted, and shall be sufficient evidence "of such will [of real estate] and of its validity and contents," even though not granted in solemn form, unless within four days after receipt of notice the opponent gives notice of intention to dispute its validity); § 25 (the will of a person dying in British possessions without Manitoba and leaving real estate within it is provable, without the original, on one month's notice, by the probate, or a certificate of the judge, registrar, or clerk, that the original is there filed and purports to be executed before two witnesses; this to be "'prima facie' evidence of the will and the contents thereof and of the same having been executed so as to pass real estate"; but the probate or certificate shall not be used if the judge "finds reason to doubt" the sufficiency of execution and so orders); § 26 (for the above certificate no proof of the official's appointment, authority, or signature is needed); c. 46, Rule 494 (certified copies of pleadings, etc., "filed in any office of the court," admissible without proof of the signature or official character of the officer); 1916, Re Goodman, 28 D. L. R. 197, 29 id. 725, Man. (extradition; certified copy of indictment under seal of clerk of U. S. District Court in Massachusetts; admissible under Can. Evid. Act, § 23).

New Brunswick: Consol. St. 1903, c. 127, § 58 (all judicial proceedings of "any court" in the United Kingdom or any foreign State or Canadian province or British colony, and all "legal documents filed or deposited in any such court," are provable by copy under seal of Court, or if there is no seal, under signature of a judge, with a statement of the lack of a seal; and no proof of the seal or signature or the truth of the statement is necessary); c. 151, § 31 (the probate or administration letters of a will deposited in a court out of the province, but affecting lands within it, when purporting to be under the hand of the custodian and the seal of the court, or an exemplification similarly authenticated, when proved before a person authorized to take acknowledgments and authenticated like deeds, shall be evidence "of the said original will being deposited" as above, and may be registered with like effect as the original); § 32 (will affecting land in the province but probated in British dominions out of the province; a copy by any court officer and under court seal, with a certificate of a judge of the court, shall be evidence of the original having been "proved and registered" there, and may be registered here like an original, and a certified copy will be evidence); c. 127, § 65 (registrar's certified copy of a registered will is evidence of its contents and execution, on six days' notice with a copy of the copy); 1890, Doe *v.* Savoy, 30 N. Br. 227, 232 (admissibility of a certified copy of an unprobated will from the registry of deeds, considered; Consol. St. 1877, c. 77, §§ 14, 15, and St. 1892, c. 11, § 2, construed); 1895, Murray *v.* Duff, 33 N. Br. 351, 362 (St. 1892, applied).

Newfoundland: Consol. St. 1916, c. 91, § 16 (all "judicial proceedings of any court of justice in Great Britain or Ireland or in any foreign State or in any British colony" and all "legal documents filed or deposited in any such court" are provable as in N. Br. Consol. St. c. 127, § 58; nor need the judicial character of the signer be proved); c. 83, Rules of Court, Ord. 33, Rule 3 (documents filed in the Supreme Court are provable by office-copies).

Nova Scotia: Rev. St. 1900, c. 163, § 15 (certified copy, under seal of court or the proper officer's hand, of any document "filed in any court in this Province" is admissible; certified copy of any order or entry of judgment suffices, without producing the record or other proceeding); § 16 (like Dom. Evid. Act, § 23); § 21 (the probate or the registrar's certified copy of a will, or an examined copy of the original will, "when such will has been recorded," is admissible; but the Court may

order production of the original, or direct such other proof of it "as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged will and its unaltered condition, and the correctness of the prepared copy"; this section to apply to wills proved "elsewhere than in this Province," provided the original has been deposited and probate granted in a court having jurisdiction); § 22 (for such copies, ten days' notice and a schedule of documents must be given, unless the Court dispenses); Rules of Court 1900, Ord. 35, R. 3 ("certified copies of all writs, records, pleadings, and documents filed in the Supreme Court" are admissible like the originals); 1909, Angle *v.* Musgrave, 44 N. Sc. 38 (Quebec notary's certified copy of a will on record in his office, admitted without further proof, under Rev. St. c. 163, § 27, though the will had not been probated in Nova Scotia; Townshend, C. J., diss.).

Northwest Territories: 1903, Beebe *v.* Tanner, 6 N. W. Terr. 13 (copy of judgment of circuit court in South Dakota, under seal of the clerk, admitted under Dom. Evid. Act, 1903, § 10); 1904, Stevens *v.* Olson, 6 N. W. Terr. 106 (copy of judgment of district court in Minnesota, *semble*, held admissible upon notice to the opponent, under Dom. Evid. Act, 1903, §§ 10, 19).

Ontario: Rev. St. 1914, c. 76, § 32 (exemplification under seal of court is admissible for any judicial proceeding in the Supreme Court of Judicature in England or Ireland or the Superior Courts in Scotland or any court of record in Canada or any British possession or "of the United States or of any State of the United States of America," "without any proof of the authenticity of such seal or other proof whatever," in the same manner as a proceeding of the Supreme Court of Ontario may be proved by exemplification in that court); § 42 (will may be proved by probate or letters of administration *c. t. a.*, or a copy, under seal of the Surrogate Court, etc.); § 43 (for wills or real estate probated and filed in any court of the British possessions out of Ontario, of a person there dying, one month's notice is to be given, and the probate or a certificate or prescribed tenor may be used; but the Court may refuse to admit the probate or certificate); 1889, Barber *v.* McKay, 17 Ont. 562 (certified probate copy from the registry office, excluded, no notice having been given).

Prince Edward Island: St. 1889, c. 9, § 21 (like Newf. Consol. St. 1916, c. 91, § 16, including the Dominion and provinces of Canada); § 23 (execution and contents of a will are provable by exemplification under seal of court where recorded, or of the judge or registrar thereof, or of "the custodian of such will," whether in this province or elsewhere in British dominions or in any foreign country; also its probate under seal of "any court of competent jurisdiction"; the seal, signature, and authority of the officer need not be proved); §§ 55, 56 (certified copies of depositions, without proof of the officer's signature, admissible); St. 1915, c. 11, §§ 1, 2 (proof of wills executed in Quebec before a notary).

Saskatchewan: Rev. St. 1920, c. 44, § 25 Evidence Act (will is provable by the probate of a certified copy by the clerk of court; but the Court "may order the original will to be produced in evidence or may direct such other proof" as is needed to authenticate it, etc.; this to apply also to wills probated out of the province, if the original will was deposited and the court had jurisdiction); § 20 (like Dom. Evid. Act, § 23, but including the superior courts of Scotland and the railway commissioners of Canada); § 19 (document filed in any court, provable by the clerk's certified copy); 1909, In re Cheshire, 2 Sask. 218 (exemplification of letters probate in England under the seal of the High Court of England, sufficient).

Yukon: Consol. Ord. 1914, c. 30, § 15 (par. (1): "a copy of any document, writing, or proceeding, filed in any court in this Territory, shall be received as evidence to the same extent as the original, if it is certified under the seal of the court, or by the proper officer under his hand"; par. (2): "a copy of any order for judgment, or of the entry of the judgment in the docket of judgments, certified under the hand of the proper officer, suffices to prove the judgment without producing other part of the record"); ib. § 16 (like Dom. Evid. Act, § 23, inserting "or territory" of Canada); ib. §§ 22, 23 (like N. Sc. Rev. St. 1900, c. 163, §§ 21, 22, substituting as certifier the clerk of the Territorial court, and the word "probated" for "recorded," and requiring only five days' notice); c. 48, Rule 275 (like N. Sc. Ord. 35, R. 3, applying to any court).

UNITED STATES: FEDERAL. Constitution 1789, Art. IV, § 1 ("Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof"); Rev. St. 1878, § 905, Code 1919, § 1409 (St. 1790, May 26: "The records and judicial proceedings of the courts of any State or Territory, or of any such country [subject to the jurisdiction of the U. S.], shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form"; for rulings under this statute, see *post*, § 1681*a*; compare Rev. St. § 906, Code § 1410, in note 1, § 1680, *ante*); § 1276 (U. S. marshal's bond, provable by certified copy by clerk of the district court under seal of the court); § 1289 (similar, for bonds of clerks of district courts); § 6323 (U. S. marshal's bond in

consular courts, provable by certified copy by the secretary of the treasury or the minister; unless the judge, on sworn denial of execution or for other good cause, requires production of original); § 8804 (bankruptcy proceedings; various documents provable by certified copy); 1804, Church *v.* Hubbart, 2 Cr. 237 (quoted *supra* in the text); 1809, Yeaton *v.* Fry, 5 Cr. 335, 343 (proceedings in the vice-admiralty court of Jamaica, under certain seals, received); 1826, Catlett *v.* Ins. Co., 1 Paine C. C. 594, 613 (consular certificate of an officer attesting a foreign judgment, excluded); 1899, Wagner *v.* County Com'rs, 34 C. C. A. 147, 91 Fed. 969 (Maryland secretary of State or court clerk, not authorized to certify to the genuineness of a justice's signature to a judgment); 1909, Pineland Club *v.* Robert, 4th C. C. A., 170 Fed. 341 (an exemplification of a will under S. C. Civ. Code 1892, § 2494, must be under seal of the Court and hand of the judge); 1917, Werlick's Will, U. S. Court for China, 1 Extra-terr. Cas. 668 (certificate of probate of will in "His Majesty's High Court of Justice," with purporting registrar's signature and seal of court, admitted, under U. S. St. 1900, June 6, § 1040, being Alaska Comp. L. 1913, § 1872, quoted *ante*, § 1680); 1922, Collins *v.* Loisel, 257 U. S. —, 42 Sup. 469 (extradition for cheating; a warrant of arrest, etc., from Bombay, India, certified by the U. S. consul-general at Calcutta, admitted).

ALABAMA: Code 1907, § 6180 (will duly probated and recorded, receivable "without further proof thereof," or a certified copy); § 6191 (admitting a certified copy of a will probated in another State, by the clerk of court, with certificate of a judge, or by the judge only, if no separate clerk; out of the U. S., by the clerk of court, with certificate of a judge, or by the judge only, if no separate clerk, with attestation of a judge of a court of record, mayor, or U. S. consular, etc., officer); § 4658 (justice's judgment, provable by certified statement by him or by his successor in possession of docket); § 2546 (letters testamentary and of administration, provable by certified copy); § 3996 (certified copies of letters testamentary, etc., to be admissible); § 3998 (certified transcript of records of justice of the peace, admissible, but without the county only when attested by the county probate judge); 1831, Torbet *v.* Wilson, 1 Stew. & P. 200, 204 (certified copy by a clerk under private seal, there being no official court seal, sufficient); 1874, Powell *v.* Young, 51 Ala. 518, 520; 1880, Holly *v.* Bass, 68 Ala. 206, 208 (affidavit-certificate of a judge of a Florida court, not properly authenticated); 1882, Burns *v.* Campbell, 71 Ala. 271, 294 (justice's record, not provable by certified copy, but by sworn copy); 1887, Stevenson *v.* Moody, 85 Ala. 33, 4 So. 595 (affidavit of exemption, and a record of it in probate court, provable by the certified copy without more; explaining the contrary intimation in s. c., 83 Ala. 4, 418, 3 So. 695); 1910, Pearce *v.* Fisher, 170 Ala. 456, 54 So. 164 (bankrupt court record, certified by clerk of court under seal of court, admitted).

ALASKA: Comp. L. 1913, § 577 (like Or. Laws 1920, § 10109); § 1872 (judicial records; quoted *ante*, § 1680).

ARIZONA: Rev. St. 1913, § 1739 (records of all "courts of this State," provable by certified copy under seal of "the lawful possessor of such records"); §1223 (probated will, provable by certified copy); § 1744 (in a suit on any instrument in writing filed in a suit in another court of the State, a certified copy by the clerk of court under seal is admissible; but the clerk of court shall be subpœnaed to bring it, if the opponent denies execution in a plea and affidavit); § 1745 (certified copy under official seal, by State or county officers, of all notes, bonds, etc., "or other documents, properly on file with such officers," admissible); § 1666 (claim of title by a third person to personalty levied upon; copy of the writ of levy, admissible in trial in another county); § 1733 (records of a court of "any other State or of the U. S. or of any foreign country," provable by "attestation of the clerk" or other custodian under court seal); § 1738 (State librarian's certified copy of judicial decision in "any of the law or equity reports in the State library," admissible); § 1754 (judgment of justice of peace in any State, provable by exemplification by the justice or his successor, and certificate of magistracy by clerk of court of record in the county under court seal).

ARKANSAS: Dig. 1919, § 4118 (justice's certified copy of proceedings before him, admissible); § 4119 (clerk of the circuit court's certified copy of justice's records delivered to him by law, admissible); § 4246 (certified copy of a deposition *in perpetuam*, admissible on a trial elsewhere than in the circuit court of the county where filed); § 10537 (probated will, provable by exemplification of record by the clerk having custody); 1904, Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147 (certified transcript of proceedings before a commissioner for U. S. Courts, admitted).

CALIFORNIA: C. C. P. 1872, § 1905 ("A judicial record of this State or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister State may be approved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form"); § 1906 ("A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of

the chief judge or presiding magistrate that the person making the attestation is the clerk of the court or the legal keeper of the record, and in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country"); § 1907 (judicial record of a foreign country; quoted *post*, § 2158); § 1921 (justice's record in a sister State, provable by the justice's certified transcript); § 1922 (such transcript may be authenticated by a certificate of the clerk or prothonotary of the county of justice's residence under seal of the county or of the common pleas or county court); § 1323 ("duly authenticated" copy of foreign probated will, receivable for probate); § 1923 (see the quotation *ante*, § 1680).

COLORADO: Comp. L. 1921, C. C. P. § 393 ("A judicial record of this State or of the United States may be proved by the production of the original, or a copy thereof, certified by the clerk or other person having the legal custody thereof under the seal of the court to be a true copy of such record"); § 394 (from any other U. S. State or Territory, "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, or presiding magistrate, as the case may be, that the said attestation is in due form"); § 395 (from a foreign country, "certified by the clerk, with the seal of the court annexed if there be a clerk and seal, or by the legal keeper of the record," with official seal, if any; and with a certificate by a judge of the court attesting the clerk's certificate; and also a certificate of the U. S. minister or ambassador or consul as to the court's jurisdiction and official signatures); § 405 (certified copy of deposition 'in perpetuam,' admissible); Gen. St. § 8834 (all papers duly filed or deposited with a county judge and all record-books there kept, provable by certified copy under official seal); § 6539 (justice's proceedings, etc., provable by the justice's certified copy under seal; if offered in another county, then also attested by the county clerk's certificate); § 5213 (exemplified copy of a record of a probated will, admissible); § 5235 (judgment of insanity by a foreign court, provable by certified copy by the court or a judge under court seal, attested by the U. S. minister, ambassador, consul, or vice-consul); § 5390 (copies of probate "records and entries or of any papers or exhibits on file in such court," certified by the clerk or judge under seal of the court, are admissible); § 5375 ("authenticated copies" of probate inventories, etc., are admissible); 1889, Thalheimer *v.* Crow, 13 Colo. 397, 405, 22 Pac. 779 (clerk of U. S. circuit court's certified copy of tax-bill admitted); 1909, Henry Investment Co. *v.* Semonian, 45 Colo. 260, 100 Pac. 425 (copy of Nebraska judgment lacking both attestation and certificate, excluded).

COLUMBIA (*Dist.*): Code 1919, § 1070 (quoted *ante*, § 1680); § 1071 (certified copy of a will and decree of probate under court seal, admissible to prove execution); 1906, Scott *v.* Herrell, 27 D. C. App. 395, 398 (certified copy of a will, admitted under Code 1901, § 1071).

CONNECTICUT: Gen. St. 1918, § 4840 (judge or clerk's certified copies, with or without court seal, of probate records, admissible); § 4857 (same for a lost bond filed in probate court); § 5431 (ex-justice's certified copies of his records, admissible); § 2772 (superior court clerk's certificate as to the fact of a liquor license, admissible); § 5433 (town-clerk's attested copy, under town seal, of recorded justice's judgment, admissible); 1795, Spegail *v.* Perkins, 2 Root 274 (certificate of a clerk of court in another country, excluded); 1857, Dibble *v.* Morris, 26 Conn. 416, 424 (clerk of probate alone, and not the judge, is authorized to certify copies of records).

DELAWARE: Rev. St. 1915, §§ 3246–48 (provisions for proof by copy of a foreign probated will); §4229 ("any record or paper belonging to a public office or legally in the custody of a public officer," provable by the custodian's certified copy under seal); § 1369 (coroner's certified copy of inquest record, admissible); § 3887 (chancery bonds, recorded, provable by certified copy); §§ 3093, 3096 (certified copy of record of guardians' accounts, etc., in orphans' court, admissible); § 3299 (record of partition in orphans' court, provable by certified copy under court seal); § 3987 (justice's certified transcript of proceedings, admissible); § 3334 (record of will probated before county register of wills, provable by office copy); § 3409 (county register of will's certified copy of recorded executor's accounts, etc., admissible); St. 1921, c. 224 (foreign wills; amending Rev. C. c. 93, § 3246, par. 8); 1918, Burris *v.* Taylor, 7 Boyce Del. 87, 102 Atl. 984 (justice's certified transcript of document without signature, not admissible under Code 1915, § 3987).

FLORIDA: Rev. G. S. 1919, § 2718 (judicial records of this State, or the U. S., or a State or Territory thereof, provable by copy attested by the officer having charge, under court seal; a recital by the attester that he has such charge, to be 'prima facie' evidence); § 2719 (wills and administration-letters recorded in a public office of this State, provable by the keeper's certified copy; probated wills in a U. S. State or Territory or foreign State, provable if certified according to the law of the place of probate granted); § 2763 (certified copy of a recorded deposition 'in perpetuam,' admissible); § 2722 (certified copies of "all final judgments and decrees . . . in the circuit courts of this State," admissible); § 3363 (justice's docket, provable by certified copy); §§ 4500, 4520 (circuit court clerk's certified copy of recorded

charter of corporation not for profit, admissible); 1906, Mansfield *v.* Johnson, 51 Fla. 239, 40 So. 196 (execution returned and on file, proved by the clerk's certified copy); 1906, Thomas *v.* Williamson, 51 Fla. 332, 40 So. 831 (statutory rule for certified copies of probated wills, construed).

GEORGIA: Rev. C. 1910, § 5798 (record in a public office, provable by certified copy); § 5800 (same for letters testamentary, of administration, and of guardianship); § 5801 (justice's records, provable by certified transcript, authenticated when out of the county by the county ordinary); § 3864 (probated will, provable by certified copy); §§ 3865, 3875-6, 3877 (foreign probated will, provable according to the Federal statute); § 5753 (judicial records and probated wills, provable by copy); § 5824 (judicial records of a State, etc., of the U. S., provable by the clerk's attested copy under court seal, certified by the judge, chief justice, or presiding magistrate); § 5819 (a "foreign judgment" must be authenticated by copy under great seal of State); §§ 3196, 3197 (certified copy of sundry papers of limited partnership organization, filed in office of clerk of superior court, admissible); § 5825 (justice of the peace's records in any U. S. State, provable by his certificate, attested by the certificate under court seal of any court of record in the county); § 5826 (similar, for records of any justice formerly in office, certified by his successor); 1879, Buck *v.* Grimes, 62 Ga. 605; 1899, Bell *v.* Bowdoin, 109 Ga. 209, 34 S. E. 339 (certified copies of copies of lost justice's papers established under C. §§ 5213, 5214, admissible without proving loss of original); 1900, Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344 (copy of a record in another U. S. State must bear the great seal); 1905, Conrad *v.* Kennedy, 123 Ga. 242, 51 S. E. 299 (under Code § 5237, a certified copy of a will probate in another State must be attested as in due form by the judge, etc.); 1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175 (Code 1895, § 5214, *supra*, applied); 1907, Sellers *v.* Page, 127 Ga. 633, S. E. 1011 (transcript of a court of ordinary; Code § 4250 applied).

HAWAII: Rev. L. 1915, § 2593 ("all judgments, orders, and other judicial proceedings of any court of justice in any part of this Territory or in any foreign State, and all affidavits, pleadings, and other legal documents, wills, and codicils filed or deposited in any such court," are provable by examined or certified copy); § 2602 (probate of a will, or letters of administration *c. t. a.* "shall be 'prima facie' evidence of the original will or codicil"); § 2600 (record of a court of record or a judge thereof at chambers is provable by transcript "authenticated by the attestation of the clerk of such court with the seal of such court annexed," or of the judge at chambers with the court seal); § 2601 (docket of any circuit judge at chambers or any district magistrate; transcript of the judgment, execution, and return, "when subscribed by said judge or magistrate," shall be admissible); § 2319 (record of a case in office of clerk of a Supreme Court may be proved by clerk's certified copy).

IDAHO: Comp. St. 1919, § 7949 (like Cal. C. C. P. § 1905, substituting "another State or Territory" in the second sentence); § 7950 (like Cal. C. C. P. § 1906); §§ 7955-56 (like Cal. C. C. P. §§ 1921, 1922, substituting "another State or Territory" and adding in § 7956 "or court of general jurisdiction"); § 7957 (like Cal. C. C. P. § 1923); § 7970 (writing itself must be produced, except "when the original is a record or other document in the hands of a public officer"); § 7133 (justice's docket, provable by certified copy of clerk or justice or his successor); §9388 (certified copy of the sentence of a convict, delivered by the officer to the warden, to be "evidence of the fact therein contained").

ILLINOIS: Rev. St. 1874, c. 3, § 56 (authenticated copy of an inventory or bill of appraisement of a decedent's estate, admissible); c. 30, § 33 (certified copies of deed-registry's record of probated wills and exemplified foreign wills, admissible); c. 38, § 474, St. 1883, June 23 ("duly authenticated copy of the record of a former conviction," admissible in proving a prior conviction of habitual criminals); c. 51, § 13 ("The papers, entries, and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk"); § 17 (justice's proceedings provable by certified copy by the justice under private seal or his successor having custody, and, if offered out of the county of justice's residence, attested by the county clerk's certificate); § 46 (certified copy of a recorded deposition 'in perpetuam,' admissible); c. 148, § 9 ("authenticated copies," with a certificate of probate by "the proper officer or officers," of a will of land in this State proved according to the laws of "any of the U. S., or the Territories thereof, or of any country out of the limits of the U. S.," may be recorded and be "as good and available in law" as wills executed here); § 10 ("all original wills, or copies thereof, duly certified according to law, or exemplifications from the records in pursuance of the law of Congress in relation to records in foreign States," may be recorded and be good and available in law); § 11 (certified copies of a record of wills in the county court by the clerk under court seal, admissible); 1872, Brackett *v.* People, 64 Ill. 170 (certified copy of a record of naturalization in Missouri, by the clerk under court seal, excluded); 1895, Garden City S. Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753 (Rev. St. c. 51, § 13, making judicial records provable by the clerk's certified copy under court seal, includes records out of the State, because such a copy was already admissible at common law for records

within the State; the act of 1872, Rev. St. c. 51, § 13 simply repeats that rule for domestic records, and extends it to foreign records); 1902, People *v.* Miller, 195 Ill. 621, 63 N. E. 504 (approving the preceding case); 1917 Teter *v.* Spooner, 279 Ill. 39, 116 N. E. 673 (bill in chancery to set aside a will; transcript of attesting witnesses' testimony in the probate court, certified by the probate judge, but not by the clerk of the probate court, held admissible); 1918, Barnett *v.* Barnett, 284 Ill. 580, 120 N. E. 532 (will executed in Illinois but probated in Colorado to lands in Illinois; whether a certified copy of the will and probate, recorded in the Illinois county, is sufficient evidence of title, under Rev. St. c. 30, § 33, and c. 148, § 9).

INDIANA: Burns' Ann. St. 1914, § 470 (judicial records of a State, etc., of the U. S., provable "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form"); § 474 (records of a justice of the peace in the U. S., provable by certified copy under seal of the justice or his successor or the justice having legal custody, with the certificate of the clerk of a court of record of the county or district); § 475 (records of a local justice, provable by certified copy under seal by him or by the justice having legal custody); § 494 (records of a U. S. State or Territorial court, provable by the clerk's attestation under court seal, with the seal of the chief justice or other judge or presiding magistrate certifying due attestation); § 461 (recorded depositions 'in perpetuam memoriam,' provable by certified copy); § 2758 (letters testamentary and of administration, provable by certified transcript); § 2816 (same for foreign representative's appointment); § 1039 (decree of court changing a name, provable by the clerk's certified copy under court seal); § 1986 (indictment "lost, mislaid, stolen, or destroyed," provable by court clerk's certified copy of the record); § 3147 (probated will, provable by the court clerk's certified copy under official seal); 1857, Draggoo *v.* Graham, 9 Ind. 212 (foreign judgment of justice of the peace); 1861, Vaughn *v.* Griffeth, 16 Ind. 353 (same); 1861, Phelps *v.* Tilton, 17 Ind. 423, 426 (same); 1871, Ault *v.* Zehering, 38 Ind. 429, 431 (same); 1881, Bradford *v.* Russell, 79 Ind. 64, 70 (foreign judgment).

IOWA: Comp. C. 1919, §§ 7351–7353 (like Nebr. Comp. St. 1922, §§ 8919–8921); § 7808 (record, or properly authenticated transcript, of a probated will, admissible); § 7354 ("Copies of records and proceedings in the courts of a foreign country may be admitted in evidence upon being authenticated as follows: 1. By the official attestation of the clerk or officer in whose custody such records are legally kept. 2. By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally intrusted with the custody of such records, and that the signature to his attestation is genuine. 3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court"); 1855, Lattourett *v.* Cook, 1 Ia. 15; 1860, Guesdorf *v.* Gleason, 10 Ia. 495; 1871, Railroad Bank *v.* Evans, 32 Ia. 202, 205; 1872, Darrah *v.* Watson, 36 Ia. 117, 118; 1897, Rowe *v.* Barnes, 101 Ia. 302, 70 N. W. 197 (excluding a certificate of a foreign record in the name of the judge instead of the clerk); 1904, Tomlin *v.* Woods, 125 Ia. 367, 101 N. W. 135 (Code § 4646 applied to a California justice's record).

KANSAS: Gen. St. 1915, § 7273 (record lawfully kept in "any public office," or a paper lawfully filed or recorded there, provable by the legal custodian's certified copy under official seal); § 7279 (ex-justice's records, provable by certified copy of the justice in possession); § 7272 (foreign country's judicial records, provable by the legal custodian's "official attestation," with a certificate of one of the judges or magistrates of such court as to due attestation, and the "official certificate" of the custodian of the "principal seal of the government," under that seal, "stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court"); § 11772 (recorded probated will, provable by the probate judge's certified copy under court seal); § 11779 (will probated in a State or Territory of U. S., recorded in a local probate court, provable like a local will); § 11782 (same for a foreign probated will, after local hearing and re-probate); § 7260 (depositions to be authenticated by officer's certificate and signature, under seal of court or office, if he has any; except that if the officer is out of the State and has no seal, there must be an attestation by the keeper of the great seal or by the clerk of a court having a seal, unless either parol proof is made or the deposition was taken by commission); § 7278 (justice's record, provable by his certified copy); § 7894 (similar); 1900, Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078 (c. 97, § 4, applied); 1921, Muir *v.* Campbell, — Kan. —, 202 Pac. 844 (inheritance; certified copy of docket entries of justice of the peace admitted on the facts).

KENTUCKY: Stats. 1915, § 1627 (record of paper properly in the clerk's office of any court, provable by the custodian's attested copy, "upon proof of the execution of the original"); § 1630 (entry of date of execution, etc., from a clerk's or justice's book, admissible in a proceeding against the officer and sureties); § 1635 (records of a court of "any State," provable with the same effect as in such State by the clerk's attested copy under seal of

court, certified by the judge, chief justice, or presiding magistrate; records of any court of U. S., provable with the same effect as in U. S. courts by the clerk's attested copy under court seal); § 1638 (record-books of any court out of the U. S. provable by the keeper's attested copy certified under official seal by a U. S. consul, chargé, or minister); § 1643 (lost papers in a judicial proceeding; "attested copies" may be used under certain conditions); 1827, Thomas *v.* Tanner, 6 T. B. Monr. 52, 53 (authority of a clerk of another State court to give copies, presumed).

LOUISIANA: Code Pr. 1900, § 752 (judgments in "the different courts of the U. S.," provable by certified copy of the clerk under his seal, attested by the "judge, chief justice, or magistrate who presides in the court"); § 753 (judgments in foreign countries, provable by copy "clothed with all the forms required to prove their authenticity in the countries" where rendered); Ann. Rev. St. 1915, § 1439 (certified copy by the recorder or justice, of testimony at a fire inquest, admissible); St. 1888, No. 140 ("duly certified copies of inventories of a succession" in New Orleans, when returned into court, admissible); St. 1870, No. 43 (in any trial in a district or parish court, "any record, paper, or document belonging to the files or records of either the district or parish court of the parish in which the trial is proceeding" is provable by the document itself produced by the clerk of the district court, without making a copy, unless the case is appealed to the Supreme Court); 1822, Hanna *v.* His Creditors, 12 Mart. 32, 52 (mortgage register's certificate of copy of a judgment, excluded); 1904, State *v.* Allen, 113 La. 705, 37 So. 614 (bigamy; certified copy of an official Indiana marriage certificate, recorded in a circuit court held properly authenticated).

MAINE: Rev. St. 1916, c. 87, § 128 (records of a Federal or other State court, provable by the clerk's attested copy under court seal); c. 84, § 7 (clerk of court's certified copy of record of list of magistrates, and of certificates of discharge from army and navy, admissible); c. 88, §§ 26, 28 (records of justice of the peace deceased or removed, provable by copy certified by another justice or clerk of court in county).

MARYLAND: Ann. Code 1914, Art. 35, § 40 (debt of record in another of the U. S., provable by exemplification of the keeper under seal of the court or office); § 63 (court of chancery; keeper's certified copy under official seal of books, papers, etc., in his custody, admissible); § 64 (certified copy under official seal by the clerk of any court or register of wills, of any record in his custody, admissible, including any paper required to be recorded); § 66 (same for judicial proceedings, not required to be recorded, copied from papers, docket, and minutes); Art. 54, § 6 (land-office commissioner's transcript of a docket of proceedings, admissible); Art. 93, §§ 54, 56 (to prove a named executor to be infamous or insane, a transcript of a court-record of adjudication is admissible); § 112 (register of wills' certified copy of a record-certificate of an administrator's notice to creditors, admissible); §§ 351, 352 (custodian's certified copy under seal of court or office of a foreign will required to be recorded or lawfully lodged for safekeeping or authorized to be recorded, admissible; details specified); § 354 (authenticated copy of a foreign probated will recorded by a domestic wills-register; register's certified copy under official seal, admissible); § 355 (will probated in a domestic court may be required by the Court to be produced for proof, in custody of the register or deputy); Art. 17, § 56 (circuit court clerk's certified copy under official seal of any bond filed, is 'prima facie' evidence of "such bond and the execution and delivery thereof"); Art. 20, § 2 (constable's bond, provable by certified copy under court seal by clerk of circuit or superior court); Art. 79, §§ 1, 2 (recorded release given to executor, trustee, etc., provable by certified copy under seal by the county register of wills or clerk of court); Art. 93, § 38 (certified copy under seal of administrator's bond, admissible).

MASSACHUSETTS: Gen. L. 1920, c. 216, § 10 (register's certified copies of insolvency courts' proceedings, admissible); c. 233, § 69 (judicial records of other States or the U. S. provable by copy under attestation of the officer having charge of the records, with the court seal); 1831, Com. *v.* Phillips, 10 Pick. 28, 30 (record of a court in the State, provable by certificate of the clerk, under the court seal); 1860, Chamberlin *v.* Ball, 15 Gray 352 (for a record of a court in the State, "it is not necessary that it should be an exemplified copy under the seal of the court; . . . in Massachusetts it is sufficient if the copy is attested by the clerk; this rule of evidence is founded on immemorial usage"); 1901, Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757 (deputy clerk's certified copy from another State, held defective in not stating that the certifier was custodian of the records).

MICHIGAN: Comp. L. 1915, § 12503 (records of a court in a U. S. State or Territory or foreign country, provable by attestation of the clerk under court seal, or of the legal custodian under official seal); § 12505 (any common-law mode, to be still proper); § 12511 (records of a justice of the peace in another State of the U. S., provable by the justice's certified copy, attested by the clerk of a court of record in the county or district under official seal); § 11777 (recorded letters testamentary or of administration or guardianship, provable by certified copy of the registry of deeds); § 12517 (judgments recorded in a deed-registry, provable by certified copy); § 959 (justice's record, provable by his certified copy); § 12518 (record of condemnation proceedings, provable by certified copy of the clerk or the

register of deeds;] see also id. §§ 2813, 3158); § 1748 (certified copy of a convict's sentence, admissible); § 13785 (recorded probated will, provable by the probate judge's certified copy under seal); § 13939 (probate court's adjudication of heirs, provable by certified copy); § 14922 (decree of sale of watercraft, provable by the clerk's certified copy); § 13387 (same for proceedings under a creditor's bill); § 1821 (State prison warden's register of convictions of convict, admissible, by certified copy); § 12506 (order, etc. of "any court of record in this State," provable by copy authenticated by certificate of judge, clerk, or register, under court seal); § 13802 (probated will record, provable by probate judge's certified transcript attested by his seal); 1865, Facey *v.* Fuller, 13 Mich. 527 (justice's transcript); 1871, Shotwell *v.* Harrison, 22 Mich. 410 (same); 1871, Goodsell *v.* Leonard, 23 Mich. 374 (same); 1876, Wilber *v.* Goodrich, 34 Mich. 84 (same); 1881, Campbell *v.* Wallace, 46 Mich. 320, 9 N. W. 432 (same); 1882, Wisner *v.* Wirth, 48 Mich. 291, 12 N. W. 194 (assignment in bankruptcy); 1884, Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627 (justice's transcript); 1892, Howard *v.* Coon, 93 Mich. 442, 444, 53 N. W. 513 (same); 1911, General Conference Ass'n *v.* Michigan S. & B. Ass'n, 166 Mich. 504, 132 N. W. 94 (certified copy of a Canadian will probate, admitted).

Minnesota: Gen. St. 1913, § 8412 (records of "any court of any other State or of the U. S.," admissible "when authenticated by the attestation of the clerk or other officer having charge," under court seal); § 8441 (clerk's certified copy under official seal of minutes of conviction and judgment, with a copy of the indictment, sufficient without producing the judgment-roll); § 8442 (justice of the peace's certified copy of his docket, admissible in any court in the county); § 8443 (the same when read in another county must be authenticated by certificate of the clerk of the district court of the county of the justice's residence under court seal); § 8445 (certified copy of a justice's certificate of conviction, admissible); § 8446 (judgment of a justice "in any State of the U. S.," provable by an exemplification by him or his successor, with a certificate of magistracy authenticated by the clerk of a court of record in that county under court seal); § 7272 (probated will, or its record, or a transcript of the record certified by the probate judge under court seal, admissible "without further proof"); § 8444 ("The proceedings in any case had before a justice, not reduced to writing by him, nor being the contents of any paper produced before him, unless such paper be lost or destroyed, may be proved by the oath of such justice, or, in case of his death or absence, by producing the original minutes entered in a book kept by him, with proof of his handwriting; or they may be proved by producing copies of such minutes, sworn by a competent witness to have been compared by him with the original entries, with proof that such entries were in the handwriting of the justice"); St. 1921, c. 455, § 2 (record of conviction of former offense, provable by certified copy of record in this State); 1872, Bryan *v.* Farnsworth, 19 Minn. 239; 1884, Herrick *v.* Ammerman, 32 Minn. 544, 21 N. W. 836; 1886, Gunn *v.* Peakes, 36 Minn. 177, 179, 30 N. W. 466 (certified copy by a clerk of court, authenticated by the great seal of Nova Scotia, appended to a certificate of the keeper of the seal, admitted).

Mississippi: Code 1906, § 1952, Hem. § 1612 (certified copy of a recorded deposition 'in perpetuam,' admissible); § 1954, Hem. § 1614 ("copies of all judgments, decrees and specialties of record rendered in any foreign country," admissible if certified under official seal by the "officer having custody of the record, and authenticated by the certificate of any public minister, secretary of legation, or consul of the U. S."; but if execution is disputed under oath, the original "shall be produced or its absence accounted for"); § 1957, Hem. § 1617 (copies of the record of a land-conveyance under a justice's judgment and of the record of a certified transcript of proceedings and of the record of an execution and return, certified by the clerk under official seal, admissible); § 1958, Hem. § 1618 (certified copy, under official seal, by the clerk, of wills and of their record when lawfully recorded, admitted); § 1960, Hem. § 1620 (copies of "records, books, and files belonging to the offices of the U. S.," certified by the officer having charge, admissible); § 1964, Hem. § 1624 (duly certified copy of a record of appointment and qualification of an executor, administrator, or guardian, in other States, Territories, or the District of Columbia, or foreign countries, and a certificate that he is liable to account by the office to whom he is accountable, admissible; also a certified copy thereof by the clerk of the chancery court where filed); § 1967, Hem. § 1627 (duly certified copy of a taxed bill of costs, admissible); § 1969, Hem. § 1629 (copy of an entry on the judgment-roll, with the caption at the top of the page of entry, certified by the clerk under seal of court, to be "competent evidence of such enrollment"); § 1971, Hem. § 1631 (in a suit on a writing filed in a suit brought thereon in another court, a copy attested by the clerk of the latter court is admissible); 1837, Strong *v.* Runnels, 2 How. 667 (copy of a Tennessee record, admitted on the facts); 1904, Wise *v.* Kerr Thread Co., 84 Miss. 200, 36 So. 244 (certified copy of a justice's judgment, admitted, under St. 1866, c. 101, Code 1892, § 2413).

Missouri: Rev. St. 1919, § 5387 (judicial records of the U. S. or any State, attested by the clerk under court seal if any, and certified by the judge, chief justice, or presiding magistrate, "shall have such faith and credit" as in their own jurisdiction; records in this State

are provable by copy attested by the clerk under court seal, or, if no seal, under his private seal); § 5389 (proceedings of a justice of the peace, provable by certified copy by the justice or the lawful custodian); § 5390 (justice's records lawfully in custody of the clerk of a county court, provable by the clerk's certified copy); § 5391 (ex-justice's proceedings, provable by certified copy by his successor in possession, or by the lawful custodian); § 5491 (certified copies of depositions 'in perpetuam' admissible); § 4191 (clerk's certified copy of a fee-bill, admissible); § 35 (letters testamentary and of administration, provable by certified copy under court seal); § 389 (certified copy, under probate court seal, of the appointment of a guardian or curator, admissible); § 5508 (certified copies of recorded depositions to establish land-corners, admissible); § 1979 (certified copy of a recorded land-title decree, admissible); §§ 535, 539 (probate clerk's exemplification of the record of a probated will, admissible); § 13642 (workmen's compensation; coroner's inquest proceedings, provable by certified copy); 1838, Wineland *v.* Coonce, 5 Mo. 296; 1850, Halsted *v.* Rice, 13 Mo. 171 (certified transcript of a justice's record must be by one legally possessed of his papers); 1853, McDermott *v.* Barnum, 19 Mo. 204; 1906, Stevens *v.* Oliver, 200 Mo. 492, 98 S. W. 492 (certified copy of a recorded probate of an Ohio will, admitted under Rev. St. 1899, § 4635).

MONTANA: Rev. C. 1921, §§ 10555, 10556 (like Cal. C. C. P. §§ 1905, 1906); §§ 10571, 10572 (like Cal. C. C. P. §§ 1921, 1922); § 10067 (transcript of minutes of probate court, certified by the clerk under court seal, to be evidence of appointment of executor, etc.); 1922, Henderson *v.* Daniels, — Mont. —, 205 Pac. 964 (probate proceedings from Illinois, held not sufficiently authenticated under Rev. C. 1921, § 10040).

NEBRASKA: Rev. St. 1922, § 8919 (judicial record of this State or a Federal court, provable by certified copy of the clerk or legal custodian under seal of office); § 8920 (of a sister State, by attestation of the clerk under court seal, certified by the "judge, chief justice, or presiding magistrate" to be in due form); § 8921 (proceedings before a justice of peace in any of the U. S., by the justice's certificate, "supported by the official certificate" of the clerk of any court of record in the county); § 8922 (judicial records, provable as in Kan. Gen. St. § 7272); § 5619 (will established after contest, and recorded, provable like a recorded deed); § 5620 (recorded exemplification of a chancery decree affecting realty, provable by the record or an exemplification thereof); § 1157 (certain county court records, provable by the judge's certificate, without calling the judge); § 1278 (probated will provable by the judge's certificate of proof under seal, or a transcript thereof as recorded in the registry of deeds); 1901, Linton *v.* Baker, — Nebr. —, 96 N. W. 251 (statute applied to admit a copy of a judgment of the Queen's Bench Division of the English High Court of Justice); 1903, Martin *v.* Martin, 70 Nebr. 207, 97 N. W. 289 (statute applied to admit a certified copy of a probate of a will in Pennsylvania); 1906, Gordon Bros. *v.* Wageman, 77 Nebr. 185, 108 N. W. 1067 (transcript of Missouri justice's judgment, held properly authenticated under the above statute); 1908, Koltermann *v.* Chilvers, 82 Nebr. 216, 117 N. W. 405 (a will-probate, admitted under the curative provisions of Cobbey's Annot. St. 1903, §§ 4817, 5008, 5025, 5026).

NEVADA: Rev. L. 1912, §§ 5469, 5470 (certified copies of depositions 'in perpetuam,' admissible); § 5408 (judicial record of this State, or of the U. S., provable by certified copy by the clerk or other legal custodian under court seal); § 5410 (judicial record of any other State of U. S. or any Territory, provable by the clerk's attestation, under court seal if any, with a certificate by the judge, chief justice, or presiding magistrate); § 5411 (judicial record of a foreign country, provable by certified copy of the clerk under court seal, if there be a clerk and seal, or by the legal keeper under official seal if any, with a certificate of attestation by a judge of the court, and a certificate of signatures and jurisdiction by a U. S. minister or ambassador or consul); § 5877 (copy of record of a probated will, with clerk's exemplification, admissible); § 5910 (certified copies of letters testamentary and of administration, etc., admissible).

NEW HAMPSHIRE: 1834, Mahurin *v.* Bickford, 6 N. H. 567 (certified copy of a Vermont justice's judgment, by the county clerk, excluded).

NEW JERSEY: Comp. St. 1910, Evidence § 27 (record in a foreign State, etc., there admissible, provable by copy exemplified according to U. S. law); Orphans' Courts §§ 23, 24, 25 (provides for admission of copies of a foreign probated will); Courts § 83 (same for the register's certified copy of a local probated will); Orphans' Courts §§ 5, 20, 21, 158 (similar, for a county surrogate's copies and register's copies); Partition § 9 (orphans' court clerk's certified copy under court seal of the commissioner's appointment and report, admissible); Poor § 27 (court clerk's certified copy under seal of a pauper-support award, admissible); Practice § 51 (certified transcript of a sheriff's return, by the sheriff or court clerk, admissible); Orphans' Courts § 163 (receipts to an executor, etc., recorded with the surrogate on proof or acknowledgment like a deed, provable by the record or a certified copy under seal, if the original is lost or not in the power of the offeror to produce); Evid. § 27*a* (certified copy, under seal of court, of "any pleading . . . or of judgments, orders, decrees or writs of any kind," in the courts of the State, to be admissible); Justices Courts §§ 112, 117 (justice's docket, provable by certified copy); Orphans' Courts § 162 (surrogate's transcript of records under official seal,

admissible); St. 1911, May 1, c. 309 (exemplified copy of probate of foreign will need not contain proofs of execution); 1912, McDevitt *v.* Deacon, 83 N. J. L. 712, 85 Atl. 186 (certified copy of a will admitted, under Gen. St. Orphans' Courts, § 20, *supra*).

NEW MEXICO: Annot. St. 1915, § 2156 (duly certified copies of recorded depositions 'in perpetuam,' admissible); § 5888 (probated will, certified by the clerk under court seal, or a duly authenticated transcript of record, admissible).

NEW YORK: C. P. A. 1920, § 382 (judicial records in the State, provable by the clerk of court's certified copy under seal of court); J. C. A. 1920, § 471 (local justice's docket, provable by his certified transcript); C. P. A. § 387 (justice's transcript of a docket-book, authenticated by the county clerk's certificate under seal, admissible; deceased or absent justice's minutes, provable by an examined copy); C. P. A. § 399 (record of a court of the United States, provable by certified copy of the clerk or custodian); C. P. A. § 394 (judgment, proceedings, etc., in the docket-book of a justice in an "adjoining State," provable by the justice's certified transcript, authenticated by the clerk of the county under the county court seal); C. P. A. § 395 (foreign country's judicial record, provable by copy attested by the clerk of court under court seal or by the custodian under official seal, certified by the chief judge or presiding magistrate of the Court, and certified also by the custodian of the great or principal seal of government under that seal); §§ 151, 153 (same as Con. L. Dec. Est. § 42); Cons. L. 1909, Decedent Est. § 42 (mode of proving a probated will by copy, prescribed); Decedent Est. §§ 44, 45 (foreign probated will; mode of proof prescribed); C. Cr. P. § 482 *a* (clerk's certified copy of minute of conviction, with indictment, to be evidence where no record of judgment was signed and filed); 1862, Lazier *v.* Westcott, 26 N. Y. 146, 148 (copy of a record of a Canadian court, held duly authenticated).

NORTH CAROLINA: Con. St. 1919, § 1779 (writings "recorded or filed as records in any court," provable by the keeper's certified copy under official seal, unless the Court orders production of the original); § 1781 (letters testamentary, inventory, etc., in another State, provable by certified copy according to Federal law or by "the proper officer of the said State or Territory"); § 1777 (will by an inhabitant of another State or Territory, of property in this State, provable, if the original cannot be obtained, by copy certified under Federal law or by the proper officer, etc.; so also § 4149); §§ 1773, 1774, 1775 (certified copies of locally probated wills, admissible; details prescribed); § 368 (when record and original of a will is destroyed or lost, clerk of court's certified copy is admissible, in probate proceedings); § 1115 (certificate of incorporation; noted *ante*, § 1680); § 3289 (partnership assumed name; certified copy of certificate by clerk of superior court, admissible).

NORTH DAKOTA: Comp. L. 1913, § 7911 (judicial records of a court of the U. S. or any U. S. State or Territory, provable by the clerk's certified copy under court seal if any, with a certificate of "the judge, chief justice, or presiding magistrate"); § 7912 (judicial records of a foreign country; like Cal. C. C. P. § 1906); §§ 7914, 7915 (justice's docket record, provable in the same county or subdivision by certified copy by himself or his successor; in another county or subdivision, the certificate of the clerk of the district court must be added); § 7920 (like Cal. C. C. P. § 1923); § 7931 (certified copies of depositions 'in perpetuam,' admissible); 1907, Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612 (justice of the peace's record in another State, held not to be within the statutes).

OHIO: Gen. Code Ann. 1921, § 10519 (certified copy of a recorded will with probate, admissible); § 125 (notary's commission recorded with clerk of court, provable by certified copy under seal of court); § 8598 (certified copy of designation of heir made in court, admissible); § 11541 (mode of authenticating deposition, prescribed).

OKLAHOMA: Comp. Stats. 1921, § 637 (judicial records in a foreign country, provable by copy officially attested by the clerk or other lawful custodian, with certificate of attestation by "one of the judges or magistrate[s] of such court," and the official certificate, as to the court's jurisdiction and seal, of the officer having custody of the principal seal of government); §§ 643, 1066, 4836 (justice's certified copy of proceedings before him, admissible); §§ 644, 1066 (proceedings before a former justice, provable by certified copy by the justice in possession of the records); § 659 (certified copies of depositions 'in perpetuam,' admissible); § 2851 (same for deposition taken for the accused); § 1191 (letters testamentary or of administration, provable by transcript of the minutes of court, with the judge's certificate under court seal of his qualification and the non-revocation of letters); § 1208 (letters issued in any of the U. S. or Territories, provable by certified copy "under seal of the authority granting the same"); § 2951 (clerk of a district court's certified copy of indictments, informations, and bonds filed, admissible when the original is "lost, destroyed, or stolen, or for any other reason cannot be produced at the trial"); § 8346 (sheriff's certified copy of process of commitment and returns thereon, admissible).

OREGON: Laws 1920, § 752 (like Cal. C. C. P. § 1905, but requiring court seal for local or U. S. records); § 754 (judicial record of a foreign country provable by copy "certified by the clerk, or other person having the legal custody of the record, with the seal of the Court affixed thereto, if there be a seal, together with the certificate of the chief judge, or presiding

magistrate, that the certificate is in due form and made by the clerk or other person having the legal custody of the original"); §§ 769, 770 (like Cal. C. C. P. §§ 1921, 1922, substituting "under the seal of his office" in § 770); §§ 885, 886 (certified copy of proceedings and deposition 'in perpetuam,' admissible);, § 1146 (record, or duly certified copy, of a probated will recorded in a deed-registry, admissible in all controversies relating to real property situate in the county of record); § 10109 (foreign probated will, recorded like a domestic probated will, provable in the same manner); § 755 (judicial record of a foreign country; like Cal. C. C. P. § 1907; quoted *post*, § 2158); § 771 (contents of certificate, like Cal. C. C. P. § 1923).

PENNSYLVANIA: St. 1856, Apr. 19, § 2, Dig. § 7613, Court Records (exemplifications of court records of Phila. Co. and of Supreme Court eastern district, admissible); St. 1911, June 1, Dig. § 54, Adoption (court decree of adoption, provable by exemplified copy); St. 1917, June 7, §§ 11, 15, Dig. 1920, §§ 18929, 18934, Reg. of Wills (copies of recorded probated wills and of the probate, receivable; also copies of wills, after probate is conclusive, recorded in another county where the land is); St. 1911, May 11, Dig. 1920, §§ 10347, 10348, Evidence (certificate of a court prothonotary in this State, under seal of office, of an acknowledgment of a sheriff's or treasurer's deed, receivable); St. 1860, Mar. 29, Dig. § 10319, Evidence (record of proceedings before a justice or alderman in any other State; certified copy by the justice, etc., verified by certificate of the clerk of the appropriate Court of record under seal, receivable); 1859, Magee *v.* Scott, 32 Pa. 539 (a justice's docket is not a record; hence, his certificate of a copy is inadmissible, except by statute).

PHILIPPINE ISLANDS: C. C. P. 1901, § 303 (like Cal. C. C. P. § 1905, but assimilating the rule for courts both within and without the Islands to the California rule for a "sister State"); § 304 (like Cal. C. C. P. § 1907): §§ 316, 317 (justice's record; substantially like Cal. C. C. P. §§ 1921, 1922, but applying the rule also to local justices); § 318 (like Cal. C. C. P. § 1923); 1908, Ya Cheng Co. *v.* Tiaoqui, 11 P. I. 600.

PORTO RICO: Rev. St. & C. 1911, § 1424 (like Cal. C. C. P. § 1905); § 1425 (like Cal. C. C. P. § 1906, but omitting the intermediate certificate of the judge); §§ 1440, 1441 (courts not of record; like Cal. C. C. P. §§ 1921, 1922); § 1442 (like ib. § 1923).

RHODE ISLAND: Gen. L. 1909, c. 312, § 32 (certified copies of executor's or guardian's discharge, etc., recorded in a probate court, admissible); c. 320, § 9 (same for lost bond filed in probate court); c. 281, § 39 (district court clerk's or judge's certified copies under seal of a justice's transferred records, admissible).

SOUTH CAROLINA: St. 1800, C. C. P. 1922, § 708 (certified transcript of minute-books of a domestic Court of record, by the clerk or lawful custodian, receivable); St. 1865, Civ. C. 1922, § 5572 (exemplification of a probated will, under hand of the probate judge and court seal, or the hand and seal of any other officer having legal possession, receivable after ten days' notice); § 5753 (exemplification and certificate, by the judge, of a foreign probated will, receivable); C. C. P. 1922, § 343 (probate judge's certified copy of order appointing executor or administrator, admissible).

SOUTH DAKOTA: Rev. C. 1919, § 2719 (like N. D. Comp. L. § 7911); §§ 2722–3 (justice's docket, provable by his certified copy; but in any other county or subdivision, a certificate of the clerk of the circuit court under court seal must be added); § 2728 (like Cal. C. C. P. § 1923); § 2779 (certified copies of depositions 'in perpetuam,' admissible); § 2720 (foreign judicial records; like Cal. C. C. P. 1872, § 1906); § 2767 (mode of authenticating depositions, prescribed).

TENNESSEE: Shannon's Code 1916, §§ 5579–82 (certified copy of a judicial record in (1) this State, (2) a U. S. State or Federal court, or (3) a foreign country, receivable; to be authenticated (1) by the clerk or legal custodian under seal of office; (2) by the clerk under seal of office, with the judge's certificate of due attestation, or by a justice of the peace for his own record, with the certificate of a clerk of a court of record in the county; (3) by the clerk or a legal custodian, with certificate of the judge of court, and certificate of the custodian of the great seal of government under that seal; the provision for justices of the peace applies to justices' records both within and without the State); §§ 3913, 3915, 3920, 3924*a*–10, 3929–32 (certified copies of probated wills, domestic and foreign, receivable; but the original of a will of real estate may be required to be produced, upon a suggestion of "fraud committed in the drawing or obtaining" or "any irregularity in the executing or attestation"; further details prescribed); 1871, Coffee *v.* Neely, 2 Heisk. 304, 307 (foreign clerk's certificate under Code § 5580, formerly § 3795; seal of office, without seal of court, sufficient).

TEXAS: Rev. Civ. Stats. 1911, § 3694 (copies of all records of "courts of this State, certified to under the hand and seal, if there be one, of the lawful possessor," admissible); § 3706 (in a suit on an instrument filed in another court of this State, the clerk's certified copy under court seal is admissible, but upon affidavit denying execution, the clerk shall attend with the original); § 3275 (certified copy of testimony at a will-probate, admissible).

UTAH: Comp. L. 1917, § 7088 (for a record of this State or of the United States, like Cal. C. C. P. § 1905, first part; for a record of another State or a Territory, like the same section, second part); § 7089 (for a record of a foreign country, like Cal. C. C. P. § 1906, except that only one certificate is needed, and

that from any one of the seven officers named); § 7094 (like Cal. C. C. P. § 1921, reading "of another State or of a Territory"); § 7095 (like Cal. C. C. P. § 1922, inserting "or court of general jurisdiction").

VERMONT: Gen. L. 1917, § 1671 (county clerk's certified copy of records of a former justice deposited with him, admissible); § 1932 (certified copies by the county clerk of recorded depositions 'in perpetuam,' receivable); § 3187 (attested copies of probate decrees, receivable, and certificates of probate, administration, and guardianship, receivable like the probate, etc.); § 3225 (so for a copy of a foreign will and probate thereof); § 3502 (probate court's certified copy of bond approved and filed in probate court, admissible as if the original); St. 1919, Mar. 27, No. 72 ("record of a deed mortgage, judgment, or other public record of another State or foreign country," provable by certified copy under oath by legal custodian, reciting that "the laws of such State or foreign country require such instrument or judgment to be recorded"; if a judgment, clerk must certify under court seal); 1852, Spaulding *v.* Vincent, 24 Vt. 501 (copy of a foreign record must be "certified by the clerk and the presiding judge and the seal of the court, with the broad seal of the province or kingdom to the appointment of the judge, with the proper certificate from the office of appointment"); 1855, Parish *v.* Pearsons, 27 Vt. 621 (copy of a domestic judgment must be authenticated by court seal); 1917, Humphrey *v.* Wheeler, 92 Vt. 47, 101 Atl. 1018 (certified copy of writ filed in town clerk's office, admitted).

VIRGINIA: Code 1919, §§ 6197–8 (attested copy of "any record or paper in the clerk's office of any court" in the State or in West Virginia, receivable); § 6205 (attested copy of the records of a U. S. or State court, by the clerk of court under court seal, if there is one, certified by the judge, chief justice, or presiding magistrate as attested in due form, receivable); § 6207 (notarial copy of record "in any foreign court," receivable, if under seal of office and certified by a court of record or mayor or other chief magistrate or seal of State of kingdom, province, etc.); § 5251 (authenticated copy of a foreign probated will and probate-certificate of property in the State, admissible); 1811, Hadfield *v.* Jameson, 2 Munf. 53, 71, 77 (certified copy of a judgment from the British governor of Hispaniola, under the Governor's seal, not the colonial seal, received); 1817, Gibson *v.* Com., 2 Va. Cas. 111, 120 (a copy of the General Court's judgment, certified by its clerk, is evidence in the Superior Court); 1826, Dickinson *v.* M'Craw, 4 Rand. 158, 160 (statute applied).

WASHINGTON: R. & B. 1909, § 1254 (records of any court of the United States, or any State or Territory, admissible "when duly authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed"); § 1253 (certified copy of a deposition 'in perpetuam', admissible); § 1304 (a duly probated and recorded will, "certified by the judge of the superior court and attested by the seal of said court, may be read as evidence without any further proof"); § 1305 (record of the foregoing, and exemplification thereof by the clerk having custody, admissible); § 1317 (foreign probated wills; copy to be authenticated by attestation of the clerk of court, or if no clerk, of the judge, and "by the seal of office of such officers, if they have a seal"); § 1386 (copy of letters testamentary or of administration, or of the record thereof, certified by the clerk under seal of the superior court, admissible); St. 1917, Mar. 16, c. 156 (Probate Code; clerk's exemplified copy of recorded probated will, admissible like the original).

WEST VIRGINIA: Code 1914, c. 130, § 5 (clerk of court's attested copy of a document in his office, admissible); § 7 (same for a Virginia clerk); § 19 (records of a court of the U. S. or of any State, Territory, or District, provable by the clerk's attested copy under court seal, certified by the judge, chief justice, or presiding magistrate to be attested in due form); § 21 (record of a foreign court, provable by a notary's certified copy under seal, authenticated by a court of record or the chief magistrate of a county or city or the great seal of State); c. 50, § 182 (justice's docket entry, provable by a transcript by him or his successor or its lawful custodian).

WISCONSIN: Stats. 1919, § 4140 (domestic courts; record provable by certified copy by "the clerk, judge, or justice having legal custody of the original," under seal "of the court or of such officer"); §§ 4121, 4134 (certified copy of a recorded deposition 'in perpetuam,' admissible); § 4142 (justice of the peace's certified transcript of his proceedings, admissible before him); § 4143 (justice of the peace's proceedings, provable in any court in the same county by a copy certified by him or his successor or other legal custodian; in any other county, by the same, with a certificate of the clerk of the circuit court of the county under court seal); § 4144 (record of an absent or deceased justice, authenticated by proving his handwriting to the produced record, or by proving a sworn copy and the handwriting of the original entries); § 4145 (record of any court of the U. S. or of any State or Territory or District thereof, provable "when authenticated in the manner directed in § 4140, by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of the court affixed, or in the manner provided by Acts of Congress for the authentication of judicial proceedings"); § 4146 (records of a justice or other court not of record in any U. S. State or Territory, provable by certified copy by the justice or his successor, with a certificate by the clerk of a court of record in

§ 1681*a*. **Same: Federal Statute for Judicial Records.** The *Federal statute* (Rev. St. § 905), passed in 1790, has been of particular importance, not only as furnishing a model for State legislation, but also as providing under the Constitution a rule which is available in any State or Territorial court, for using certified copies of judicial records from another State or Territory.[1] It has been generally conceded that this Federal provision is not exclusive of other rules, but is merely additional to them.[2] Thus there are now usually three sets of rules, by any of which such a certified copy may be prepared and admitted, — the common-law rule, the local State statutory rule, and the Federal rule; one of them being often more liberal or simple than the others. It is worth noting that, although another of the

the county under court seal); § 4147 (records in a foreign country, admissible "when authenticated in the manner required in the two preceding sections"; proof of genuineness of signatures of the authenticating officers and of seal of court of record is "not to be required in the first instance"); § 4149 (certified copy when made admissible must have the official seal of the custodian or of the court; the signature and seal will be presumed genuine, except when an additional certificate is required); § 4150 (but the seal of court is not necessary for a copy to be used before the same court); § 2295 (certified copy of a recorded foreign probated will, admissible); § 2464*b* (registers in probate; certified copies by them are receivable like those of clerks of court).

WYOMING: Comp. St. 1920, § 6311 (certified copy of a deposition 'in perpetuam,' admissible); § 4673 (making admissible certified copies of "duly certified copies" of "proceeding in foreign courts mentioned and referred to in §§ 4666, 4667, and 4670," "when recorded in the office of the county clerk of the county where the land involved is situated"); § 6753 (probate clerk's certified transcript, under court seal, of minutes showing appointment of administrator, etc., admissible).

§ 1681*a*. [1] As *between the Federal courts themselves*, the statute lays down no rule; consequently (*ante*, § 6), the ordinary rule for courts within the same jurisdiction is applicable, namely a clerk's copy under court seal suffices, without the statutory certificate of the judge; 1877, Turnbull *v.* Payson, 95 U. S. 418, 424 (even where the record is from another circuit or district); 1899, National Accid. Soc'y *v.* Spiro, 37 C. C. A. 388, 94 Fed. 750 (and a deputy clerk's certificate will be presumed to have been made during the clerk's absence).

The same is true of a Federal record-copy offered *in a State court:* 1877, Turnbull *v.* Payson, 95 U. S. 418, 424 (even where the record is from a Federal court sitting without the State); 1903, Allison *v.* Robinson, 136 Ala. 434, 34 So. 966 (a Federal record need not be certified by the judge when offered within the State in which the Federal court is); 1800, Pepoon *v.* Jenkins, 2 John. Cas. 119 (a copy under the court seal certified by the clerk, sufficient); 1850, Williams *v.* Wilkes, 14 Pa. St. 228, 230 (U. S. Circuit Court is not within the statute, but is to be treated as a domestic court of the State).

[2] 1897, Droop *v.* Ridenhour, 11 D. C. App. 224, 244; 1900, Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344; 1895, Garden City S. Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753; 1855, Lattourett *v.* Cook, 1 Ia. 1; 1904, Tomlin *v.* Woods, 125 Ia. 367, 101 N. W. 135; 1828, Taylor *v.* Bank, 7 T. B. Monr. Ky. 576, 585; 1858, Landry *v.* Klopman, 13 La. An. 345; 1869, Kingman *v.* Cowles, 103 Mass. 283; 1901, Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; 1871, Dean *v.* Chapin, 22 Mich. 275; 1893, Ellis' Appeal, 55 Minn. 401, 408, 56 N. W. 1056; 1893, Ellis *v.* Ellis, 55 Minn. 401, 56 N. W. 1056; 1800, Olden *v.* Field, 2 Yeates Pa. 532; 1824, Kean *v.* Rice, 12 S. & R. Pa. 203, 207; 1856, Ohio *v.* Hinchman, 27 Pa. 479, 485; 1871, Coffee *v.* Neely, 2 Heisk. 304, 307; 1796, Ellmore *v.* Mills, 1 Hayw. Tenn. 359; 1883, Pickett *v.* Boyd, 11 Lea Va. 498, 501; 1831, Ex parte Povall, 2 Leigh Va. 816, 817; 1889, Thrasher *v.* Ballard, 33 W. Va. 285, 287, 10 S. E. 411.

Contra: 1892, Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46 (since the Code, a judgment in a sister State must be authenticated under the Federal statute if applicable, or if not, under the Code section applicable; but compare the later decision *supra*); 1903, Lehmann *v.* Rivers, 110 La. 1079, 35 So. 296, *semble* (for a Federal judgment in bankruptcy); 1881, Hope *v.* Hurt, 59 Miss. 174, 178 (where no domestic statute provides for authentication of judicial records in other States, the Federal statutory mode must be followed). Compare the analogous rulings as to Rev. St. § 906, cited *ante*, § 1680*a*, note 2.

Conversely, the Federal mode suffices, even though the local statute requires more: 1903, Dusenberry *v.* Abbott, — Nebr. —, 95 N. W. 466, or though the local statute provides nothing. Compare the cases as to *records of foreign deeds*, cited *ante*, § 1652, n. 4, § 1680, n. 2.

United States is in a State court in theory generally a foreign state, yet the rule adopted in the Federal statute is not the one prescribed by Chief Justice Marshall for foreign records, but corresponds in form to the orthodox English common-law rule, with the addition of a formal certificate of the clerk's authority by the judge. The fact that this statute was passed fourteen years before the decision in Church *v.* Hubbart [3] suggests that it represented the traditional rule as then familiar to the profession; and yet it foreshadows, with its judge's certificate, the American theory of custodian's authority.

The interpretation of this statute, simple as it is, has given rise to many rulings, concerned chiefly with the literal application of its words to copies of various sorts.[4] The number of these rulings, when compared with the

[3] Quoted *supra*.

[4] These rulings in the Federal courts are already carefully collected and fully stated by various editors in their Annotations to the Revised Statutes, and it seems unnecessary to repeat them here. But in the following list will be found (not in completeness) rulings of the State courts on the same statute; they are also important (though more so before local statutes had become so numerous), but they are not elsewhere collected; space does not suffice to set forth the tenor of each, for much quotation of reasoning would be needed for accuracy: *Alabama:* 1848, Hudson *v.* Daily, 13 Ala. 722, 727; 1850, Elliott *v.* McClelland, 17 Ala. 206, 208; 1858, Thrasher *v.* Ingrad, 32 Ala. 645, 657; *Arizona:* 1920, Ford *v.* State, 21 Ariz. 567, 192 Pac. 1117 (marriage certificate authenticated by Mexican chief judge with seal, by governor of Federal district, by foreign affairs department, and by American vice-consul, admitted); *Arkansas:* 1847, Butler *v.* Owen, 7 Ark. 369; 1854, Central Bank *v.* Veasey, 14 Ark. 671, 674; 1884, Blackwell *v.* Glass, 43 Ark. 209, 211; *California:* 1859, Low *v.* Burrows, 12 Cal. 181, 188; *Connecticut:* 1812, Russell *v.* Edwards, 5 Day 363; 1866, Adams *v.* Way, 33 Conn. 419, 429; 1897, Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57; *Delaware:* 1845, Regan *v.* McCormick, 4 Harringt. 435; *Georgia:* 1850, Settle *v.* Allison, 8 Ga. 201, 205; 1858, Goodwyn *v.* Goodwyn, 25 Ga. 203; 1874, Cox *v.* Jones, 52 Ga. 438; 1880, McAllister *v.* Mfg. Co., 64 Ga. 623, 624; 1903, Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672; 1914, Hope *v.* First National Bank, 142 Ga. 310, 82 S. E. 929; *Illinois:* 1839, Trader *v.* McKee, 2 Ill. 558; 1853, Ducommun *v.* Hysinger, 14 Ill. 249; 1859, Spencer *v.* Langdon, 21 Ill. 192; 1869, Newman *v.* Willetts, 52 Ill. 98; 1872, Brackett *v.* People, 64 Ill. 170; 1875, Horner *v.* Spelman, 78 Ill. 206; *Indiana:* 1833, Adams *v.* Lisher, 3 Blackf. 241, 243; 1845, Redman *v.* Gould, 7 Blackf. 361; 1857, Draggoo *v.* Graham, 9 Ind. 212; 1861, Vaughn *v.* Griffith, 16 Ind. 353; 1881, Bradford *v.* Russell, 79 Ind. 64, 70; 1881, Ansley *v.* Meikle, 81 Ind. 260, 262; *Iowa:* 1847, Gay *v.* Lloyd, 1 Greene 78; 1847, Young *v.* Thayer, 1 Greene 196; 1849, Lewis *v.* Sutliff, 2 Greene 186; 1854, Roop *v.* Clark, 4 Greene 294; 1855, Lattourett *v.* Cook, 1 Ia. 1; 1859, Greasons *v.* Davis, 9 Ia. 219, 224; 1870, Simons *v.* Cook, 29 Ia. 324; *Kentucky:* 1814, Stephenson *v.* Bannister, 3 Bibb 369; 1822, Strode *v.* Churchill, 2 Litt. 75, 76; 1831, Helm *v.* Shackleford, 5 J. J. M. 390, 393; 1847, Waller *v.* Cralle, 8 B. Monr. 11, 15; 1848, Moore *v.* Ann, 9 B. Monr. 36; 1852, Young *v.* Chandler, 13 B. Monr. 252; *Louisiana:* 1824, Kirkland *v.* Smith, 2 Mart. N. S. 497; 1827, Balfour *v.* Chew, 5 Mart. N. S. 517; 1829, Scott *v.* Blanchard, 8 Mart. N. S. 30, 306; 1842, Jordan *v.* Black, 1 Rob. La. 575, 578; 1842, Goodman *v.* James, 2 Rob. La. 297; 1842, Bowles' Succession, 3 Rob. La. 33; 1845, U. S. *v.* Bank of U. S., 11 Rob. La. 418, 429; 1855, Fitzpatrick *v.* Williams, 10 La. An. 517; 1879, State *v.* Barrow, 31 La. An. 691; *Maryland:* 1855, Case *v.* McGee, 8 Md. 9, 14; *Massachusetts:* 1824, Warren *v.* Flagg, 2 Pick. 448, 450; 1901, Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; *Michigan:* 1878, Wilt *v.* Cutler, 38 Mich. 189, 198; *Mississippi:* 1848, Melvin *v.* Lyons, 10 Sm. & M. 78; 1849, Stuart *v.* Swanzy, 12 Sm. & M. 684, 689; 1852, Stewart *v.* Swanzy, 23 Miss. 502, 505; 1854, Bates *v.* McCully, 27 Miss. 584; 1856, Jordan *v.* Thomas, 31 Miss. 557; 1866, Sherwood *v.* Houston, 41 Miss. 59, 64; *Missouri:* 1823, Hays *v.* Bouthalier, 1 Mo. 346; 1831, Hutchison *v.* Partick, 3 Mo. 65; 1834, Posey *v.* Buckner, 3 Mo. 604; 1834, Blair *v.* Caldwell, 3 Mo. 353; 1835, McQueen *v.* Farrow, 4 Mo. 212; 1844, Bright *v.* White, 8 Mo. 421, 426; 1850, Duvall *v.* Ellis, 13 Mo. 203; 1852, Wilburn *v.* Hall, 16 Mo. 426, 430; 1852 McLain *v.* Winchester, 17 Mo. 49, 54; 1858, Manning *v.* Hogan, 26 Mo. 570; 1860, Grover *v.* Grover, 30 Mo. 400, 403; *Nebraska:* 1898, Comstock *v.* Kerwin, 57 Nebr. 1, 77 N. W. 387; 1905, Chapman *v.* Chapman, 74 Nebr. 388, 104 N. W. 880; *New Hampshire:* 1828, Robinson *v.* Prescott, 4 N. H. 450, 454; 1834, Mahurin *v.* Bickford, 6 N. H. 567; *New Jersey:* 1901, Steele *v.* Queen, 67 N. J. L. 99, 50 Atl. 668; *New York:* 1800, Smith *v.* Blagge,

scanty English rulings on the same subject, is a suggestive illustration of the inherent obstinacy with which our system of litigation refuses to suffer the final settlement of a principle by any concise codified statement, however skilful and correct.

It is worth noting that the peculiar *double certificate* prescribed by R. S. § 906 (a judge certifying the copyist's office, and then his clerk certifying the judge's office) concerns only documents "*not appertaining to a court*," so that there are ordinarily three distinct officers involved (copyist-custodian, judge, and judge's clerk). It is applicable only to official records in general, as noted in § 1680*a*, *ante*, and not to the specific class of judicial records. For judicial records, U. S. Rev. St. § 905 is intended. U. S. Rev. St. § 906 was *not* intended for judicial records. If it did apply to judicial records, the meaningless and ineffectual formality would be prescribed for the clerk to certify the judge, and then the judge to certify the clerk; and yet that form is sometimes employed by attorneys in proving judicial records, under the belief that the statute of our forefathers countenances such a singularity.[5]

§ 1682. **Same: Copies of Registered Deeds; Judicially established Copies of Lost Documents.** (1) The use of certified copies of *registered deeds* involves no special variation from the general principle already considered for copies of official documents in general (*ante*, §§ 1677, 1680).

(*a*) So far as concerns the *implied authority to certify* copies, we find in England the general principle here also negativing this authority; for although the register (or "inrolment") was there apparently regarded as

1 Johns. Cas. 238; 1846, Coit *v.* Millikin, 1 Den. 376; 1858, Hatcher *v.* Rocheleau, 18 N. Y. 87, 89; 1862, Morris *v.* Patchin, 24 N. Y. 394 (general commentary on the statute); 1879, Burnell *v.* Weld, 76 N. Y. 103; *North Dakota:* 1907, Strecker *v.* Railson, 16 N. D. 68, 111 N. W. 612 (justice of the peace); *Ohio:* 1832, Silver Lake Bank *v.* Harding, 5 Oh. 545; *Oregon:* 1853, Pratt *v.* King, 1 Oreg. 49; 1886, Keyes *v.* Mooney, 13 Or. 179, 181, 9 Pac. 400; *Pennsylvania:* 1846, Lothrop *v.* Blake, 3 Pa. St. 483, 495; 1848, Snyder *v.* Wise, 10 Pa. 157; *South Dakota:* 1913, Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383 (for a Federal District Court within the State, the judge's certificate, certifying to the clerk's, is not necessary); *Texas:* 1856, Houze *v.* Houze, 16 Tex. 598; 1856, Patrick *v.* Gibbs, 17 Tex. 275, 277; *Vermont:* 1834, Blodget *v.* Jordan, 6 Vt. 580, 585; *Wisconsin:* 1855, Ordway *v.* Conroe, 4 Wis. 45, 48; 1859, Kirschner *v.* State, 9 Wis. 140, 145; 1863, Hackett *v.* Bonnell, 16 Wis. 471, 477.

[5] The following cases seem to countenance this error; 1908, Britton *v.* Chamberlain, 234 Ill. 246, 84 N. E. 895 (decree of Supreme Court of New York; the clerk certified under court seal the correctness of the copy, the justice J. S. L. certified that the attestation was in due form and the clerk certified that J. S. L. was justice; "we think the decree was properly certified"); 1908, Light *v.* Reed, 234 Ill. 626, 85 N. E. 282 (the opinion refers to such an erroneous triple certificate of a judicial record as being "in strict accord with the act of Congress"). But when this error is committed, the clerk's superfluous certificate may be disregarded, and the copy used under the present R. S. § 905: 1856, Gavit *v.* Snowhill, 26 N. J. L. 76.

It is therefore not quite correct to say (as in Ganow *v.* Ashton, 32 S. D. 458, 143 N. W. 383, following certain annotators) that in U. S. Rev. St. 1878, § 905, the reason for requiring a judge's certificate to the clerk's certificate is that "the [local] Court is not presumed to know or to take judicial notice of the *laws* in force or what is '*due form*' in another State or foreign jurisdiction." The reason is (*ante*, § 1679) that the local court (where the document is offered) does not know, and the foreign judge does know, (1) whether his clerk was genuinely the signer and sealer, (2) whether J. S. was the clerk, and (3) whether the clerk was by law the custodian; but of these three things, only (3) is a point of law. The "due form" of the Federal statute is merely a technical phrase covering those three elements; there is no peculiarity of "form" involved in the certificate; (1) and (2) are pure fact and (3) is pure law.

receivable to prove the deed's contents and execution,[1] yet the clerk of inrolments could not certify copies.[2] In the United States, on the other hand, no doubt seems ever to have been entertained that the registrar as custodian, even where statute did not expressly make his copies admissible, was impliedly authorized to give them. (*b*) The *authentication* of the registrar's copy would, on general principles, have been sufficiently made, for domestic officers, by his seal of office, and, for foreign officers, by the great seal of State with a certificate of due attestation (*ante*, § 1679). But the local statutes providing for registration and for the use of certified copies now almost universally contain express provisions for authentication; where these are lacking,[3] the Federal statute (Rev. St. § 906; quoted *ante*, § 1680) is available for the purpose. (*c*) But the certified copy merely furnished the contents of the register, and thus brought up ultimately the fundamental question of the admissibility of the register to prove the contents and *execution of the deed*. This question, as already noticed (*ante*, §§ 1648–1656), involves its own peculiar principles.

(2) Statute has in many jurisdictions provided for the *establishment of lost documents* — records, deeds, and the like — by judicial proceedings based on *copies*. These copies become official copies, and are usually by statute expressly made admissible; they become parts of an official register, however, and thus come under the general principle.[4]

§ 1683. **Quasi-Official Copies certified by Private Persons.** No person not an official can upon any principle have an authority to certify copies which shall be admissible,[1] unless at least a duty is expressly cast upon him by statute. Even then it is doubtful whether this statutory duty upon a private person would suffice to render his copies admissible.[2] But in a few jurisdictions, on grounds of public convenience, statutes have expressly declared admissible, without calling the copyist, certified copies made by sundry kinds of *custodians of private documents* having frequent use for evidential purposes; the chief instances are the *registers of churches* and the *records of corporations*.[3]

§ 1682. [1] See the cases cited in § 1650, *ante*.

[2] See the quotation from Buller's Nisi Prius, *ante*, § 1677.

[3] The authorities on all the points concerning certified copies of registered conveyances have been placed *ante*, §§ 1648–1656.

[4] The authorities are placed *ante*, § 1660. For the rule against a *copy of a copy*, see *ante*, § 1275; for the *conclusiveness* of such a copy, see *ante*, § 1347.

§ 1683. [1] 1814, Stoever *v.* Whitman, 6 Binn. 416 (copy of church register certified under corporate seal, excluded; Tilghman, C. J.: "It might be convenient if such certificates were received in evidence; but that alone will not authorize courts of justice to receive them. The party against whom a fact is to be proved has a right to call for the oath of a witness, except in those cases where it is otherwise ordered by Act of Assembly").

[2] The general principle has already been examined *ante*, § 1633*a*, § 1674, *sub fine*.

[3] Compare the statutes and cases cited *ante*, § 1223, exempting the rule for *production of the original;* the two series of statutes do not always coincide; compare also the statutes permitting proof by *affidavit* (*post*, § 1710):

ENGLAND: 1911, Albutt's and Screen's Case, 6 Cr. App. 55 (under St. 1879, 42 Vict. c. 11, § 4, a copy of a banker's book need not be by an officer of the bank; here by a chartered accountant).

CANADA: *Dominion:* Rev. St. 1906, c. 79, § 174 (certified copy of a company by-law, under the company's seal and officer's signature, to be evidence); §109 (same, as against a shareholder); Evid. Act, c. 145, § 24 (corporation documents and book-entries; cited *ante*, § 1680); *British Columbia:* Rev. St. 1911, c. 78, § 32 (like Dom. Evid. Act, § 24); *Manitoba:*

§ 1684. **Officially Printed Copies (of Decisions, Statutes, and Miscellaneous Documents).** There is no reason why an officer may not be authorized to

Rev. St. 1913, c. 21, § 35 (building-society's by-laws, etc., provable by the certified copy of the secretary or manager, without proof of the society's seal); c. 35, § 87 (joint-stock company's by-law, provable by its officer's certified copy under company seal); c. 168, § 100 (railway corporation's proceedings, provable by the secretary's certified copy); c. 65, § 15 (like Dom. Evid. Act, § 24); § 28 (like ib. § 28); c. 168, §§ 98, 100 (by-laws, etc., of railway companies, provable by certified copy of the president or secretary); *Newfoundland:* Consol. St. 1916, c. 92, §§ 3, 4 (affidavit-copy of bankers' books, admissible); *Nova Scotia:* Rev. St. 1900, c. 163, § 11 (like Dom. Evid. Act, § 24); c. 128, § 79 (certified copy of a corporate resolution, by an officer under corporate seal or by a registrar under his seal, admissible); c. 99, § 204 (secretary's certified copy of a railway corporation's minutes of meeting, admissible); § 214 (so for by-laws, etc., certified by president or secretary); *Ontario:* Rev. St. 1914, c. 76, § 26 (any "document, by-law, rule, regulation, or proceeding," and any "entry in any register or other book of any corporation created by charter or statute in this province" is provable by copy "purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof," without further proof); § 49 (commercial documents provable by copy; cited *ante*, § 1223); *Saskatchewan:* St. 1906, c. 30, § 194 (regulation etc., of a railway company, provable by copy certified "by the president, secretary, or other executive officer," under company seal); *Yukon:* Consol. Ord. 1914, c. 30, § 11 (like Dom. Evid. Act, § 24; quoted *ante*, § 1680).

UNITED STATES: *Federal:* U. S. St. 1917, Feb. 14, c. 53, § 7 (intoxicating liquor in Alaska; carriers required to keep a record of shipments; the carrier's agent's certified copy of the record to be admissible); *Alabama:* Code 1907, § 3978 (registers of marriage, births, and deaths, kept by law or church rule; custodian's certification admits them); 1889, Hawes *v.* State, 88 Ala. 37, 69, 7 So. 302 (the statute applies to registers kept out of the State; certificate of a purporting custodian sufficiently authenticates a copy of the register); *Connecticut:* Gen. St. 1918, § 5728 (corporations; quoted *ante*, § 1680); § 5733 (churches, common proprietors, etc.; quoted *ante*, § 1680); *Delaware:* Rev. St. 1915, § 2171 (religious society's register of a birth, death, marriage, or burial, provable by the chairman's copy under corporate seal); *Georgia:* Rev. C. 1910, § 5823 (domestic corporation's books, provable by copy certified by the chief officer in charge); *Illinois:* Rev. St. 1874, c. 51, § 15 (papers and records of "any corporation or incorporated association," provable by certified copy by the "secretary, clerk, cashier, or other keeper," under corporate seal, if any); *Indiana:* Burns' Ann. St. 1914, §§ 5771, 5794 (records of telegraph and telephone companies, provable by the secretary's attested copy, "when the interests of said corporation are concerned"); 1873, King *v.* Ins. Co., 45 Ind. 43, 60 (copies not in terms of the statute, excluded); *Kansas:* Gen. St. 1915, § 7282 (religious society's register of marriages, etc., provable by affidavit-copy); *Kentucky:* Stats. 1915, § 1629 (official books or ordinances of a religious society, provable by the custodian's certified copy); *Louisiana:* Rev. Civ. C. 1920, § 694 (secretary of a railroad company's certified copy under corporate seal of the company's books, admissible); § 3488 (harboring a deserting seaman; copy of shipping articles, authenticated by captain's affidavit, to be evidence that the seaman "actually signed said articles"); *Maryland:* Ann. Code 1914, Art. 23, § 13 (certified copy of a corporation by-law under corporate seal, by the president and secretary, or treasurer, admissible); *Massachusetts:* Gen. L. 1920, c. 155, § 22 (attested copy of corporate articles of organization, admissible); c. 176, § 35 (fraternal benefit society; printed copy of constitution and by-laws, certified by secretary or corresponding officer, admissible); c. 233, § 77 (bank's records; cited *ante*, § 1710); *Minnesota:* Gen. St. 1913, § 6289 (certified copy of a record of deeds, etc., of cemetery lots, by the secretary of a cemetery association, admissible); *Missouri:* Rev. St. 1919, § 5351 (domestic corporation's records and papers on file, provable by certified copy of the secretary or president under corporate seal); § 5353 (church register of marriages, etc., kept in the State, provable by affidavit copy); § 9773 (same as § 5351, but reading "and" for "or" before "president"); § 11849 (certified copy, by secretaries, of proceedings of consolidated trust companies, admissible); *Nebraska:* Rev. St. 1922, § 6824 (documents in the custody of the Nebraska State Historical Society are provable by certified copy of its secretary or curator "under seal and oath"); *New Jersey:* 1902, Hancock *v.* Supreme Council, 67 N. J. L. 614, 52 Atl. 301 (whether a certified copy of a foreign parish register, by a priest or clerk, is admissible, not decided); *New York:* C. P. A. 1920, § 412 (records of a "public hospital" showing condition or treatment of patient, provable by transcript certified by superintendent or his assistant); *North Dakota:* Comp. L. 1913, § 5065 (fraternal benefit society's articles of association, etc., provable by copy "certified by the secretary of the society or corresponding officer"); *Ohio:* Gen. Code Ann. 1921, § 9496 (fraternal benefit societies; printed copy of constitution

give printed copies as well as to give written copies; nor has there been any doubt that such authorized copies were admissible. Yet it cannot be said that such an authority has ever been implied from the nature of an office (*ante*, § 1674). An official printer's copies have been usually regarded as admissible; but the official printer's authority, though a general one, is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source, not so much in a doubt of any of these principles, as in the difficulty of presuming the authenticity (*post*, § 2151) of a printed copy purporting to be an official one. The doctrine of presuming the genuineness of an official seal has served to furnish a mode of authenticating certified copies (*ante*, § 1679, *post*, § 2163); but there has naturally been a hesitation about extending this doctrine to impressions of type purporting to represent an official seal or certificate. Thus, it is with the authentication of the copy rather than the authority to furnish it that the difficulties have arisen.

In general, then, where an *official printer* is appointed, his printed copies of official documents are admissible. It is not necessary that the printer should be an officer in the strictest sense, nor that he should be exclusively concerned with official work; it is enough that he is appointed by the Executive to print official documents. As for authentication of his copies, it is enough that the copy offered purports to be printed by authority of the government; its genuineness is assumed without further evidence.

Such seem to be the general principles of the common law, to be drawn from a variety of passages:

Ante 1726, GILBERT, C. B., Evidence, 11: "My Lord Chief Justice Parker allowed the printed statute to be evidence, in the case of the College of Physicians and Dr. West, of

etc., certified by the secretary or corresponding officer, admissible); *Oklahoma:* Comp. St. 1921, § 647 (religious society's register of marriages, etc., in this Territory, provable by certified copy by the pastor "or other head of any such society or congregation, or by the clerk or other keeper of such register"); § 5267 (instruments affecting real estate but not requiring record may be proved by copy "duly verified by oath or affidavit of any person knowing the same to be a true copy"); *Pennsylvania:* St. 1837, Mar. 31, § 20, Dig. 1920, § 10351, Evid. (church registers; cited *ante*, § 1680); St. 1897, May 25, Dig. § 18557 (employee's sworn copy of books of account of a common carrier, etc., "or other public corporation," admissible; cited *ante*, §§ 1223, 1519); *Rhode Island:* Gen. L. 1909, c. 292, § 48 (custodian's certified copy of a newspaper deposited with the Rhode Island Historical Society, admissible); *South Dakota:* Rev. C. 1919, § 8812 (recorded affidavits of notice of sale of corporation shares, provable by secretary's certified copies under corporate seal); *Tennessee:* Shannon's Code 1916, § 3369 *a* 112 (printed copies of constitution, etc., of fraternal benefit society, certified by secretary or corresponding officer, admissible); § 5569 (in actions between corporations and their stock holders, corporate books are provable by secretary's certified copy under corporate seal); *Texas:* Rev. Civ. St. 1911, § 3713 (domestic corporation's records, provable by copy authenticated by president and secretary under corporate seal); *Utah:* Comp. L. 1917 § 918 (corporation secretary's certified copy of filed affidavit of notice of sale of corporate stock, admissible); *Wisconsin:* Stats. 1919, § 4181 *a* (corporate clerk's certified copy of an affidavit of notice, admissible); § 4182 (certificate of assessment and notice, by the secretary of a mutual insurance company, admissible); § 4182 *a* ("verified copies" of the books of a life or mutual benefit association "doing business on the level premium or assessment plan," admissible, when served on the opponent six days before term, with an opportunity given for inspection of books); *Wyoming:* Comp. St. 1920, § 5345 (fraternal benefit society; printed copy of constitution and laws, certified by secretary or corresponding officer, admissible).

the truth of a private act of Parliament touching the institution of the College of Physicians, because the printed statute-book is printed by the Queen's authority, and therefore, though it be not so good evidence as an exemplification under seal, yet it must be supposed as good an evidence of the truth of a copy as a copy compared with the rolls and sworn to by the testimony of any witness, which is allowed daily as a good proof of the copy of a record; for a copy printed by the public authority derives more credit from that authority than it would from the testimony of any living witness that had compared it."

Ante 1767, BULLER, J., Trials at Nisi Prius, 225: "Not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are allowed to be evidence, because they are the hints of what is supposed to be lodged in every man's mind already. But in private acts of Parliament the printed statute-book is not evidence, . . . for they are not considered as already lodged in the minds of the people. However, a private act of Parliament in print that concerns a whole country, as the act of Bedford Levels, for rebuilding Tiverton, etc., may be given in evidence without comparing it with the record. And these things are the rather admitted because they gain some authority from being printed by the King's printer, and besides from the notoriety of the subject of them they are supposed not to be wholly unknown."

1814, TILGHMAN, C. J., in *Biddis* v. *James*, 6 Binn. 326: "Confidential persons have been selected to compare the copies with the original rolls and superintend the printing. The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record. . . . I am for admitting the printed copies authorized by the Legislature, either of this or any other State, whether the laws be public or private."

1820, DUNCAN, J., in *Jones* v. *Maffet*, 5 S. & R. 532: "Such authorized authentic publication would be more satisfactory evidence than a sworn copy; less danger of mistake or corruption or fabrication. . . . It is not the being in a statute book which gives them authenticity, but the publication by the King's printer."

1854, EASTMAN, J., in *Emery* v. *Berry*, 28 N. H. 473, 487 (admitting a printed copy of the Maine Statutes, purporting to be official): "Such a course seems called for by the great convenience and saving of expense that it will afford to all parties, and by that confidential relation which exists between the States. The rule, too, would seem to be almost entirely free from any danger of abuse, and error or imposition could easily be detected."

1878, MARSTON, J., in *Wilt* v. *Cutler*, 38 Mich. 196: "The distinct authority for printing and publishing the laws need not appear in any case where they purport to be published under the authority of the government."

(1) This principle has been broadly applied to admit printed copies of *miscellaneous public documents*.[1]

Compare also the cases cited *ante*, § 1674, notes 10, 11 (certificates by private persons).

§ 1684. [1] ENGLAND: 1698, Dupays *v.* Shepherd, 12 Mod. 216 (printed proclamation of peace; "such things as these in print as are of a public nature, as a public act of parliament, . . . may be given in evidence without comparing it with the record"); 1704, Captain Quelch's Trial, 14 How. St. Tr. 1084 (Boston; piracy upon Portuguese vessels; to prove the treaty of alliance of 1703 between Portugal and England, the London Gazette of May 24 and July 14, 1703, were received, reciting the signing of the treaty; Newton, answering the objection made to them: "The Gazette is published by authority, and has been often allowed as good evidence"); 1793, R. *v.* Holt, 6 T. R. 436 (Ashhurst, J.: "The Gazette is an authoritative means of proving all acts relating to the King and the State"; Buller, J.: "The Gazette, which is published by royal authority," is admissible to prove "anything done by his Majesty in his character of King or which has passed

(2) Upon this principle, also, a copy purporting to be officially printed, of a *decision of a court* is admissible.[2] The few instances of exclusion rest on other grounds, — for example, the failure to account for the original of a document,[3] or the preference for a certified copy over a printed copy.[4] There is little authority on the precise point, for the reason that, by another Exception to the Hearsay rule, all printed copies of judicial decisions, whether by official authority or by private enterprise, are generally treated as admissible.[5] But there can be no doubt of the general principle. Statutes sometimes expressly declare printed volumes of reports admissible.[6]

(3) The most frequent application of the principle, however, is to the

through his Majesty's hands"; here received to show certain addresses presented to the King and the fact of their presentation; Kenyon, L. C. J.: "That the Gazette is evidence of many acts of State is not doubted. . . . These documents are addresses of different bodies of subjects . . . received by the King in his public capacity. They then become acts of State, and of such acts, announced to the public in the Gazette, it is admitted that the Gazette is evidence"); 1805, Kirwan *v.* Cockburn, 5 Esp. 234 (official gazette received to prove an army appointment; compare §§ 1228, 1242, *ante*, which are involved in this ruling); 1809, Van Omeron *v.* Dowick, 2 Camp. 44 (official gazette, admitted); 1811, R. *v.* Gardner, 2 Camp. 513 (*contra* to Kirwan *v.* Cockburn. *supra*); 1820, Att'y-Gen'l *v.* Theakstone, 8 Price 92 (official gazette, admitted); 1825, Bradley *v.* Arthur, 4 B. & C. 304 (official printed copy of army regulations, excluded); for the learning about the privileges of the King's printer, see Basket *v.* Univ. of Cambridge, 1 W. Bl. 106; Universities *v.* Richardson, 6 Ves. Jr. 689.

UNITED STATES: *Federal:* 1842, Watkins *v.* Holman, 16 Pet. 55 ("American State Papers" admitted); 1856, Bryan *v.* Forsyth, 19 How. 334, 338 (report printed in "American State Papers," admitted); 1860, Gregg *v.* Forsyth, 24 How. 179, 180 (similar); 1881, Post *v.* Supervisors, 105 U. S. 667 (printed copies of legislative journals, published by law, are evidence of the contents, in Illinois); 1919, Chesapeake & Delaware Canal Co. *v.* U. S. 250 U. S. 123, 39 Sup. 407 (records of the U. S. Treasury Department, printed by authority of law and produced from the custody of the Department, admitted without the certification of copy mentioned in U. S. Rev. St. 1878, § 882); *Delaware:* 1844, Houston *v.* Spruance, 4 Harringt. 117, 119 (printed official pamphlet showing mail routes, admitted); *Florida:* 1870, Doe *v.* Roe, 13 Fla. 602 ("American State Papers" admitted); *Illinois:* 1839, Lurton *v.* Gilliam, 2 Ill. 577, 579 (State Register, received to prove the Governor's proclamation); *Indiana:* 1889, Marks *v.* Orth, 121 Ind. 10, 13, 22 N. E. 668 (printed document purporting to be congressional, excluded on the facts); *Louisiana:* 1859, Dutillet *v.* Blanchard, 14 La. An. 97 ("American State Papers" received); *Massachusetts:* 1871, Whiton *v.* Ins. Co., 109 Mass. 30 (official volume of the U. S. "Foreign Relations" admitted); 1886, Cushing *v.* R. Co., 143 Mass. 77, 78, 9 N. E. 22 (printed copy of a purporting U. S. Senate document; not decided); *Mississippi:* 1858, Nixon *v.* Porter, 34 Miss. 697, 707 ("American State Papers," admitted); *Missouri:* 1872, Callaway *v.* Fash, 50 Mo. 420, 423 ("Patent-Book of the State of Illinois," excluded on the facts); *New Jersey:* 1844, Brundred *v.* Del Hoyo, 20 N. J. L. 334 (government gazette, not received to show a patent-application published); *New York:* 1810, Radcliff *v.* Ins. Co., 7 Johns. 50 (officially printed diplomatic correspondence, admitted); 1827, Root *v.* King, 7 Cow. 636 (officially printed edition of legislative journals received); *Vermont:* 1888, Fulham *v.* Howe, 60 Vt. 351, 357 (official printed copy of the Federal census-compendium, received).

For *statutes* covering this part of the subject, see *infra*, note 15.

[2] 1877, Ely *v.* James, 123 Mass. 44. In R. *v.* Raudnitz (1869), 11 Cox Cr. 360, a copy of bankruptcy adjudication in a journal purporting to be the London Gazette was admitted under special statute.

[3] 1873, Hoyt *v.* Shipherd, 70 Ill. 309, 310 (report of a contract in an official volume of local decisions, excluded, because the original was not accounted for).

[4] 1877, Donellan *v.* Hardy, 57 Ind. 393, 402 (official printed report of an opinion of the Supreme Court, not received to prove the contents of a judgment, a certified copy being available).

For this general subject of the preference of one kind of copy over another kind, see *ante*, § 1273.

[5] See *post*, § 1703.

[6] For the statutes dealing expressly with official reports, see *infra*, note 15; for the statutes dealing with all other printed reports, see *post*, § 1703.

evidencing of the *statute law*, domestic and foreign. Upon the theory of judicial notice, no evidence of a domestic law need be offered (*post*, § 2572). Nevertheless, it may be offered; and the present Exception is employed whenever an officially printed copy of a statute is received.

(*a*) For *domestic general statutes*, no doubt seems to have existed, — at least since the middle of the 1700s; [7] copies purporting to be the officially printed ones are unquestionably admissible.

(*b*) For *domestic private acts*, there was at one time [8] apparently no recognition of copies purporting to be officially printed. Yet there was no real ground, either in principle or in policy, for the distinction. It came to be the custom in England to insert in private acts a clause providing expressly that they should be printed by the King's printer and that a copy so printed should be admissible.[9] But in the United States the same result was generally reached on common-law principles; [10] and legislation has now almost everywhere sanctioned this rule.[11]

(*c*) For *foreign statutes*, no difficulty seems ever to have been felt as to the admissibility of a copy proved actually to have been printed by official authority. But there was with some Courts a hesitation about assuming the genuineness of a copy purporting to have been thus printed. In New York and New Jersey, it was perhaps once the law that no officially printed copy, however proven, could be received.[12] In England, and in a few of our own courts, some sort of authentication, by testimony on the stand, was additionally required; testimony that the copy or edition offered was "commonly accepted" in the foreign court being usually the form of this authentication.[12] In still other courts (represented by the last two quotations above), the mere purporting to be officially printed was taken as sufficient; [12] precisely in the same

[7] 1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1347 (a printed statute, on objection, was proved as an examined copy); 1700, Anon., 2 Salk. 566 (on a plea of 'nul tiel record,' the official printed copy of a statute will not suffice; an exemplification under the great seal is necessary; because this is equivalent to the original; see *ante*, § 1216); 1735, Edwards *v.* Vasey, cited 1 W. Bl. 110 (king's printer's copy of a statute, admissible).

Whether the authority must be that of the central government, or whether that of a *municipality* would equally suffice, seems not to have been settled; but statutes (*infra*, note 15) have almost everywhere covered the subject; on the general principle, a municipal authority would suffice; 1900, Boston *v.* Coon, 175 Mass. 283, 56 N. E. 287 (Revised Ordinances of Boston, admitted on the facts).

[8] As indicated in the quotations *supra*.

[9] Park, J., cited in Phillipps on Evidence, II, 342; 1841, Greswold *v.* Kemp, Car. & M. 127; 1842, R. *v.* Milton, 1 C. & K. 58, note.

[10] 1808, Young *v.* Bank, 4 Cr. 387; 1838, Owen *v.* Boyle, 15 Me. 149 (here the foreign government was accustomed to use the edition); 1814, Biddis *v.* James, 6 Binn. Pa. 326 (quoted *supra*); 1824, Kean *v.* Rice, 12 S. & R. 207; for Missouri, see the singular ruling cited in note 15, *infra*.

[11] See them *infra*, note 15.

[12] For the rulings in the different jurisdictions, see *infra*, note 15.

Certain other principles affecting the mode of evidencing foreign law may here be discriminated. (*a*) Whether an expert witness to the foreign law may state its terms, if it lies in statute, *without producing a copy* either printed, certified, or examined; this involves the question of a rule of preference for copy-testimony over recollection testimony, and is discussed *ante*, § 1271. (*b*) Whether a witness to foreign common law is sufficiently an *expert*, is dealt with *ante*, § 564; and, similarly, whether a witness, sufficiently expert, has had *adequate sources of observation* of the law, is considered *ante*, § 690. (*c*) The use of ordinary *private compilations* of foreign law, whether in *treatises* or in *reports of decisions*, forms the subject of special and different Exceptions to the Hearsay rule, treated *post*, §§ 1697, 1703. (*d*) Whether the terms of a foreign

way that the purporting impression of the foreign great seal of State was taken to be genuine (*post*, § 2163). But before any full and detailed development of principle had taken place in the courts, statutes intervened, in almost every jurisdiction, to provide a definite and liberal rule.

These statutes commonly state, in the alternative, two conditions of admissibility: the volume must either *purport* to be printed by authority of the foreign government, or it must be *proved* to be commonly admitted in the courts of that country as evidence of the law. (1) The first alternative properly sanctions the liberal rule of authentication which had already been accepted by some Courts. But the source of the authority by which the printing must purport to have been sanctioned is seldom specifically named in these enabling statutes; owing to this, and to lack of foresight on the part of the editors, statutory collections have sometimes been excluded because the title-page or printed certificate does not convey the proper purport of authority. To satisfy, by a single formula, the demands of all the jurisdictions would perhaps be impossible. The uniform provision approved by the National Conference of Commissioners on Uniform State Laws should receive general adoption.[13] (2) The second alternative practically allows the use of a volume "commonly admitted" in the courts of the foreign country, even though it was not, and does not purport to have been, printed by official sanction. The curious result here is that the resort to testimony of such common acceptance in foreign courts seems to have been originally intended merely to authenticate the official character of a volume whose purporting official character would not be assumed without other evidence;[14] while under these statutes (as commonly phrased) the operation of this expedient has now become much wider, and serves to admit even private compilations provided they are "commonly admitted" in the foreign courts.[15] (3) It may be added that, by many statutes, still a third method is provided, namely, the *Secretary of State's certified copy* of the printed statute-book officially sent to him by the foreign government and kept in his office. This, however, being in form at least a certified and not a printed copy, comes within the general principle of certified copies (*ante*, § 1680).

law may be *judicially noticed*, or may be the subject of a *presumption*, falls under those respective heads, *post*, §§ 2536, 2573. (*e*) Whether the *opinion rule* affects testimony to foreign law is examined *post*, § 1953.

[13] A Federal rule would presumably be constitutional; compare the Federal clause cited *ante*, § 1681, note 12.

[14] See Lacon *v.* Higgins, Eng., *infra*.

[15] The statutes are as follows:

ENGLAND: Besides the following, there are also a few minor special statutes: 1845, St. 8 & 9 Vict. c. 113, § 3 (copies of non-public acts of Parliament, "if purporting to be printed by the Queen's printers," and of parliamentary journals and royal proclamations, "purporting to be printed by the printers to the Crown or by the printers to either House of Parliament, or by any or either of them," are admissible "without any proof being given that such copies were so printed"); 1865, St. 28 & 29 Vict. c. 63, § 6 (Governor's proclamation of royal assent or veto to a colonial law, provable by a copy purporting to be published by authority of the Governor in any newspaper in the colony); 1868, St. 31 & 32 Vict. c. 37 Documentary Evidence Act, § 2 (any proclamation, etc., as cited *supra*, § 1680, is provable by a copy of "the Gazette purporting to contain such proclamation," etc., or by production "of a copy purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed

under the authority of the legislature of such British colony or possession"); 1882, St. 45 Vict. c. 9, § 2 (preceding statutes extended to copies purporting to be printed under superintendence or authority of Her Majesty's Stationery Office); St. 1907, 8 Edw. VII, c. 16, § 1, Evidence Colonial Statutes (Acts, etc., of the Legislature of any British possession, and orders, etc., made thereunder, provable by copy "purporting to be printed by the Government printer"); St. 1908, 8 Edw. VII, c. 67, § 88 (reform school certificate; London Gazette to be evidence); St. 1914, 4 & 5 Geo. V, c. 59, Bankruptcy, § 137 (London Gazette, to be evidence of facts stated in a notice published by law); the provisions of the Documentary Evidence Acts, 1868 and 1882, were extended to cover various new departments of Government in the following Acts: St. 1917, 7 & 8 Geo. V, c. 44, § 4 (Ministry of Re-construction); c. 51, § 10 (Air Council); 1805, Richardson *v.* Anderson, 1 Camp. 66, note (printed collection of U. S. treaties proved by the U. S. minister to be authorized, excluded; Ellenborough, L. C. J., required an examined copy, and "would not have admitted a book of treaties with Spain proved to have been printed by the king's printer there"); 1822, Lacon *v.* Higgins, 3 Stark. 178 (copy of a French Code, purporting to be printed at the royal printing-office, and proved to be commonly accepted in French courts, received); 1866, R. *v.* Wallace, 10 Cox Cr. 500 (copy of a proclamation in a journal entitled "Dublin Gazette, published by authority," not admitted under St. 28 & 29 Vict.).

CANADA: *Dominion:* Rev. St. 1906, c. 145, Evidence Act, § 22 (proclamations, etc., concerning Northwest Territories, to be provable by printed copy of the Canada Gazette, or the official printer for Canada, Manitoba, or the Northwest Territories); § 21 (proclamations, etc., of the Governor-General or Governor in Council or of any minister or head of department of the government of Canada are provable by printed copy, as in Ont. R. S. c. 76, § 23); § 22 (proclamations, etc., of a Lieutenant-Governor or Lieutenant-Governor in Council of any Canadian province, or head of department of a provincial government, are provable by printed copy as in Ont. R. S. c. 76, § 23); § 20 (imperial "official records, acts, or documents" are provable as in England, or by the Canada Gazette or a volume of the Canadian Acts of Parliament, or by copy purporting to be by the Queen's printer for Canada); § 30 (all official documents printed in the Canada Gazette are provable thereby); § 19 ("Every copy of any Act of the Parliament of Canada, public or private, printed by the King's Printer, shall be evidence of such Act and of its contents; and every copy purporting to be printed by the King's Printer shall be deemed to be so printed, unless the contrary is shown") c. 10, § 6 (inquiries into privileges, etc., of Senate or House; journals provable by copy "printed or purporting to be printed by the order of the Senate or House"); c. 75, § 33 (animal contagious diseases; order or regulation provable by printed copy certified by the minister of agriculture); St. 1903, 3 Edw. VII, c. 61, § 11 ("copies of the said Revised Statutes [of 1906, authorized by this act to be prepared], purporting to be printed by the King's printer, from the amended roll so deposited, shall be evidence of the said Revised Statutes"); St. 1907, 6–7 Edw. VII, c. 43, § 11 (Revised Statutes 1906; copies in French or English "purporting to be printed by the King's printer, shall be evidence of the said Revised Statutes and of their contents").

Alberta: St. 1906, c. 3, § 7, par. 54 (a legislative act, public or private, is provable by a copy "printed by authority of law," and every copy so purporting shall be deemed 'prima facie' to be so printed); ib. par. 55 (the King's printer's copy of a regulation or order in council is admissible); St. 1910, 2d sess., Evidence Act, c. 3, § 25 ("Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof, and other public documents, purporting to be printed by or under the authority of the Parliament of Great Britain and Ireland or of the Imperial Government" or any Government or legislature of the British dominions, "shall be admitted in evidence to prove the contents thereof"); ib. § 26 (substantially like Ont. R. S. c. 76, § 23); ib. § 28 (like Ont. R. S. c. 76, § 25, including the Alberta Gazette and "the official gazette of any province or territory in Canada").

British Columbia: Rev. St. 1911, c. 78, § 28 (like Dom. Evid. Act, § 21); § 29 (like ib. § 22); § 31 (like ib. § 23); § 36 (like ib. § 30, including the B. C. Gazette).

Manitoba: Rev. St. 1913, c. 65, § 9 (substantially like Dom. Evid. Act, § 17, but omitting departmental documents); § 10 (like ib. § 22, but limited to the province of Manitoba and the Manitoba Gazette); § 11 (like ib. § 22, but applying to other provinces than Manitoba); § 14 (like ib. § 20); § 21 (like ib. § 30, applying also to any province of Canada and its official gazette); § 32 (for ascertaining foreign or domestic law, the judge may refer to "any books of statutes, reports of cases"); c. 112, § 49 (in libel, etc., the legislative journals are provable by a copy purporting to be printed by legislative authority); c. 126, § 60 (official medical register, admissible); c. 133, § 339 (municipal by-laws, provable by printed copy purporting to be by authority); c. 153, § 23 (official pharmaceutical register, admissible); c. 164, § 15 ("publications in the Manitoba Gazette, and all copies of the statutes of this Province, the journals of the House, sessional papers, and all other documents," purporting to be by "any King's printer or Queen's printer," shall be admissible); § 16 (where the Lieutenant-Governor

under a former statute authorized "any person" to print any of the foregoing documents, a copy purporting to be by a person so authorized is admissible); c. 198, § 10 (in part repeats c. 65, § 10); St. 1914, c. 1, § 12 (Revised Statutes, 1913, are provable by copies purporting to be printed by the King's printer from the official roll as deposited).

New Brunswick: Consol. St. 1903, c. 127, § 47 (British bankruptcy proceedings, provable by the London Gazette, purporting to be published by Royal authority); § 51 (proclamations, etc., of the Province; like Ont. R. S. 1914, c. 76, § 23); § 52 (proclamations, etc., of the Dominion; like ib. § 23); § 50 (a law of the Dominion or any province of Canada may be proved by a purporting copy of the Official Gazette or a purporting copy by the official or King's printer); St. 1918, c. 27 (adding to Consol. St. c. 127, § 58 a provision for proving laws, etc. of the United Kingdom by Official Gazette, etc., as in ib. § 50).

Newfoundland: Consol. St. 1916, c. 2, § 5 (purporting printed copy of House journals, admissible in inquiries touching privilege, etc.); c. 1, § 3 (acts of the Legislative Council, provable by the Royal Gazette or by copies "purporting to be published by the King's printer for the Island"); St. 1919, c. 21, Evidence Act, § 1 (similar to N. Br. Consol. St. c. 127, § 51).

Nova Scotia: Rev. St. 1900, c. 3, § 32 (copy of the Council or House journals purporting to be printed by its order, admissible in inquiries of privilege, etc.); c. 163, § 3 (any statute of the Parliament of the Empire or Canada or this Province or a Canadian province, colony, or territory, or any ordinance of such territory, is provable by copy purporting to be by the Queen's printer or the respective government printer); § 4 (like Dom. Evid. Act § 20, adding the King's printer for Nova Scotia); § 5 (like ib. § 21); § 6 (like ib. § 22, specially mentioning the Province of Nova Scotia and the King's printer therefor, and including also any territory of Canada); § 10 (like ib. § 30, adding the Royal Gazette).

Ontario: Rev. St. 1914, c. 76, § 21 (statutes or ordinances of any government in the Empire; like Alta. Evid. Act § 25, *supra*); § 23 (proclamations, orders, regulations, appointments, etc., by any chief executive officer or head of department of the Government of Canada or of any province or territory of Canada are provable by printed copy in the Canadian Gazette or respective Official Gazette or purporting to be by the respective King's or Government printer); § 25 (copies of notices, documents, etc., printed in the Canada Gazette and the Ontario Gazette are 'prima facie' evidence of the originals).

Prince Edward Island: St. 1889, § 30 (proclamations, etc.; like Dom. Evid. Act § 21); § 33 (like ib. § 30); § 34 (statutes of any province of Canada are provable by copy "purporting to be printed and published by the printer authorized to print and publish the same"); St. 1918, c. 4, § 5 (amending St. 1889, c. 9, § 30, by including proclamations, etc. "of this Province" as well as Canada, and making them provable by the Royal Gazette of this province, or a volume of Acts of the Legislature purporting to contain notice of such proclamation, etc.).

Saskatchewan: Rev. St. 1920, c. 44, Evidence Act § 3 (British or Canadian statutes and ordinances, provable by copy purporting to be printed by the Queen's or King's or government printer); § 4 (like Dom. Evid. Act § 20, adding the Government printer for Saskatchewan); § 5 (like ib. § 21); § 7 (like ib. § 22, adding the government printer for Saskatchewan); ib. § 10 (like Ont. R. S. c. 76, § 25, substituting the Saskatchewan Gazette); § 6 ("publications in the Saskatchewan Gazette" and all documents "printed or purporting to be printed by the government printer" shall be deemed to be "authentic copies of the originals" and admissible "without proof as the originals might be"); c. 1, § 54 (orders in council, provable by King's printer's copy, as in c. 44, § 7); c. 1, § 53 ("every copy of an Act, public or private, printed by authority of law shall be evidence of such Act and of its contents, and every copy purporting to be so printed shall be deemed to be so printed unless the contrary is shown"); St. 1920, c. 2, § 10 (Revised Statutes 1920 "printed by the King's printer from the said roll," to be evidence).

Yukon: Consol. Ord. 1914, c. 1, § 8, par. 54 (Commissioner's regulation or order, provable by printed copy in the Yukon Official Gazette); ib. par. 55 (a printed copy of an ordinance, public or private, purporting to be printed by authority of law, is admissible); c. 30, § 3 (statutes of the Imperial or Dominion Parliament, or of a province, etc., of Canada, or ordinances of this Territory or another of Canada, are provable by copy purporting to be printed and published by the King's printer or respective Government printer); § 4 (Imperial proclamations, etc.; like Dom. Evid. Act § 20, adding "Yukon Territory" under cl. *c*); § 5 (Dominion proclamations, etc.; like Dom. Evid. Act § 21); ib. § 6 (proclamation, etc., of a Lieutenant-Governor, etc., or of the Yukon Commissioner; like Dom. Evid. Act § 22); § 10 (like Dom. Evid. Act § 30, adding the Yukon Gazette); St. 1914, No. 5, § 9 (copies of the Consolidated ordinances of 1914, "printed under the direction of the Commissioner," to be received in evidence).

UNITED STATES: UNIFORM ACT: Uniform Proof of Statutes Act, 1920, § 1 ("Printed books or pamphlets, purporting on their face to be the session or other statutes of any of the United States, or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such State, territory or foreign jurisdiction, or proved to be commonly recognized in its courts, shall be received in the courts of this state as 'prima facie' evidence of such statutes").

FEDERAL: Rev. St. 1878, § 908, Code 1919, § 1411 (Little & Brown's edition of the laws and treaties of the U. S., admissible); St. 1877, March 2, c. 82, § 4, Code § 1412 (second edition of the Revised Statutes, for 1878, printed under the same direction, admissible); Code 1919, §§ 1413, 5907 (supplements to the Revised Statutes "published under the authority of Congress," to be 'prima facie' evidence); § 1414 (the "pamphlet copies of the acts and resolutions of each session of Congress, and the bound copies of the acts and resolutions of each Congress, shall be legal evidence," etc.); § 6187 (printed copies of trademark papers in patent-office; quoted *ante*, § 1680); § 8038 (U. S. shipping board's published reports of investigations; "such authorized reports, without further proof or authentication, shall be competent evidence of such reports"); St. Mar. 19, 1920, § 2 (trademark records; cited more fully *ante*, § 1681); St. 1916, Sept. 7, c. 451, § 24, 39 Stats. (Shipping Board's authorized published reports "shall without further proof or authentication, be competent evidence of such reports"); St. 1920, Feb. 28, § 417 (Interstate Commerce Act revised; the Commission may publish its reports and decisions as it deems fit, and "such authorized publications shall be competent evidence . . . without any further proof or authentication thereof"); 1801, Talbot *v.* Seeman, 1 Cr. 1, 13, 38 (pamphlet printed by congressional order, containing communications from U. S. diplomatic agents abroad giving copies of French admiralty ordinances, admitted); 1806, U. S. *v.* Johns, 4 Dall. 412, 415 (Maryland statute-book, "published by authority," admitted); 1816, Craig *v.* Brown, 1 Pet. C. C. 355 (printed foreign statutes must bear the State seal); 1822, Commercial & F. Bank *v.* Patterson, 2 Cr. C. C. 346 (Pennsylvania statute-book, purporting to be published by legislative authority and deposited in the State Department, admitted); 1831, Hinde *v.* Vattier, 5 Pet. 398 ("Land Laws of Ohio," received under Ohio law); 1841, U. S. *v.* Glassware, 4 Law Reporter 36 (printed copy of an English statute, bought of the royal printer, admitted); 1852, Ennis *v.* Smith, 14 How. 400, 429 (printed copy of the code of France, purporting to be official and received by the Federal Supreme Court in exchange for U. S. statutes, admitted); 1869, O'Keefe *v.* U. S., 5 Ct. Cl. 674, 682 (volume of English statutes, purporting to be officially printed, and testified to by an English lawyer as an authorized book, admitted); 1870, Armstrong *v.* U. S., 6 Ct. Cl. 225 (printed volume of laws sent by a foreign government to the Federal Supreme Court, admitted); 1872, The Pawashick, 2 Low. 142, 147 (officially printed book of foreign statutes, admissible when "shown to the reasonable satisfaction of the Court" to be genuine; here, a purporting printed copy of the English Merchant Shipping Act was admitted without any proof by witnesses); 1903, Nashua Savings Bank *v.* Anglo-American L. M. & A. Co., 189 U. S. 221, 23 Sup. 517 (printed copies of a purporting act of the British Parliament, testified by an English attorney to have been "issued by authority, being printed by Her Majesty's printer," and to be there receivable without further evidence, admitted, under the law of New Hampshire); 1904, Drewson *v.* Hartje P. M. Co., 131 Fed. 734, 738, 65 C. C. A. 548 (patent-office printed copy of a patent, held sufficient to show the date of application on the facts); 1914, Stewart *v.* U. S., 9th C. C. A., 211 Fed. 41 (U. S. General Land Office map, recited to be issued by authority of the Secretary of the Interior, admitted).

ALABAMA: Code 1909, § 3988 (public or private statutes or proceedings of any legislative body, "purporting on the face of the book to be printed by authority" of the government, State, or Territory, receivable); § 3989 (ordinances, etc., of a municipal corporation of this State; a copy "purporting on the face of the book to be printed by authority or to be a code of ordinances," etc., is to be evidence of the "due adoption and continued existence of" the ordinances, etc.); § 26 (printed report of commissioner, admissible to show the issuance of a fertilizer-license); § 1259 (municipal ordinances, etc., "purporting to be published by authority of the council, in book or pamphlet form," to be evidence of passage and publication, etc.); 1832, Cox *v.* Robinson, 2 St. & P. 91, 94 (printed copy of statute procured by the Secretary of State as required by law, received; also, when purporting to be published by State authority); 1839, Hanrick *v.* Andrews, 9 Port. 9, 37 (New York statute, appearing to be published by public authority, received); 1839, Smoot *v.* Fitzhugh, 9 Port. 72, 75 (same; Virginia statutes); 1849, Geron *v.* Felder, 15 Ala. 304 (printed copy of statutes must be published by authority of law); 1873, Clanton *v.* Jones, 50 Ala. 260, 262 ("Revised Code of Mississippi," received); 1877, Bradley *v.* Bank, 60 Ala. 252, 259 (statutes of Louisiana, received); 1883, Johnson *v.* State, 73 Ala. 483, 486 (volume purporting merely to be "published by authority," rejected); 1885, Edmunds *v.* State, 79 Ala. 48 (preceding case approved); 1889, Hawes *v.* State, 88 Ala. 37, 43, 71, 7 So. 302 (purporting official printed copy of Mississippi Code, received); 1892, Falls *v.* Building Co., 97 Ala. 417, 13 So. 25 (publication by a private person under State authority suffices); 1916, Pensacola St. A. & G. S. S. Co. *v.* Brooks, 14 Ala. App. 364, 70 So. 968 (book of Florida Statutes held admissible on the facts, under Code 1907, § 3988).

ARIZONA: Rev. St. 1913, § 1731 ("printed statute-books" of this Territory, or the District of Columbia, or any U. S. State or Territory, or any foreign government, "purporting to have been printed under the authority thereof," admissible); § 1735 (municipal ordi-

nances, etc. "printed in any newspaper, book, pamphlet, or other form, and which purport to be published by authority of the council of such city or town," are admissible); St. 1921 c. 2 (following the Uniform Proof of Statutes Act).

ARKANSAS: Dig. 1919, § 4115 ("the printed statute-books of this State," admissible to prove private acts); § 4116 ("the printed statute-books of the several States and Territories" of the U. S., "purporting to have been printed under the authority" thereof, admissible); § 4129 (city or incorporated town ordinances, etc., provable by "printed copies" "published by the authority of" the city or town); §§ 3119, 3120 (banking company's charter, in a criminal cause, provable by "the printed statute-book" of the creating State); § 4117 (printed copies of law of another State or Territory deposited with State Secretary; see *ante*, § 1680); § 7497 ("any municipal corporation"; like § 4129); 1850, Clarke *v.* Bank, 10 Ark. 516, 527 (printed statute-book, purporting to be published by authority, received); 1850, Barkman *v.* Hopkins, 11 Ark. 157, 168 (same); 1850, May *v.* Jameson, 11 Ark. 368, 377 (same); 1853, Dixon *v.* Thatcher, 14 Ark. 141, 146 (same; certain Louisiana volumes rejected); 1859, Yarbrough *v.* Arnold, 20 Ark. 592, 596 (same; book not so purporting, excluded); 1892, Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 372, 19 S. W. 1053 (printed copy of a municipal ordinance published by authority, received); 1901, Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62 (Deering's edition of California Codes, rejected as not purporting to be official).

CALIFORNIA: C. C. P. 1872, § 1900 ("books printed under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be commonly admitted in the tribunals of such State or country as evidence of the written law thereof," receivable); the thirteenth word *supra*, "and," should be omitted, and this improvement is made in some of the codes founded on the California Code; the latter in these sections is confusing in failing to make clear that a "purporting" authority suffices; id. § 1963, *infra*, attempts to cure this; § 1918 ("public documents printed by the order of the Legislature or Congress or either House thereof," receivable to prove acts of the Executive of this State, a sister State, or the United States; legislative proceedings of the same, provable "by published statutes or resolutions" or by copies "printed by their order," and for a foreign country, by "journals published by their authority or commonly received in that country as such"; acts of a municipal corporation, or its board or department, in the State, "by a printed book published by the authority of such corporation"); § 1963 (there is a presumption "that a printed and published book purporting to be printed or published by public authority was so printed or published"; and "that a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases").

COLORADO: C. C. P. 1921, § 396 ("printed copies in volumes, of statutes, codes, or other written law, of any Territory or any other State or foreign government, purporting or proven to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals" thereof, admissible); Comp. L. 1921, Gen. St. § 9167 (municipal ordinances, etc., provable by copy "printed in book form or pamphlet form, and purporting to be printed and published by authority of the corporation"); § 6535 ("printed statute-books of the U. S. and of the several States and Territories, printed under the authority" thereof, and "books of reports of decisions of the Supreme Courts of the U. S. and of the several States and Territories, published by authority of such Courts," admissible); § 6523 (Mills' Annotated Statutes to be evidence of Colorado statutes); § 6525 ("Revised Statutes of Colorado 1908," under Secretary of State's certificate, to be evidence); § 6524 ("Mills' Annotated Statutes of the State of Colorado, revised edition edited and annotated by John H. Gabriel, Esq." 1912, receivable in evidence); 1884, Bruckman *v.* Taussig, 7 Colo. 561, 5 Pac. 152 (statute applied to a volume of Missouri statutes).

COLUMBIA (*Dist.*): 1898, Main *v.* Aukam, 12 D. C. App. 375, 392 (Georgia Code, admitted; "the impress of the [public] authority by which it is published" suffices).

CONNECTICUT: Gen. St. 1918, § 5726 (U. S. State and Territorial public statutes, "printed by authority," admissible).

DELAWARE: Rev. St. 1915, §§ 4129, 4220 (printed copies of domestic laws, public or private, "published by authority of the State," admissible; also, of laws of another of the U. S. "if purporting to be published under the authority of their respective governments or if commonly admitted and read as evidence in their courts"); § 4221 ("reports of cases" in courts of another of U. S., "published by authority," admissible); § 4225 (Wilmington city ordinances, provable by printed copy "published by authority of the city council"); 1835, Bailey *v.* M'Dowell, 2 Harringt. 34 (printed statutes of Virginia, etc., in the Secretary of State's office, and purporting to be published by authority, excluded); 1839, Kinney *v.* Hosea, 3 Harringt. 77 (mere private publication of statutes, excluded); 1839, Bank of Wilmington and B. *v.* Wollaston, 3 Harringt. 90, 93 (official printed domestic volume containing a bank charter, admitted).

FLORIDA: Rev. G. S. 1919, § 2714 ("printed copies" of domestic legislative acts, public and private, "which shall be published under

authority of the government," admissible; also "such copies of private acts"); § 2715 ("printed copies of the statute laws" of the U. S. or a State or Territory thereof, "if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts," admissible); § 2628 ("printed copies" of private acts may be given in evidence); § 4455 (fraternal benefit society; printed copy of constitution and laws, certified by secretary or corresponding officer, admissible); 1894, Rogero *v.* Zippel, 33 Fla. 625, 15 So. 326 (Throop's N. Y. Statutes, held not to be a publication purporting to be under authority, though certified as correct by the Secretary of State; under the statute, the fact of being "commonly admitted" must be evidenced).

GEORGIA: Rev. C. 1910, §§ 5797, 5818 (laws of this State, the U. S., and other States of U. S., "as published by authority," to be recognized without proof); 1859, Stanford *v.* Pruet, 27 Ga. 243, 246 (a certain printed volume, excluded); 1907, Missouri S. L. Ins. Co. *v.* Lovelace, 1 Ga. App. 446, 58 S. E. 93 (a purporting official printed copy of Missouri insurance laws, received).

HAWAII: Rev. L. 1915, § 2598 (where the governor or head of a department is authorized to act, or to certify anything and publish it in any newspaper, "proof of the said newspaper purporting to contain a copy or notification" thereof shall be evidence of the act or certificate "having been duly done or given" and of the "purport and due making" of such law, etc.; and "the mere production of a newspaper purporting to contain public notices published by authority shall be 'prima facie' evidence of the publication thereof on the day on which the same bears date"); § 2599 (legislative proceedings, and proclamations; copies "purporting to be printed by authority" are admissible "without any proof being given that such copy were so printed").

IDAHO: Comp. St. 1919, § 7944 (like Cal. C. C. P. § 1900 inserting "Territory"); § 7952 (like Cal. C. C. P. § 1918, substituting "another State or Territory" for "a sister State").

ILLINOIS: Rev. St. 1874, c. 51, § 10 ("The printed statute books of the U. S., and of this State and of the several States, Territories, and late Territories of the U. S., purporting to be printed under the authority of" the U. S., etc., admissible); § 12 ("books of reports of decisions of the Supreme Court and other court of the U. S., of this State, and of the several States and Territories thereof, purporting to be published by authority," admissible); c. 24, § 65 (municipal ordinances, "when printed in book or pamphlet form, and purporting to be published by authority of the board of trustees or the city council," admissible); c. 124, § 8 (laws and legislative resolutions and journals, provable by a volume containing a "published" certificate of Secretary of State); 1854, Charlesworth *v.* Williams, 16 Ill. 338 (book purporting to be Ohio statutes, read); 1864, Ewbanks *v.* Ashley, 36 Ill. 177, 181 (printed copy of town by-laws, admitted under statute); 1865, Block *v.* Jacksonville, 36 Ill. 301, 303 (municipal ordinance printed in a newspaper, received under special town charter); 1872, Hensoldt *v.* Petersburg, 63 Ill. 111, 113 (printed town ordinance, admitted under one of the town ordinances); 1875, Byars *v.* Mt. Vernon, 77 Ill. 467, 469 (printed city ordinance, received under statute); 1883, Eagan *v.* Connelly, 107 Ill. 458, 462 (Ohio statute-book, admitted under statute); 1885, Hudson *v.* Green, H. S. Co., 113 Ill. 618, 629 (Indiana statute-book, admitted under statute); 1897, Louisville, N. A. & C. R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368 (city ordinance; must purport to be printed by authority); 1899, Grand Pass S. C. *v.* Crosby, 181 Ill. 266, 54 N. E. 913 (Indiana statute-book, admitted under the statute); 1906, McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921 (printed book of Iowa statutes with the title-page reading, "published by authority of the State," admitted under Rev. St. 1874, c. 51, § 10); 1906, Chicago & A. R. Co. *v.* Wilson, 225 Ill. 50, 80 N. E. 56 (under Rev. St. c. 24, § 65, *supra*, the printed copy is of course not conclusive); 1907, Illinois C. R. Co. *v.* Warriner, 229 Ill. 91, 82 N. E. 246 (village ordinance, purporting to be published by authority, although the printed certificate on it contained an inconsistent date).

INDIANA: Burns' Ann. St. 1914, § 472 (printed statute-books of Indiana State, Northwest Territory, and Indiana and Illinois Territories, "purporting to be printed under the authority of said State or Territories," admissible); § 473 (printed statute book of another State in State secretary's office; quoted *ante*, § 1680); § 8654 (municipal ordinances "in book or pamphlet form, if the same shall purport to be printed under the authority of the common council," admissible); § 495 (domestic Supreme Court's decision, provable by reports published "as provided by the laws of this State" when properly identified); 1858, Magee *v.* Sanderson 10 Ind. 261, 263 (statute-book purporting to be printed by authority; purporting certificate of correctness by the Secretary of State, not sufficient); 1860, Line *v.* Mack, 14 Ind. 330 (similar); 1861, Vaughn *v.* Griffeth, 16 Ind. 353 (similar); 1862, Crake *v.* Crake, 18 Ind. 156, 160 (similar); 1869, Paine *v.* R. Co., 31 Ind. 283, 315, 353 (similar); 1878, Rothrock *v.* Perkinson, 61 Ind. 39, 48 (printed volume "published by authority," received); 1909, State *v.* Wheeler, 172 Ind. 578, 89 N. E. 1 (official book of annual Acts is 'prima facie' evidence).

IOWA: Comp. C. 1919, § 7356 (acts of the Executive, provable by "public documents purporting to have been printed by order of the Legislatures of those governments, respectively, or by either branch thereof"); § 7357 (legislative journals, provable by copy "purporting

to have been printed" by order of the appropriate House); § 7358 (statutes provable as in Nebr. Rev. St. § 8925); § 7360 (ordinance of a municipal corporation, provable by "printed copies . . . published by its authority"); 1874, Greasons *v.* Davis, 9 Ia. 223 (private edition of statutes of another State, proved to be there current, admissible); 1867, Webster *v.* Rees, 23 Ia. 269 (statute applied); 1896, Goodwin *v.* Ass. Soc., 97 Ia. 226, 66 N. W. 157 (a copy certified in print by the Secretary of State, not sufficient under a clause "published by authority of the Legislature"); 1904, Summitt *v.* U. S. Life Ins. Co., 123 Ia. 681, 99 N. W. 563 (N. Y. Session Laws, held to "purport to have been published, etc.," under Code § 4651); 1920, Barrett *v.* Chicago M. & St. P. R. Co., 190 Ia. 509, 175 N. W. 950, 180 N. W. 670 (printed city ordinances, under Code § 687, presumed to have been adopted and published, and admitted as authentic).

KANSAS: Gen. St. 1915, § 7274 ("printed statute-books of this State or of the Territory of Kansas, printed under authority," admissible to prove private acts); § 7276 ("printed books containing the acts of the Congress of the United States, purporting to be published by authority of Congress or by authority of the United States," admissible); § 7277 ("public documents purporting to be edited and printed by authority of Congress or either House thereof," admissible); § 7271 ("printed copies in volumes of statutes, codes, or other written law enacted by any other State or Territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts" of such State, etc., admissible); § 7280 ("printed copies" of ordinances, etc., of any city or town in the State, "published by authority of" such city, etc., admissible); § 1414, St. 1903, c. 122, § 194 (ordinances of second class city, provable by book "purporting to be published by authority of the city"); § 1681, St. 1913, c. 118, § 1 (similar, for second class cities); ib. § 1893 (similar, for third class cities); § 5989, G. S. 1868, c. 56 (State secretary's printed certificate prefixed "to each printed volume of the laws" and his certificate in the same as to newspaper publication of each law, to be "evidence of the facts therein contained"); § 7275 (copy certified under seal by the State secretary of any act, etc., in printed statute-books of the U. S. States and territories purporting to be printed by authority, deposited with the secretary, and required to be kept there, admissible); § 11837, G. S. 1868, c. 119, § 11 (printed copy of General Statutes deposited with State secretary, and certified by him under State seal, to be "an authentic record of such laws"); § 11840, St. 1915, c. 28, § 3 (printed copies of General Statutes of 1915, with printed authentication of attorney-general, shall be "evidence in all courts"); St. 1921, c. 207, § 3 (revision of General Statutes, when published with commission's certificate, to be evidence).

KENTUCKY: Stats. 1915, §§ 1626, 2419 (copies of Assembly journals, printed by the State, and certain specified editions of the laws, admissible); § 1642 (law of the U. S. or a State or Territory thereof, provable by copy "printed under authority" thereof and received in the Secretary of State's office, or by certified copy thereof); § 1644 (law of "any State or Territory," provable by a printed volume or pamphlet "showing on its face that it was published by authority thereof"); § 2775 (municipal corporation's ordinances, provable by "printed copy officially published by the city"); 1828, Taylor *v.* Bank, 7 T. B. Monr. 576, 585 (printed copy of statutes, admitted under statute); 1871, Roots *v.* Merriwether, 8 Bush 400 (statutes purporting to be officially printed, admissible); 1906, Graziani *v.* Burton, — Ky. —, 97 S. W. 800 (copy of the Ohio law, proved by the Secretary of State to have been received by him, etc., admitted under Stats. § 1642).

LOUISIANA: Rev. Civ. C. 1920, § 1440, § 2171 ("The published statutes and digests of other States," admissible to prove "the statute laws of the States from which they purport to emanate").

MAINE: Rev. St. 1916, c. 87, § 129 (printed copies, "purporting to be published under authority of government," of a law of the United States or a State or Territory thereof, admissible); 1838, Owen *v.* Boyle, 3 Shepl. 147, 150 (book purporting to be an authorized copy of the laws of a British province, received).

MARYLAND: Ann. Code 1914, Art. 35, §§ 53, 54 (private laws "published by the authority of this State" may be read "from the printed statute-book"; laws of the U. S. or a State or Territory of the U. S., from "any printed volume purporting to contain" them; Baltimore city ordinances, from "the printed volume thereof published by the authority" thereof); Art. 80, § 8 (Code of Public General Laws of 1910, certified as "authentic" by commission appointed by court of appeals, to be "evidence of the law"); St. 1912, c. 21, p. 58, Mar. 13 (Bagby's Annotated Code of the Public Civil Laws of Maryland, to be evidence of the Code and Statutes to 1912 inclusive, save such as "relate exclusively to Crimes and Punishments"); St. 1914, c. 16, Feb. 24 (Bagby's Annotated Code, in three volumes, now including Art. 27 on Crimes and Punishments, legalized "to be evidence").

MASSACHUSETTS: Gen. L. 1920, c. 233, § 70 (printed copies of the statutes of the United States, and of any other State or Territory, or of a foreign country, "which purport to be published under the authority of their respective governments, or which are commonly admitted and read as evidence in their courts," admissible); § 75 ("the printed copies of all statutes, acts and resolves of the Commonwealth, public or private, which are published

under its authority," admissible); 1825, Raynham *v.* Canton, 3 Pick. 293, 296 (statutes of another State, in "a volume purporting on the face of it to contain the laws," admissible); 1857, Merrifield *v.* Robbins, 8 Gray 150 (the phrase "By Authority" on the title-page, held sufficient); 1862, Ashley *v.* Root, 4 All. 504 (statute applied); 1894, Bride *v.* Clark, 161 Mass. 130, 36 N. E. 745 (statute applied).

MICHIGAN: Comp. L. 1915, § 12512 (local constitution, laws, and resolutions, private and public, provable by "printed copies" "published under the authority of the government"); § 12513 (constitution, laws, and resolutions of another State or Territory of the U. S. or of a foreign State, provable by "printed copies," "if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts"); § 12514 (ordinances of a city or village council, etc., provable by printed copy or volume of ordinances "purporting to have been published by authority" of the council, etc.); § 2631 (village ordinance, provable by "any volume of ordinances purporting to have been written or printed by authority of the council"); § 3004 (similar, for city ordinance); 1878, Wilt *v.* Cutler, 38 Mich. 189, 195 (statutes purporting to be "printed by order of the Governor," admitted); 1891, People *v.* McQuaid, 85 Mich. 123, 124, 48 N. W. 161 (an unofficial compilation of statutes, "commonly admitted in all courts" in Pennsylvania, received to show that law); 1896, Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246 (printed copy of foreign — here Canadian — statutes, receivable, if proved by a competent witness — here a Toronto barrister — to be commonly accepted by the foreign court).

MINNESOTA: Gen. St. 1913, § 8414 ("Printed copies of all statutes, acts, and resolutions of this state published under its authority, whether of a public or private nature, the journals of the senate and house of representatives kept by the respective clerks thereof as provided by law, and deposited in the office of the secretary of state, and the printed journals of said houses, respectively, published by authority of law, shall be admitted as sufficient evidence thereof in all cases whatsoever"); § 8415 ("Copies of the ordinances, by-laws, resolutions, and regulations of any city, village, or borough, certified by the mayor, or president of the council, and the clerk thereof under its seal, and copies of the same printed in any newspaper, book, pamphlet, or other form, and which purport to be published by authority of the council of such city or village, shall be 'prima facie' evidence thereof, and after three years from the compilation and publication of any such book or pamphlet, shall be conclusive proof of the regularity of their adoption and publication"); § 8416 ("Printed copies of the statute laws of any other state, or of a foreign country, which purport to be published under the authority of their respective governments, or if commonly admitted as evidence in their courts, are admissible as 'prima facie' evidence of such laws in all cases whatsoever in this state"); § 9406 (Revised Laws 1905, as published pursuant to law, admissible "without further proof or authentication"); § 9423 (General Statutes 1913, as published pursuant to law, to be evidence "without further proof or authentication"); 1891, Holly *v.* Bennett, 46 Minn. 386, 49 N. W. 189 (printed book purporting to contain municipal ordinances published by the city's authority, received under its charter); 1906, Clagett *v.* Duluth, 143 Fed. 824, C. C. A. (Young's and Wenzel's official compilation of Minnesota statutes, held not conclusive).

MISSISSIPPI: Code 1906, § 1986, Hem. § 1646 ("printed acts of the Legislature, published by authority thereof," admissible); 1835, Baughan *v.* Graham, 1 How. 220, 224 (foreign book must be shown to be published by authority of the State); 1852, Stewart *v.* Swanzy, 23 Miss. 502, 504 (a foreign book purporting to be printed by authority is presumed to have been so printed).

MISSOURI: Rev. St. 1919, § 4032 (in criminal causes, the powers, etc., of "any banking company or corporation" are provable by "the printed statute-book of the State, government, country" creating it); § 5335 ("the printed statute-books of this State, printed under its authority," to be evidence of private acts); § 5336 ("the printed statute-books of sister States and the several Territories of the U. S., purporting to be printed by the authority of such States or Territories," admissible); § 5338 ("the printed books containing the acts of the Congress of the U. S., purporting to be published by authority of Congress or by authority of the U. S.," admissible); § 5340 ("the printed volumes, purporting to contain the laws of a sister State or Territory," admissible); § 5341 ("public documents, purporting to be edited or printed by authority of Congress, or either house thereof," admissible); § 5342 ("the printed journal of the Senate and House of Representatives of this State, and all public documents or reports therein contained, and all reports or documents printed by order of this State or by either House of the General Assembly, or purporting to be printed by authority thereof," admissible); § 5350 ("printed copies" of ordinances, etc., of a city or incorporated town in this State, "purporting to be published by authority of such city," etc., "and any printed pamphlet or volume, purporting to be published by authority of any such town or city and to contain the ordinances," etc., admissible); § 5400 (copy of a certain act of Congress dealing with lands, printed with Missouri session laws 1875, to be evidence); §§ 7957, 7984 (city ordinances, "when printed and published by authority of the corporation," admis-

sible); § 7094 (copy of Revised Statutes of 1919 in the office of the Secretary of State, containing a certificate by such Secretary and chairman of the revising committee, admissible; each copy containing such printed certificate, admissible); § 5337 ("copies of any act, law, resolution or constitution, contained in any printed statute-book of a sister State or territory," admissible if the State secretary of the State in question or of this State certifies correctness and the certificate sets out "in full the title-page of such printed book"); § 7080 (State secretary's certificate "as published in the session acts," to be 'prima facie' evidence of adoption of amendments to Constitution); § 10428 ("authorized publications" of State public service commission's reports, etc., admissible); § 13025 (State printer's published copy of records of State board of equalization, to be "evidence of the action of said board"); 1844, Bright *v.* White, 8 Mo. 421, 425 (certain volumes not purporting to be printed, etc., excluded); 1848, Baily *v.* Trustees, 12 Mo. 174, 177 (private statute must be produced, even where the law has made the printed statute-book evidence; an enigmatic ruling); 1850, Haile *v.* Hill, 13 Mo. 612, 616 (certain volumes allowed to be read); 1861, Cummings *v.* Brown, 31 Mo. 309 (under the statute, the volume need purport only to contain the laws, and not to be printed by authority); 1874, State *v.* Williamson, 57 Mo. 192, 200 (volume published "pursuant to law," admitted); 1893, Tarkio *v.* Cook, 120 Mo. 1, 12, 25 S. W. 202 (ordinances admitted under the statute); 1893, Glenn *v.* Hunt, 120 Mo. 330, 337, 25 S. W. 181 (the statute sanctioning copies certified by the Secretary of State does not prevent the use of a printed book otherwise admissible; under Rev. St. § 4832 the printed copy need not purport to be by authority).

MONTANA: Rev. C. 1921, §§ 10550, 10568 (like Cal. C. C. P. §§ 1900, 1918); § 11985 (printed statutes, admissible in a criminal case to prove incorporation); § 10606, par. 5 (like Cal. C. C. P. § 1963).

NEBRASKA: Rev. St. 1922, § 8903 ("printed copies in volumes of statutes, code, or other written law, enacted by any other Territory, or State, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law" in the courts thereof, admissible); § 8923 (acts of the Executive, domestic or foreign, provable by "public documents purporting to have been printed by order" of the Legislature or either branch); § 8924 (legislative journals, provable by copy "purporting to have been printed by order of" the respective Houses); § 8925 ("printed copies of the statute laws of this State, or any of the United States, or of Congress, or of any foreign government," purporting, etc., as in id. § 8903, admissible); §§ 3525, 3897, 4064, 4330 (municipal ordinances, provable "in book or pamphlet form, and purporting to be published or printed by authority of the city council," or "city," or "trustees"); § 3122 ("Revised Statutes of Nebraska for 1913," with Secretary of State's certificate, to be evidence of the laws "without further authentication," but "the existing editions" of the Compiled Statutes and Cobbey's Annotated Statutes, to be evidence of "the law as therein contained"); 1902, Hewitt *v.* Bank, 64 Nebr. 463, 90 N. W. 250, 92 N. W. 741 (certain Oklahoma statute-books, not admitted, on the facts).

NEVADA: Rev. L. 1912, § 5413 ("Printed copies in volumes of statutes, code, or other written law, enacted by any other State, or Territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals" of such State, etc., are admissible); § 793 (city ordinances, "published in book or pamphlet form, by authority of the city council," admissible); § 1016 (compilation of 1917, by the justices of the Supreme Court, "as printed, shall be legal evidence"); § 7176 (in criminal cases, incorporation, etc., may be proved by "printed statutes of the State," etc.); St. 1921, c. 77, Mar. 8 (printed laws; adopts the Uniform Proof of Statutes Act).

NEW HAMPSHIRE: 1854, Emery *v.* Berry, 28 N. H. 473, 485 (volume of statutes of another State, "purporting on its face to have been printed by authority," admissible; quoted *supra*); St. 1919, Mar. 27, c. 87 ("statutes or judicial decisions of another State"; a "volume purporting to be a printed copy of such statutes" etc. "that appear to have been printed by public authority, and appear to the trial Court to be correct copies of such statutes or judicial decisions and generally accepted as such" to be 'prima facie' evidence; this is not only awkward in its language but erroneous and unpractical in its rule).

NEW JERSEY: Comp. St. 1910, Evidence § 24 (statute-book and pamphlet session-law of one of the United States, "printed and published by the direction or authority of such State," admissible; the Court to determine whether it was so printed, etc.); § 25 (same for the law of a foreign country or province or subdivision); Cities §§ 1844, 1932, 2065, 2363, 2459 (municipal laws, provable by a volume "printed and published by authority of the common council"); §§ 1907, 2647 (provable by any compilation "duly authorized and recognized"; applicable also to a public board); Statutes § 14 (law "printed by the authority of this State," admissible); Statutes § 25 ("pamphlet laws published by the State," to be 'prima facie' evidence of due notice of intention to pass law); Cities § 214 (city ordinances codified, when printed in book form and certified by city counsel or attorney and approved by mayor, admissible); Food, etc., § 42 a ("the

book printed and published under the authority of the U. S. pharmacopoeial convention known as the U. S. Pharmacopoeia," admissible in proceedings under the food and drug laws).

NEW YORK: C. P. A. 1920, § 380 (official newspaper copy of a law of this State, admissible till six months after the end of the session; volume "printed under the direction of the Secretary of State," with his printed certificate, admissible); § 381 (compilation of colonial statutes pursuant to St. 1891, c. 125, to be evidence of the original, if it purports to be a copy from the original); § 388 (proceedings, etc., of a local city council, village trustees, board of health or of supervisors, provable by a volume "printed by authority" of the council, etc.); § 391 (foreign statute, or executive proclamation, etc., provable by a publication "purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof"); Greater N. Y. Charter, 1901, § 1556 (ordinances "published by authority of the board of aldermen," to be 'prima facie' evidence); St. 1913, c. 597, § 1 (printed proceedings of public service commissions, admissible); 1829, Packard *v.* Hill, 2 Wend. 411 (printed copy of laws of a foreign State, never receivable; of a U. S. State, receivable if printed by authority); s. c. 5 Wend. 375, 384, *semble* (same); 1829, Chanoine *v.* Fowler, 3 Wend. 177 (printed unofficial edition of a French criminal code, excluded); 1880, Hynes *v.* McDermott, 82 N. Y. 41, 54 (printed book purporting to contain French codes, but not purporting or shown to be official, and authenticated only by an expert who had not read them, excluded on the facts); 1899, Hecla P. Co. *v.* Signa I. Co., 157 N. Y. 437, 53 N. E. 650 (copy of a Spanish ordinance, admitted on the facts).

NORTH CAROLINA: Con. St. 1919, § 1749 (statute or edict, etc., of another State or Territory or a foreign country, provable by a "book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof"; also provable by the State Secretary's certified copy from "a printed volume . . . on file in the State or Supreme Court library or in the offices of the Governor or Assembly's Acts, provable by "the printed statute book"); § 1748 (private act, provable by Martin's collection); § 2825 (municipal code or ordinances, provable when "published in book form by authority of the governing body"); 1823, State *v.* Twitty, 2 Hawks 441 (printed copy of statutes of another State, inadmissible without the State seal); 1898, Copeland *v.* Collins, 122 N. C. 619, 30 S. E. 315 (volume purporting to be laws of S. C., admitted).

NORTH DAKOTA: Comp. L. 1913, § 7910 ("books purporting to be printed or published under the authority of any other State, Territory, or foreign country, and purporting to contain the statutes, codes or other written law of such State, Territory, or country, or proved to be commonly admitted in the tribunals of such State," etc., are admissible); § 7919 (substantially like Cal. C. C. P., § 1918); § 90 ("all laws, journals, and documents printed and published by any contractor under the provisions of this article, and duly certified by the Secretary of State as provided herein, shall be deemed to be officially printed and published," and full faith is to be given them); § 3931 (village ordinances. "when printed in a newspaper or published in book or pamphlet form and purporting to be published or printed by authority of the village," admissible); § 7936 (par. 35, it is presumed that "a printed and published book and [= of ?] statutes purporting to be printed or published by public authority was so printed or published"; par. 36, that "a printed and published book purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published contains correct reports of such cases"; the current edition of the Code prints "county" in par. 36, but this must be deemed a printer's error); § 3596 (city ordinances provable "if printed in book or pamphlet form by authority of the city council").

OHIO: Gen. Code Ann. 1921, § 11498 (printed copy of a law of another State, Territory, or foreign government, "proved or purporting to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law," receivable); § 4235 (municipal ordinance, etc., provable by "printed copies," published under authority of the corporation).

OKLAHOMA: Comp. St. 1921, § 636 (like S. D. Rev. C. § 2718, without the added clause); § 639 ("the printed statute-books of this Territory, printed under authority," admissible to prove private acts); § 641 ("the printed books containing the acts of the Congress of the U. S., purporting to be published by authority of Congress or by authority of the U. S.," admissible to prove all laws therein); § 642 ("public documents, purporting to be edited or printed by authority of Congress or either House thereof," admissible); § 645 ("printed copies" of ordinances, etc., of a city or incorporated town of the Territory, "published by authority of" such city, etc., admissible); St. 1921, c. 125, Mar. 27, § 2 ("Compiled Statutes of Oklahoma 1921," when approved, by the Code Commission, to be "presumptive evidence of the laws therein contained").

OREGON: Laws 1920, § 747 (like Cal. C. C. P. § 1900); § 766 (like Cal. C. C. P. § 1918; but par. 2 reads, "or by statutes or resolutions published by their order"; par. 1 reads, "prepared or printed"; par. 5 reads, "copy" for "book," and adds "or department thereof");

§ 799 (like Cal. C. C. P. § 1963); 1900, State *v.* Savage, 36 Or. 191, 60 Pac. 610 (Compiled Statutes of Nebraska, admitted under the statute); 1909, State *v.* McDonald, 55 Or. 419, 104 Pac. 967 (New Zealand statute book, admitted).

PENNSYLVANIA: St. 1866, Mar. 21, § 1, Dig. 1920, § 10341, Evidence 37 (authorized printed copy of ordinances, etc., of the Philadelphia Council, receivable); St. 1921, May 5, No. 174 (like the Uniform Proof of Statutes Act); 1814, Biddis *v.* James, 6 Binn. 321, 326 (Tilghman, C. J.: "I am for admitting the printed copies authorized by the Legislature either of this or any other State, whether the laws be public or private"); 1824, Kean *v.* Rice, 12 S. & R. 203, 205 (same; applied to a U. S. State); 1820, Jones *v.* Maffet, 5 S. & R. 532 (quoted *supra*); 1845, Mullen *v.* Morris, 2 Pa. St. 85, 87 ("printed volumes" purporting to contain the laws, receivable for U. S. States).

PHILIPPINE ISLANDS: C. C. P. 1901, § 313 (quoted *ante*, § 1680); § 334, par. 33 (like Cal. C. C. P. § 1963, par. 35); § 300 (like ib. § 1900).

PORTO RICO: Rev. St. & C. 1911, § 1421 (like Cal. C. C. P. § 1900); § 1437 (like ib. § 1918, omitting par. 1); § 1470 (like Cal. C. C. P. § 1963); 1914, Fernandez *v.* Calaf, 7 P. R. Fed. 376 (law of San Domingo, not provable by the Gazeta Oficial of San Domingo with a certificate of the American consul that it was the official organ for laws; an amusing example of the inefficiency of the common law and of judicial helplessness to do justice).

RHODE ISLAND: Gen. L. 1909, c. 292, § 49 (statutes of the U. S. or a State, Territory, or country, "purporting to be published by authority" of such State, etc., admissible; so also municipal ordinances in this State); 1870, Barrows *v.* Downs, 9 R. I. 453 (admitting a Spanish Code, authenticated by an expert and used by him to refer to).

SOUTH CAROLINA: C. C. P. 1922, § 707, 1902, § 2890 ("printed copies, in volumes, of statutes, code, or written other law, enacted by any other sovereignty, State, Territory, or foreign government, purporting or proved to have been published by the authority thereof or proved to be commonly admitted as evidence of the existing law" in the courts of that State, or "purporting to be an authentic publication by a reputable publisher," etc., receivable); 1834, Allen *v.* Watson, 2 Hill 319 (printed book of the laws of Georgia, bearing the Governor's certificate, and commonly there accepted as authority, received).

SOUTH DAKOTA: Rev. C. 1919, § 2718 (like Nev. Rev. L. 1912, § 5413, adding: "The term 'public document' is defined to be all the publications and maps printed by order of the Legislative Assembly, or Congress, or either House thereof; and all such documents are admissible in evidence"; also, "any map or publication printed by order of either branch" of the Legislature or of Congress); § 5125 (legislative journals provable by "the volumes wherein the same are published by authority of the State"); § 5158 (State reports published by Supreme Court reporter to be "evidence of the decisions of the Supreme Court"); § 6247 (municipal corporations; "any compilation of ordinances purporting to be printed under the authority of the municipality," admissible).

TENNESSEE: Shannon's Code 1916, § 5585 (statutes of this or another U. S. State or a foreign State, provable by printed copies "purporting or proved" to be published by authority, or "proved to be commonly admitted as evidence" in that State, receivable); § 5583 (acts of the Executive of the U. S., of this or another U. S. State, or of a foreign government, provable "by public documents purporting to have been printed by order of the Legislature of those governments respectively or by either branch thereof"); § 5584 (legislative journals, provable by copy purporting to have been printed by authority of the respective body); § 7357 (existence of a corporation in criminal cases, provable by a "book purporting to be the public statute-book" of the U. S. or a State).

TEXAS: Rev. Civ. Stats. 1911, § 3692 ("The printed statute-books of this State, of the United States, of the District of Columbia, or of any State or Territory of the U. S., or of any foreign government, purporting to have been printed under the authority thereof," admissible); 1846, Burton *v.* Anderson, 1 Tex. 96 (admitting a book purporting to be published under State authority, with expert testimony identifying it); 1851, Martin *v.* Payne, 11 Tex. 292 (copy of Tennessee laws, excluded under the statute).

UTAH: Comp. L. 1917, § 7083 ("Books purporting to be printed or published under the authority of another State or a Territory or foreign country, and to contain the statutes, code, or other written law of said State, Territory, or country, or proved to be commonly admitted in the tribunals of such State, Territory, or country, as evidence of the written law thereof," admissible); § 8989 (corporate charter; like Mont. Rev. C. § 11985); § 556 (city ordinances as "printed in book or pamphlet form by authority of the board of commissioners," admissible); 1912, Stuart *v.* Pederson, 41 Utah 308, 125 Pac. 395 (Mills' Annotated Statutes of Colorado admitted).

VERMONT: St. 1919, Mar. 27, No. 72 (laws and decisions of another State, provable by "a printed copy thereof purporting therein to be published by the authority of such State"); 1814, State *v.* Stade, D. Chip. 303 (copy of a law of a U. S. State, printed under authority receivable); 1827, Danforth *v.* Reynolds, 1 Vt. 259, 265 (statute-book of a U. S. State, "printed by the authority of such State and used in her courts," receivable); 1847, Territt *v.* Woodruff, 19 Vt. 182, 184 (printed statutes

of a U. S. State," "published by the authority of such state" receivable); 1852, Spaulding *v.* Vincent, 24 Vt. 501, 504 ("some copy of the law which the witness could swear was recognized in the Province as authoritative" is necessary; here for Canadian law); 1855, Smith *v.* Potter, 27 Vt. 304, 309 ("authorized statute-book" of a U. S. State, "ordinarily sufficient"); 1856, State *v.* Abbey, 29 Vt. 60, 65 (volume "purporting to be published under the authority of the State," sufficient, for a U. S. State); 1920, State *v.* Williams, — Vt. —, 111 Atl. 701 (printed copy of State bank examiner's report to the General Assembly, admitted).

VIRGINIA: Code 1919, §§ 6189–6193 (domestic statutes, etc., "published by the public printer for the time being," receivable; also such printed copies of domestic legislative journals; also Hening's publication of early Virginia statutes; also copies of statutes of the United States or of any U. S. State or Territory, "printed by authority," of such State, etc.; also, copies of ordinances, etc., of a municipal corporation in this State, "which purports to have been printed by the authority of the corporation"); 1834, Taylor *v.* Bank, 5 Leigh 471, 476 (Federal statutes, "printed under the orders of Congress by the public printer," received).

WASHINGTON: R. & B. Code 1909, § 1259 ("Printed copies of the statute laws of any State, Territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts," receivable); § 1260½ ("When the ordinances of any city or town are printed by authority of such municipal corporation, the printed copies thereof " are admissible).

WEST VIRGINIA: Code 1914, c. 130, § 2 (copies of legislative journals of this State, "printed by authority of the Legislature," admissible); c. 13, § 2 (laws of Virginia, provable by "printed copies"); § 3 (acts of the Legislature of this State, provable by printed copies "published by authority thereof"); § 4 (law of another State or country or of the U. S.; the judge may consult "any printed book purporting to contain" it).

WISCONSIN: Stats. 1919, § 4135 ("The printed copies of all statutes, acts, and resolves of this State, whether of a public or private nature, which shall be published under the authority of the State," admissible; journals of the Legislature kept by clerks and deposited with the Secretary of State, "including the printed journals of previous Legislatures there deposited," admissible; "and the printed journals of said Houses, respectively, published by authority of law," are admissible); § 4136 ("Printed copies" of the statutes of the United States or a U. S. State or Territory, "if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts," admissible); § 4137 ("Copies of the ordinances by-laws, resolutions, and regulations of any city or village in this State, printed in any newspaper, book, pamphlet, or other form, and purporting to be published by authority of the proper common council or village board," admissible); 1900, Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664 (printed copy of a city charter insufficient on the facts); 1901, Hollister *v.* McCord, 111 Wis. 538, 87 N. W. 475 (Wenzell's edition of the Minnesota General Statutes 1894, admitted under § 4136).

WYOMING: Comp. St. 1920, § 5810 (like Oh. Gen. C. 1921, § 11498); § 1763 (town ordinances provable "when printed or published in book or pamphlet form and purporting to be published by authority of the town"); § 1827 (first class city ordinances provable in same manner as in § 1763); § 4569 (Wyoming Compiled Statutes 1920, when certified and proclaimed by State secretary, to be admissible).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPICS IX, X, XI, XII: SUNDRY EXCEPTIONS

CHAPTER LV.

TOPIC IX: LEARNED TREATISES

TOPIC X: COMMERCIAL AND PROFESSIONAL LISTS, REGISTERS, AND REPORTS

TOPIC XI: AFFIDAVITS

TOPIC XII: STATEMENTS BY A VOTER

TOPIC IX: LEARNED TREATISES

§ 1690. **Scope and Policy of the Exception.** This Exception is usually spoken of as involving the use of "scientific books" or "medical books" or "books of science and art"; but the term "learned treatises" seems more accurate in indicating the scope of the doctrine. As an exception to the Hearsay rule, it has obtained complete recognition in only one or

two jurisdictions; but it deserves a fuller acceptance, and the precise bearings of the reasons for and against recognizing it deserve careful consideration.

(1) More than one reason has been advanced for prohibiting the use of learned treatises in evidence. The only forceful one, and the one generally pointed out and relied upon in judicial opinion, is that such an offer of evidence purports to employ testimonially a statement made out of court by a person not subjected to cross-examination; *i. e.* purports to violate the fundamental doctrine (*ante*, § 1362) of the *Hearsay rule*. That this is the main objection is indicated in the following passages: [1]

1831, MELLEN, C. J., in *Ware* v. *Ware*, 8 Me. 56: "These books do not come into court, as all other evidence must, either by consent or under the sanction of an oath. Without such consent or oath, their contents are mere declarations and hearsay. . . . The benefit of cross-examination would be lost by allowing books of such a character to be evidence."

1853, SHAW, C. J., in *Ashworth* v. *Kittredge*, 12 Cush. 194: "The substantial objection is that they are statements wanting the sanction of an oath, and the statement thus proposed is made by one not present and not liable to cross-examination."

1854, BATTLE, J., in *Melvin* v. *Easly*, 1 Jones L. 388: "The reason of the rule is obvious, that if the authors were present they could not be examined without being sworn and exposed to cross-examination."

1856, BURNS, J., in *Brown* v. *Sheppard*, 13 U. C. Q. B. 179: "The opinions which are to be received, upon which the jury is to deduce a certain fact, must be so given as to be subject to examination and cross-examination before the court and jury. Now it is obvious, if books upon skill and science are to be made evidence of themselves, the protection a person has of showing by an examination of the person advancing an opinion that it is improperly arrived at is quite destroyed."

1886, JOHNSTON, J., in *State* v. *Baldwin*, 36 Kan. 17, 12 Pac. 318: "The great weight of authority is that they cannot be admitted . . . , this upon the theory that the authors did not write under oath, and that their grounds of belief and processes of reasoning cannot be tested by cross-examination."

Other reasons, however, which have occasionally been suggested, usually in connection with the preceding one, must be briefly noticed.

(2) We are told that *Science is shifting;* that experiment and discovery are continually altering scientific theories and rendering them valueless; so that "a medical book which was a standard last year becomes obsolete this year"; that there is no general agreement among scientists, and that testimony characterized by such instability and uncertainty is untrustworthy.[2] There is ignorant exaggeration in these charges, which attribute to the entire body of scientific knowledge the instability due to casual rapid progress in

§ 1690. [1] *Accord:* 1882, People *v.* Wheeler, 60 Cal. 584; 1885, Gallagher *v.* R. Co., 67 Cal. 17, 6 Pac. 869; 1882, People *v.* Hall, 48 Mich. 490, 12 N. W. 665; 1884, People *v.* Millard, 53 Mich. 76, 18 N. W. 562; 1867, Payson *v.* Everett, 12 Minn. 219; 1882, Tucker *v.* McDonald, 60 Miss. 470; 1862, State *v.* O'Brien, 7 R. I. 338; 1860, Fowler *v.* Lewis, 25 Tex. (Suppl.) 381.

[2] This suggestion is found in the following opinions: 1885, Gallagher *v.* R. Co., 67 Cal. 16, 6 Pac. 869; 1831, Ware *v.* Ware, 8 Me. 57; 1853, Ashworth *v.* Kittredge, 12 Cush. Mass. 195; 1882, People *v.* Hall, 48 Mich. 490, 12 N. W. 665; 1877, Huffman *v.* Click, 77 N. C. 57.

certain departments of the sciences, and ignore even in those departments the small proportion which the field of possible change bears to the large area of established truth. But, leaving this aside, we find that the objection is in itself inconsistent with accepted legal practices, and would if consistently applied exclude all testimony even on the stand from scientific witnesses. For if these works are rejected because they may not embody the latest results of science, what shall be said of specialist witnesses in general? Out of the hundreds of scientific experts who are this month testifying in courts of justice, how many are speaking from a thorough acquaintance with the latest researches in their subjects? For how many of them is it possible to maintain steady pace with the daily progress of science? How many are not testifying on information obtained at a medical or other technical school a decade or more ago, in the standard books of that day? It is true, where conflicting views are advanced and an expert cannot state his views to be founded on the most recent investigations, that his views are naturally entitled to inferior weight; but could it seriously occur to any one to exclude all experts from the stand, not because this or that one has in fact no acquaintance with the recent literature of his profession, but because many among the whole body *may* not possess such acquaintance? Yet after all, going back to the exaggeration involved, is the objection one of appreciable magnitude? "I will not sit here," once said Chief Justice Dallas, "and hear science reviled and the recorded researches of the medical world misrepresented as leading only to uncertainty." Is there in fact such a conflict of beliefs and theories as courts must take notice of, to the exclusion of these works? It is safe to say that for practical purposes, in legal controversy, the uncertain topics are the exception and not the rule. If we can imagine a proposition to exclude a given witness to an event because possibly some other person was present, who possibly would relate a different version, which possibly would be more correct, we shall have some analogy to the true force of this objection. In short, if witnesses had never contradicted each other and experts on the stand had never differed, it might be urged with some show of reason that writers of treatises are often not agreed. It is not to be wondered at under the circumstances that a guilty feeling of inconsistency sometimes arises, and, in the words of a learned editor of Professor Greenleaf's work,[3] "Courts manifest a consciousness of the want of principle upon which the rule excluding such testimony rests."

(3) Another objection sometimes raised is the danger of *confusing the jury* by technical passages without oral comment and simplification.[4] A number of answers to this will suggest themselves; it is enough to point out that, so far as it is an appreciable danger, the counsel may be trusted to protect themselves, where necessary, against this danger by calling also an expert to take the stand.

[3] Croswell's Greenleaf on Evidence, 15th ed., I. § 497, note 4.
[4] 1853, Ashworth *v.* Kittredge, 12 Cush. 195.

(4) Another objection, once made, is that the treatises *may be used unfairly*, by taking passages which are explained away or contradicted in other books or in other parts of the book.[5] Here, again, so far as the possibility is appreciable, the opposing counsel may be trusted to protect his client's interests, exactly as he does, by bringing to the stand one expert to oppose another, and with much less difficulty and expense.

All these objections, appearing in the beginning as the casual thoughts of individual judges in past and less liberal generations, were elevated to the rank of accepted reasons and given vogue in one or two treatises on Evidence,[6] and thence found their way into many judicial opinions of a later generation. But for this, it is probable that the true reason for the rule of exclusion would not have been obscured.

(5) There is also to be noticed, moreover, the original reason offered for exclusion by Chief Justice Tindal, in Collier *v.* Simpson,[7] the starting-point of the English decisions.[8] "Physic," he said, when asked by counsel why he could not read to the jury a medical book as well as a law book, "*depends more upon practice* than law does"; meaning apparently that though the principles of law are chiefly obtained from books, the truths of medicine are to be sought chiefly in the personal experience of physicians. It is almost needless to say that medical treatises cannot in these days be put on the shelf with the simple statement that medicine depends more on practice than the law does. The great storehouses of medical experience are the books and journals of the profession. "Medical evidence," it has been truly said,[9] "altogether is little else than a reference to authority." The argument of Chief Justice Tindal has not reappeared.

1. The Exception as Recognized

The grounds for recognizing the Exception, and its proper limitations if recognized, may be taken up in the light of the general considerations already mentioned for the other Hearsay Exceptions (*ante*, §§ 1421–1424).

§ 1691. **General Principle**: (1) **Necessity.** The necessity (*ante*, § 1421) seems palpable enough, if we examine carefully the results of the strict enforcement of the Hearsay rule. The ordinary expert witness, in perhaps the larger proportion of the topics upon which he may be questioned, has not a knowledge derived from personal observation. He virtually reproduces, literally or in substance, conclusions of others which he accepts on the

[5] 1885, Gallagher *v.* R. Co., 67 Cal. 16, 6 Pac. 869.

[6] Particularly by Dr. Wharton, Evidence, § 665.

[7] 5 C. & P. 73.

[8] There seems to have been no general rule before this time; though we meet with such incidents as the tilt in Cowper's Trial between Baron Hatsell and Dr. Crell (quoted *post*, § 1697), and the refusal of Abbott, C. J., in the Donnell poisoning trial, to listen to citations from Thenard's works, on the ground that "we cannot take the fact from a publication as related by a stranger." But even in Cowper's Trial, medical works were allowed to be quoted: 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1163 (Dr. Crell was allowed to cite Parey on Renunciations, an eminent surgeon's work, on the indicia of drowning).

[9] Edinburgh Med. & Surg. Journal, XIX, 480.

authority of the eminent names responsible for them. If, whenever this is discovered, we are to reject the evidence absolutely,[1] then on all such matters the only resource is to search for a qualified expert, who may or may not be available within the jurisdiction.[2] Even where such a person is legally procurable (all the chances being against it except in a few centres of population), the expense is frequently disproportionate. Costly litigation is the parasite of justice; and we pay too high a price when we refuse to accept our information from a competent source ready at hand. Moreover, there are certain matters upon which the conclusions of two or three leaders in the scientific world are always preëminently desirable; and it is highly unsatisfactory that, except in the region where they may happen to live, the opinions of world-famous investigators should have no standing of their own.[3] Whether such persons are legally unavailable, or whether it is merely a question of relative expense, the principle of necessity (*ante*, § 1421) is equally satisfied; and we should be permitted to avail ourselves of their testimony in the printed form in which it is most convenient.

The proper rule would be for the Court to allow the use of a printed treatise, approved and read aloud by a witness expert in that subject, unless in its discretion, considering all the circumstances, the author if available should be summoned.[4] In practice, the Courts which allow the use of learned treatises apparently do not impose any such condition.

§ 1692. **Same: (2) Trustworthiness.** Under the second general consideration for Hearsay exceptions (*ante*, § 1422), the question here is whether there are any circumstances attending the publication of a learned treatise which give a fair guarantee of trustworthiness. If we consider the circumstances that have been regarded as sufficient in the foregoing and the following Exceptions to the Hearsay rule, it must be concluded that the guarantee here is at least as satisfactory. (*a*) There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the Hearsay exceptions, namely, that the declarant should have "no motive to misrepresent." They may have a bias in favor of

§ 1691. [1] 1875, R. *v.* Taylor, 13 Cox Cr. 77, 78, Brett, J. ("a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present"); 1888, Soquet *v.* State, 72 Wis. 666, 40 N. W. 391; see the principle *ante*, § 687, as applied to medical witnesses on the stand.

[2] 1857, Stone, J., in Stoudenmeier *v.* Williamson, 29 Ala. 567: "If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits. . . . It is the boast of this age of advancing civilization that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the court-room? We think not."

[3] This thought was given expression in judicial language by Foster, J., in Dole *v.* Johnson, 50 N. H. 456 (1870): "We may have little doubt that a page from Youatt or Morrell [in this case] would be a safer guide for the jury than the opinion of such a witness as Mr. W."

[4] An example of the good sense and utility of such a rule, if it could be adopted, may be seen in Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904).

a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a lawsuit or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair. When an expert employed by an electric company using the alternating or the single current writes an essay to show that the alternating current is or is not more dangerous to human life than a single current, the probability of his bias is plain; but this is the exceptional case, and such an essay could be excluded, just as any Hearsay statement would be if such a powerful counter-motive were shown to exist. (*b*) The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results. The motive, in other words, is precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other Hearsay exceptions, namely, the unwelcome probability of a detection and exposure of errors (*ante*, § 1422). (*c*) Finally, the guarantees of accuracy, such as they are, at least are greater than those which accompany the testimony of so many expert witnesses on the stand. The abuses of expert testimony, arising from the fact that such witnesses are too often in effect paid to take a partisan view and are practically untrustworthy, are too well-known to repeat (*ante*, § 563). It must be admitted that those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants.[1]

It may be concluded, then, that there is in these cases a sufficient circumstantial guarantee of trustworthiness. The Court in each instance should in its discretion exclude writings which for one reason or another do not seem to be sufficiently worthy of trust.

§ 1693. **Jurisdictions in which the Exception is Recognized.** (1) On the foregoing grounds, the Exception has received recognition in at least two jurisdictions as a deduction from common-law principles.[1] Furthermore,

§ 1692. [1] Mr. Nathaniel Moak has emphasized this (1881; 24 Albany Law Journal 268).

§ 1693. [1] *Iowa:* 1848, Bowman *v.* Woods, 1 G. Greene 445; *Alabama:* 1857, Stoudenmeier *v.* Wilson, 29 Ala. 567; 1861, Merkle *v.* State, 37 Ala. 41; 1879, Bales *v.* State, 63 Ala. 38; the latest case vacillates; 1901, Timothy *v.* State, 130 Ala. 68, 30 So. 339 (medical-jurisprudence book, not admitted to prove experiments as to powder marks); 1906, Birmingham R. L. & P. Co. *v.* Moore, 148 Ala. 115, 42 So. 1024 (two books on surgery, admitted on a question concerning appendicitis).

In *Wisconsin*, the exception seemed once to be established; 1849, Luning *v.* State, 1 Chand. 185; 1872, Ripon *v.* Bittel, 30 Wis. 619 (admitted "as evidence, but only as having that force and authority which the opinion of learned and scientific men may give"). But by later decisions (*post*, § 1696) the Exception was overthrown. In Luning *v.* State, 2 Pinn. 286 (1849; second trial), a medical witness' answer was excluded because it appeared that it would have been based on reading and hearsay, not on personal knowledge; there was no ruling, as has sometimes been thought, excluding medical books.

in several jurisdictions (including one of the above two) a statute has established an Exception of similar import.[2] But, unfortunately, the legislators, in the original enactment of Iowa (copied in California and elsewhere), used language partially appropriate to the Exception for Reputation on Matters of General Interest (*ante*, §§ 1586, 1598, 1599); and by judicial construction, in some of these States, the legislative intent to establish an Exception of the present tenor has been defeated; so that the use of learned treatises in those jurisdictions is now allowable no further than as recognized at common law under the General Interest (Reputation) Exception (*ante*, § 1598) or under the partial concessions of the common law later to be noted (*post*, §§ 1697–1700).[3]

In the *Federal Courts*, a disposition to recognize it has been shown; 1897, Western Assur. Co. *v.* Mohlman Co., 28 C. C. A. 157, 83 Fed. 811 (Lacombe, J., allowing a civil engineer, called as an expert in construction, to read excerpts from scientific books in his testimony; "The rule [of exclusion] is not of universal application. It would be a reproach to the administration of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence. . . . Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the court, although available for every one else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned").

In modern *English* practice there appears no disposition to enforce the Hearsay rule pedantically as in the United States; a virtual exception is allowed; examples may be seen in Crippen's Trial, 1910, presided over by the Lord Chief Justice of England (ed. Filson Young, Notable English Trials Series, 1920, pp. 71, 143, 152).

[2] *Cal.* C. C. P. 1872, as amended 1874, § 1944, now § 1936 ("Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are 'prima facie' evidence of facts of general notoriety and interest"); the following statutes are identical with this: *Ida.* Comp. St. 1919, § 7961; *Ia.* Code 1897, § 4618, Rev. Code, § 7325; *Mont.* Rev. C. 1921, § 10575; *Nebr.* Rev. St. 1922, § 8852; *Or.* Laws 1920, § 781; *P. I.* C. C. P. 1901, § 320 (like Cal. C. C. P. § 1936); *P. R.* Rev. St. & C. 1911, § 1451 (like Cal. C. C. P. § 1936); *Utah:* Comp. L. 1917, § 7107. The following statute is more limited: S. Car. C. C. P. 1922, § 720 (where a question of sanity or the administration of poison or other article destructive to life is involved and expert testimony is admissible, "the medical or scientific works" shall be admissible "in addition to such expert testimony").

[3] *California:* 1822, People *v.* Wheeler, 60 Cal. 582 (Code § 1944 applies to matters of general interest only, and does not admit scientific books as such); 1885, Gallagher *v.* R. Co., 67 Cal. 16, 6 Pac. 869 (similar); 1888, People *v.* Goldenson, 76 Cal. 348, 19 Pac. 170; 1891, Lilley *v.* Parkinson, 91 Cal. 655, 27 Pac. 1091; 1904, Bailey *v.* Kreutzmann, 141 Cal. 519, 75 Pac. 104; *Iowa:* the decisions applied the statute as intended, for more than a generation: 1872, Brodhead *v.* Wiltse, 35 Ia. 429; 1878, Crawford *v.* Williams, 48 Ia. 249; 1887, Quackenbush *v.* R. Co., 73 Ia. 458, 461, 35 N. W. 523, *semble;* 1888, Worden *v.* R. Co., 76 Ia. 310, 314, 41 N. W. 26; 1893, Peck *v.* Hutchinson, 88 Ia. 320, 325 (Wells' Treatise on the Eye, admitted); then the California heresy was adopted: 1894, Burg *v.* R. Co., 90 Ia. 106, 114, 57 N. W. 680 (American Mechanical Dictionary, not admitted on the facts; Railway Age, not admitted to show tests of brakes); 1897, Union R. P. Co. *v.* Yates, 25 C. C. A. 103, 79 Fed. 584 (Iowa Code held to apply strictly to matters of

(2) A partial recognition of the principle of the Exception, at common law, is found in the admission in all jurisdictions of a few specific kinds of treatises or tables (noted *post*, §§ 1697–1700).

§ 1694. **Testimonial Qualifications; Production of Original.** (1) The treatise-writer must, like every other witness, be shown beforehand to be properly *qualified* to make statements upon the subject in hand.[1] This will require, as in other Hearsay exceptions (*ante*, § 1424), another witness who will testify to these qualifications, — which means here the summoning of any one in the profession, art, or trade of the writer and ascertaining from him the writer's standing as an authority. This removes the danger of an ignorant use of statements by writers of no standing; but it is merely the application of the general principle as to testimonial qualifications. It is done even in those jurisdictions (*post*, § 1637) where the Exception is recognized only in a fragmentary form.[2] Practically, also, it guards against the supposed danger, already adverted to, of allowing the jury to be confused by book-passages offered without explanation; for the expert who indorses the book can also be used to make explanations where desirable. It also forbids, of necessity, the loose and unsafe practice (*post*, § 1700), followed in some jurisdictions, of permitting counsel to read indiscriminately to the jury, as a part of his argument, extracts from scientific treatises, and furnishes the real reason why this is to be condemned.

(2) The rule of *production of the book itself* (*ante*, § 1179) also applies, where it is desired to employ a specific book; but this does not forbid asking the witness a general question as to the opinion of the profession.[3]

"general notoriety or interest"; a medical book treating of nervous shock, excluded); 1898, Bixby *v.* Bridge Co., 105 Ia. 293, 75 N. W. 182 (declining to allow the use of medical treatises; limiting the Code words "books of science" by the later clause "facts of general notoriety and interest"; distinguishing Bowman *v.* Woods, and repudiating the later cases; approving Gallagher *v.* R. Co., Cal.); 1900, Stewart *v.* Equit. M. L. Ass'n, 110 Ia. 528, 81 N. W. 782 (preceding case followed); 1900 State *v.* Petersen, 110 Ia. 647, 82 N. W. 329 (same); 1906, State *v.* Wilhite, 132 Ia. 226, 109 N. W. 730 (a standard medical dictionary is admissible for definitions, as distinguished from "the symptoms and cure of disease"); 1909, Bruggeman *v.* Illinois C. R. Co., 147 Ia. 187, 123 N. W. 1007 (books on air brakes, to show the time required for stopping, excluded); *Nebraska:* The same history here ensued: 1884, Sioux City & P. R. Co. *v.* Finlayson, 16 Nebr. 587, 20 N. W. 860 (Forney's "Catechism of a Locomotive," admitted); 1897, Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295 ("books of science or art" does not admit books of surgery, save under the exception of "general interest"); *South Carolina:* 1915, U. S. *v.* Perkins, D. C. E. D. S. C., 221 Fed. 109 (S. C. Code 1912, § 4007, permitting medical books to be read, held not available in a Federal Court).

§ 1694. [1] 1857, Stoudenmeier *v.* Williamson, 29 Ala. 567 (Stone, J.: "books admitted or proven to be standard works with that profession"). *Accord:* 1861, Merkle *v.* State, 37 Ala. 141; 1878, Crawford *v.* Williams, 48 Ia. 249 (proof required that a herd-book was recognized by cattle-breeders as correct).

[2] 1873, Rowley *v.* R. Co., L. R. 8 Ex. 227; 1845, Spalding *v.* Hedges, 2 Pa. St. 243 (gazetteer); 1886, Railroad Co. *v.* Ayres, 84 Tenn. 729 (mortality tables).

In the use of legal treatises and statute-books to prove *foreign law* a requirement that the book shall appear to be commonly accepted in the foreign jurisdiction as evidence of the law is usually made (*post*, § 1697).

[3] The principle was applied improperly in State *v.* Winter, 1887, 72 Ia. 627, 632, 34 N. W. 475, where the witness was not allowed to state the general consensus of medical authors. In Brodhead *v.* Wiltse, 1872, 35 Ia. 430, it was said that a physician might testify to the contents of a scientific book without producing it.

2. The Exception nominally Rejected, though in part Recognized

§ 1696. **Jurisdictions rejecting a General Exception.** The Exception, as already noted, is explicitly accepted in one or two jurisdictions only. In the others, the Exception, so far as it has been ruled upon, has been repudiated in general terms.[1] But even in these jurisdictions there are several forms in which it has been recognized partially; that is, a consistent application of principle would have resulted in the exclusion of certain things that are in fact received; and their reception is an implied recognition of the principle of the Exception in those classes of cases. These may now be examined.

§ 1697. **Partial Recognition**; (1) **Legal Treatises.** (*a*) The statements of *domestic law* made by writers of legal treatises have always been consulted as sources of information. In theory, to be sure, the real nature of the process has been blinked at. As the judges are supposed to know the law, the doctrines of judicial notice (*post*, § 2572) and of refreshing the judicial memory (*post*, § 2569) have served to obscure the real effect of a practice which one would hardly think of disputing.[1] The constant references, particularly in more recent times, to the statements of treatises and compilations of more or less authority indicate the inveteracy of the practice. The readiness with which the judges rely upon anonymous legal authors' statements, but reject

§ 1696. [1] Besides the cases cited *ante*, §§ 1690 and 1693, the following rulings repudiate it:

ENGLAND: 1844, R. *v.* Crouch, 1 Cox Cr. 94, Alderson, B.; 1856, Darby *v.* Ouseley, 1 H. & N. S, 12 (rejecting histories reciting the excommunication by Popes of heretical Sovereigns and other books of ecclesiastical affairs); 1874, R. *v.* Taylor, 13 Cox Cr. 78, Brett, J.

UNITED STATES: *Federal:* 1897, Davis *v.* U. S., 165 U. S. 373, 17 Sup. 360 ("what does medical science teach as to that?" excluded, at least in the trial Court's discretion); 1897, Union P. R. Co. *v.* Yates, 25 C. C. A. 103, 79 Fed. 584; *Colo.* 1912, Denver City T. Co. *v.* Gawley, 23 Colo. App. 332, 129 Pac. 258; *Ga.* 1895, Johnston *v.* R. Co., 95 Ga. 685, 687, 22 S. E. 694; *Ill.* 1883, North Chicago R. M. Co. *v.* Monka, 107 Ill. 341; 1884, Bloomington *v.* Schrock, 110 Ill. 221; *Ind.* 1885, Epps *v.* State, 102 Ind. 550, 1 N. E. 491; *Me.* 1848, Coolidge's Trial (Waterville), Me., Boston Daily Times' Rep. 32 (medical books not allowed to be read, "on the ground that the authors of those works were not under oath when they were written"; by Whitman, C. J., and Shipley and Wells, JJ.); *Mass.* 1873, Com. *v.* Sturtivant, 117 Mass. 139; 1876, Com. *v.* Brown, 121 Mass. 81; 1889, Com. *v.* Marzynski, 149 Mass. 72, 21 N. E. 228; *Mich.* 1888, People *v.* Vanderhoof, 71 Mich. 179, 39 N. W. 28; *N. H.* 1870, Dole *v.* Johnson, 50 N. H. 456; *N. J.* 1896, New Jersey Z. & I. Co. *v.* L. Z. & I. Co., 39 N. J. L. 189, 35 Atl. 915; 1921, Lamble *v.* State, — N. J. L. —, 114 Atl. 346 (quoting encyclopedia as to probability of identical finger-prints from different persons, held improper); *S. Dak.* 1897, State *v.* Sexton, 10 S. D. 127, 72 N. W. 84; 1901, Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002 (works on veterinary surgery, excluded); *Vt.* 1917, Baldwin *v.* Gaines, 92 Vt. 61, 102 Atl. 338 (surgical books); *Wis.* 1882, Stilling *v.* Thorp, 54 Wis. 534, 11 N. W. 906; 1888, Kreuziger *v.* R. Co., 73 Wis. 160, 40 N. W. 657.

§ 1697. [1] It was disputed, but immediate rebuke was given, by Lowell, J., in The Pawashick, 1872, 2 Low. 148 ("I believe it to be the true doctrine that the unwritten law of England may be proved in this court, not by experts only, but by text-writers of authority and by printed reports of adjudged cases; and written law may be proved by the printed copies and be construed with the aid of text-books as well as of experts. . . . Evidence is competent which consists only of books of acknowledged or ascertained authority. . . . The proposition that Abbott on Shipping and the regular reports of decisions of the courts and the various books cited as authority for the law in England cannot be read for this purpose here appears to me little less than absurd").

Whether counsel may read *legal treatises in argument to the jury* is a question of the propriety of interfering with the proper functions of the Court, and of the duty of the jury to accept the Court's statement of the law, and does not concern the present question; see State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

the most distinguished authors in natural science, is of course an inconsistency which baffles the layman and brings on the law the sneers of the representatives of other sciences when called to the witness stand.

(*b*) But when it has come to the use of treatises by writers upon *foreign law*, these subterfuges fail, and the judicial conscience has been obliged to acknowledge the true nature of the process as involving the reception of evidence. The propriety of accepting such evidence, after it is shown by testimony on the stand that the authors of the treatises are recognized in the foreign jurisdiction as competent authorities, has been frequently justified in judicial opinion:

1806, ELLENBOROUGH, L. C. J., in *Picton's Trial*, 30 How. St. Tr. 492: "The text-writers furnish us with their statement of the [foreign] law, and that would certainly be good evidence upon the same principle which renders histories admissible. . . . I shall therefore receive any book that purports to be a history of the common law of Spain."

1811, Sir *William Scott* (Lord STOWELL), in *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 81: "The authorities to which I shall have occasion to refer [for the law of Scotland] are of three classes: first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and, thirdly, the certified tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority."

1844, Lord DENMAN, in the *Sussex Peerage Case*, 11 Cl. & F. 113: "We have both the materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative. . . . Proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law, and this book truly states the law,' then you have the authority of the witness and of the book."

Accordingly, the propriety of receiving treatises thus shown competent may be said to be established.[2]

It is true that in some opinions this requirement of presentation through

[2] ENGLAND: 1806, Ellenborough, L. C. J., in Picton's Trial, 30 How. St. Tr. 483, 492, 511; 1822, Lacon *v.* Higgins, 3 Stark. 178, Dowl. & R. N. P. 42, Abbott, C. J., *semble;* 1836, Breadalbane *v.* Chandos, 2 Myl. & Cr. 727, 741; 1844, Baron de Bode's Case, 8 Q. B. 254, Lord Denman, C. J.; 1845, Nelson *v.* Bridport, 8 Beav. 529, Lord Langdale, M. R. (Sicilian and Roman compilations of codes and statutes and Sicilian law-treatises, certified as in use among the profession in Sicily); 1857, Bremer *v.* Freeman, 10 Moore P. C. 306, 363.

CANADA: 1884, Rice *v.* Gunn, 4 Ont. 589.

UNITED STATES: *Federal:* 1895, Hilton *v.* Guyot, 159 U. S. 113, 16 Sup. 139, 162 (the Court, mentioning treatises on foreign law, refers to their works "for evidence of authoritative declarations, legislative or judicial, of what the law is"); 1899, The Paquete Habana, 175 U. S. 677, 20 Sup. 290 (whether by international law coasting fishing-vessels were exempt from capture as prize; "the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat," admissible, "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is"; then consulting Ortolan, Calvo, and others); *Iowa:* 1903, Banco De Sonora *v.* Bankers' M. C. Co., — Ia. —, 95 N. W. 232 (Boucier's Law Dictionary, admitted as evidence of the age of majority by the law of Mexico); 1904, Banco de Sonora *v.* Bankers' M. C. Co., 124 Ia. 576, 100 N. W. 532 (similar to the prior ruling in this case); *New York:* 1836, Devenbagh *v.* Devenbagh, 5 Paige Ch. 554, 556, Walworth, C.

Contra: 1844, Alderson, B., in R. *v.* Crouch, 1 Cox Cr. 94; 1846, Perth Peerage Case, 2 H. L. C. 874.

an expert on the stand is taken as signifying that the foreign writer's statements merely become a part of the former's testimony, and the theory is kept up that the foreign writer is as such not accepted.[3] Yet in effect the book is taken, and the rule merely requires (and very properly) that the qualifications of the writer (*ante*, § 1694) shall first be shown in the ordinary way. But the fiction may well be abandoned. The daily use by judges of the foreign law-books in our libraries exposes its untruth. Goldsmith's Chinese traveller would smile to see the judge refuse to listen to a foreign treatise while on the bench and then retire to his chambers and take down the same book from the shelves to refresh his judicial memory. Certainly, the practice which allows the use of legal treatises, even domestic only, confesses the principle which admits learned treatises generally:

1699, *Spencer Cowper's Trial*, 13 How. St. Tr. 1163. Dr. *Crell:* "Now, my lord, I will give you the opinion of several ancient authors." Baron HATSELL: "Pray, doctor, tell us your own observations." Dr. *Crell:* "My lord, it must be reading, as well as a man's own experience, that will make any one a physician, for without the reading of books of that art, the art itself cannot be attained to. Besides, my lord, I conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men. Neither do I see why I should not quote the fathers of my profession in this case as well as you gentlemen of the long robe quote Coke upon Littleton in others."

1857, STONE, J., in *Stoudenmeier* v. *Williamson*, 29 Ala. 567: "We think that medical authors whose books are admitted or proved to be standard works with that profession ought to be received in evidence. . . . Are opinions derived from the perusal of books, and deposed to by witnesses, safer guides for the jury than the books themselves are? . . . We prove the existence of our law and its principles by reported cases and elementary writers. . . . Can that be a sound rule which in the determination of a question involved in one science allows to the trying body the light shed upon it by the writings of its standard authors and withholds such lights from controversies respecting all other sciences? We think not."

(*c*) The use of printed *books of foreign statutes* or *decisions* commonly accepted in the foreign jurisdiction as evidence of the statutes is referable not to the present principle, but to another (*post*, § 1703), because they are not learned treatises but merely copies of decisions or statutes. These are also and usually admitted under the principle of Official Statements (*ante*, § 1684) as being copies authorized by law to be made and given out.[4]

§ 1698. **Same: (2) Life Tables, Almanacs, Sundry Scientific Tables.** It has long been unquestioned that standard *tables of mortality*[1] (used in com-

[3] Lord Campbell, in Sussex Peerage Case, *supra* ("You ask the witness what the law is. He may from his recollection, or on producing and referring to books, say what it is, or that it is found correctly stated in such a book").

[4] The question whether a legal expert witness may testify to the terms of a *foreign statute* without *producing a copy* of it involves the rule of Preference for a Copy over Recollection-testimony, and has been already dealt with (*ante*, § 1271). The question whether a particular witness has sufficient knowledge and experience to testify to foreign unwritten law has been examined under the head of Testimonial Qualifications (*ante*, §§ 564, 690).

§ 1698. [1] ENGLAND: 1873, Rowley *v.* R. Co., L. R. 8 Exch. 226.

UNITED STATES: *Federal:* 1886, Vicksburg R. Co. *v.* Putnam, 118 U. S. 554, 7 Sup. 1; 1921, United Verde Ext. M. Co. *v.* Koso, 9th C. C. A., 273 Fed. 369 (mortality tables admitted, even where plaintiff's occupation was

puting annuities, life-insurance sums, dower, and damages for the loss of life), and *almanacs* [2] are admissible in evidence. It is doubtful whether a general

extra-hazardous); 1921, Phelps Dodge Co. *v.* Guerrero, 9th C. C. A., 273 Fed. 415; *Alabama:* 1893, Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 170, 11 So. 886 (American tables); *Arkansas:* 1897, Arkansas M. R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550; *California:* 1893, Townsend *v.* Briggs, 99 Cal. 481, 484, 34 Pac. 116 (standard tables); 1902, Keast *v.* Santa Ysabel G. M. Co., 136 Cal. 256, 68 Pac. 771 ("McCarty's Statistician and Economist," containing Farr's table, admitted; "the Court may or may not require such preliminary proof" of standard acceptance, according to its judgment of the need therefor); *Colorado:* Comp. St. 1921, § 6536 (mortuary table given in the statute, made admissible); *Georgia:* 1879, Central R. Co. *v.* Richards, 62 Ga. 307; 1892, Richmond & D. R. Co. *v.* Garner, 91 Ga. 27, 16 S. E. 110 (mortality and annuity tables); 1894, Columbus *v.* Sims, 94 Ga. 483, 20 S. E. 332; 1896, Macon, D. & S. R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460 (admissible, but here improperly used); 1902, Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74 (Carlisle tables are admissible without prior testimony to their recognition as standard tables); *Illinois:* 1895, Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619; 1907, Calvert *v.* Springfield Electric L. & P. Co., 231 Ill. 290, 83 N. E. 185 (Wigglesworth Tables); 1909, Winn *v.* Cleveland C. C. & St. L. R. Co., 239 Ill. 132, 87 N. E. 954 (Wigglesworth Tables admitted); 1911, Marshall *v.* Marshall, 252 Ill. 568, N. E. 907 (Carlisle and other tables); *Indiana:* 1906, Pittsburgh C. C. & St. L. R. Co. *v.* Lightheiser, 168 Ind. 438, 78 N. E. 1033 (Carlisle Tables admitted); *Iowa:* 1865, Donaldson *v.* R. Co., 18 Ia. 291; 1868, McDonald *v.* R. Co., 26 Ia. 140; 1883, Coates *v.* R. Co., 62 Ia. 491, 17 N. W. 760; 1888, Worden *v.* R. Co., 76 Ia. 314, 41 N. W. 26; 1889, Gorman *v.* R. Co., 78 Ia. 509, 43 N. W. 303 (tables in a cyclopedia, admitted); 1891, Seagel *v.* R. Co., 83 Ia. 380, 49 N. W. 990 (same); 1897, Krueger *v.* Sylvester, 100 Ia. 647, 69 N. W. 1059; 1902, Pearl *v.* R. Co., 115 Ia. 535, 88 N. W. 1078 (tables "generally accepted as standard authority," receivable); 1904, Knott *v.* Peterson, 125 Ia. 404, 101 N. W. 173; 1907, Clark *v.* Van Vleck, 135 Ia. 194, 112 N. W. 648 (tables published in the Code Supplement of 1902, admitted); 1909, Peterson *v.* Brackey, 143 Ia. 75, 119 N. W. 967; 1913, Scott *v.* Chicago R. I. & P. R. Co., 160 Ia. 306, 141 N. W. 1065; *Kansas:* 1901, Atchison T. & S. F. R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603; *Kentucky:* 1879, Lancaster *v.* Lancaster's Trustees, 78 Ky. 200 (dower tables); 1897, Louisville & N. R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852; 1905, Illinois C. R. Co. *v.* Hauchins, 121 Ky. 526, 89 S. W. 530 (American Mortality Table, admitted); 1920, Louisville & N. R. Co. *v.* Scott's Adm'r, 188 Ky. 99, 220 S. W. 1066 (admissible even where the party is physically not normal); *Massachusetts:* 1907, Banks *v.* Braman, 195 Mass. 97, 80 N. E. 799 (a certain insurance table, not shown to be standard or recognized, not admitted); *Michigan:* 1895, Nelson *v.* R. Co., 104 Mich. 582, 62 N. W. 993, *semble*; *Missouri:* 1892, O'Mellia *v.* R. Co., 115 Mo. 205, 222; *Montana:* 1907, Stephens *v.* Elliott, 36 Mont. 92, 92 Pac. 45; *Nebraska:* 1894, Friend *v.* Ingersoll, 39 Nebr. 717, 724, 58 N. W. 281 (Carlisle tables); 1905, Horst *v.* Lewis, 71 Nebr. 365, 103 N. W. 460; *New Jersey:* 1898, Camden & A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634 (Carlisle or other approved table admissible, when properly authenticated); *New York:* 1874, Schell *v.* Plumb, 55 N. Y. 598; 1876, Sauter *v.* R. Co., 66 N. Y. 54; 1879, People *v.* Life Ins. Co., 78 N. Y. 128; *North Carolina:* Con. St. 1919, § 1230 (specific mortuary table adopted by statute and made admissible); *North Dakota:* Comp. L. 1913, § 7922 (Carlisle tables of mortality, admissible to prove duration of life); *Pennsylvania:* 1892, Steinbrunner *v.* R. Co., 146 Pa. 504, 515, 23 Atl. 239 (Carlisle tables); 1896, Campbell *v.* York, 172 Pa. 205, 33 Atl. 879; 1901, McKenna *v.* Gas Co., 198 Pa. 31, 47 Atl. 990 (testimony from a table based on unspecified conditions, excluded); *Rhode Island:* 1904, Reynolds *v.* Narragansett E. L. Co., 26 R. I. 457, 59 Atl. 393 (standard annuity tables, admitted); *South Carolina:* C. C. P. 1922, § 727 (mortuary table adopted by law and made admissible); 1905, Hyland *v.* Southern B. T. & T. Co., 70 S. C. 315, 49 S. E. 879 (statute applied); *Tennessee:* 1886, Railroad Co. *v.* Ayres, 84 Tenn. 729; *Vermont:* 1849, Mills *v.* Catlin, 22 Vt. 107; *Washington:* 1912, Richardson *v.* Spokane, 67 Wash. 621, 122 Pac. 330; *Wisconsin:* 1887, McKeigne *v.* Janesville, 68 Wis. 58, 31 N. W. 298; 1899, Crouse *v.* R. Co., 102 Wis. 196, 78 N. W. 446.

Distinguish the exclusion of such tables on grounds of substantive law, — as where the *expectation of life is immaterial* on the issues, or where a contract of insurance has embodied a specific reckoning; the following cases illustrate this: 1880, Mutual Life Ins. Co. *v.* Bratt, 55 Md. 200, 212; 1899, Kerrigan *v.* R. Co., 194 Pa. 98, 44 Atl. 1069; 1882, Berg *v.* R. Co., 50 Wis. 427, 7 N. W. 347; 1886, Mulcairns *v.* Janesville, 67 Wis. 37, 29 N. W. 565.

[2] *Eng.* 1703, R. *v.* Dyer, 6 Mod. 41; Brough *v.* Perkins, 6 Mod. 81; 1739, Theory of Evidence, c. II, pl. 104 ("The almanack is a sufficient evidence to prove a day Sunday"); 1860, Tutton *v.* Darke, 5 H. & N. 649, per Pollock, C. B.; the history of the English

rule in favor of standard tables of *scientific calculations* of all sorts can be regarded as established; but rulings tending in that direction are found.[3]

These almanacs and mortality tables have been explained to be admissible because they are founded on "certain and constant data" and deal with the "exact sciences." [4] But the notion that every collection of figures savors of the exact sciences is sufficiently discredited at the present day. In fact, these particular tables are among the least trustworthy of scientific efforts. The first mortality table appeared about 1690,[5] and was crude in comparison with those of to-day. The errors in tables even of the 1800s have been numerous and radical.[6] The simple fact is that the admission of a certain class of statistics was demanded by custom and practical convenience, and the judicial mind relented. Thus, a system of mere probabilities and working averages is not found wanting in qualities entitling it to be placed before the jury; yet the substance of other collections of data, possessing at least equal inductive value, made with equal or greater thoroughness, sifted, arranged, and stated by trained observers, is by the same discriminating authority relegated to the limbo of hearsay and other judicial abominations. The error has lain, not in looking too leniently upon mortality tables, but in a misconception of the true qualities of other scientific work.

§ 1699. **Same: (3) Dictionaries, Histories, and General Literature.** Within narrow but undefined limits the use is allowable of *dictionaries* and works of *general literature*, to evidence literary usage and definitions, and of historical works, to prove facts of general history:

1856, POLLOCK, C. B., in *Darby* v. *Ouseley*, 1 H. & N. 1, 8: "Standard authors may be referred to for such a purpose [to show the literary significance of parodies] or as showing the opinions of eminent men on particular subjects, but not to prove facts. . . . In this

usage is fully examined in Thayer, Preliminary Treatise on Evidence, 292.

U. S. 1857, Allman *v.* Owen, 31 Ala. 141 1882, People *v.* Chee Kee, 61 Cal. 404; 1879, State *v.* Morris, 47 Conn. 180; Ga. Code 1910, § 5755 (Stern's U. S. Calendar and Stafford's Office Calendar, admissible to prove dates); Acts 1897, p. 87, Van Epps' Suppl. § 6641 (Stafford's Office Calendar, to be "legal evidence, covering all dates between the years 1490 and 2000, both old and new style"); 1880, Munshower *v.* State, 55 Md. 24; 1887, Case *v.* Perew, 46 Hun N. Y. 62; 1889, Wilson *v.* Van Leer, 127 Pa. 378, 17 Atl. 1097.

Distinguish the *judicial notice* of a *date*, etc., (*post*, § 2582).

[3] 1897, Western Assur. Co. *v.* Mohlmann Co., 28 C. C. A. 157, 83 Fed. 811 (engineering tables; quoted *ante*, § 1693); 1885, Gallagher *v.* R. Co., 67 Cal. 16, 6 Pac. 869, *semble* (tables of weights, currency, interest, etc., admissible); 1896, Hatcher *v.* Dunn, — Ia. —, 66 N. W. 905 (not put upon this ground; a thermometer used in gauging oils, admitted); 1867, Payson *v.* Everett, 12 Minn. 219 ("bank-note detectors," excluded); 1911, Lynes *v.* Northern Pacific R. Co., 43 Mont. 317, 117 Pac. 81 (mathematical tables showing the respective distances at which trains could be stopped by air-brakes, held admissible); 1887, Garwood *v.* R. Co., 45 Hun N. Y. 129 (millwrights' tables, admissible); 1901, Cherry Point Fish Co. *v.* Nelson, 25 Wash. 558, 66 Pac. 55 (U. S. government tide-tables, prepared for Puget Sound, admitted).

For *commercial tables*, price-lists, horse-pedigrees, etc., see *post*, §§ 1704, 1706.

For *official tables of interest*, etc., see *ante*, § 1672.

For *scientific* instruments used by witnesses, see *ante*, § 665.

[4] Wharton, Evidence, § 667.

[5] 3 Bland's Ch. 227; Scratchley, Life Assurance, 2.

[6] Scratchley, id., 3–6; Blayney, Life Assurance, 96, 98. See a notable one described in Porter's Progress of the Nation (English annuities), and others in Jevons' Philosophy of Science, I, 244.

case the defendant's counsel proposed to read certain specific [church] canons, not as matters of speculative opinion, . . . but as matters of fact."

(*a*) As to *dictionaries* and the like, a counsel's citation of passages to indicate word-usage will sometimes not involve a hearsay question, *i. e.* the passage is not taken for its assertive value; the usage of authors is itself the fact in issue (*post*, § 1770).[1] But there may well be a hearsay question, for example, if Dr. Johnson were quoted as stating the incorrectness of an etymology or the meaning of a word in his time. It cannot be said what limits Courts would draw in such cases; but it is certain that they resort freely to dictionaries for definitions of the meaning of words, even where the scope of that meaning is one of the disputed issues of the case, and clearly they thus take testimony from the learned compilers of these treatises.[2]

(*b*) As to *historical* and *encyclopedic works*, most questions are disposed of usually from the point of view of Judicial Notice (*post*, § 2565), *i. e.* the Court will or will not dispense with evidence of certain notorious facts; while the Exception in favor of Ancient Reputation on Matters of General

§ 1699. [1] The following instance illustrates the difficulty of drawing the line: 1875, Tilton *v.* Beecher, N. Y., Official Report, III, 993 (Mr. Beach quoted from Newman and others, in arguing for the plaintiff that a sincere belief in the righteousness of a lie on some occasions is a possible thing in professors of religion).

The most remarkable and entertaining instance of reference to scientific and general literature as evidencing the meaning of words is the case of Maurice *v.* Judd, N. Y. City, 1818, 3 Amer. St. Tr. 603, 613. This was an action by an official gauger for a penalty imposed under N. Y. St. Mar. 31, 1818, for dealing in "fish oil" not inspected; the defendant's oil was whale oil, and the question was whether "fish" included whales. The defendant called Dr. Samuel Mitchill, the leading American scientist of the day, a professor in Columbia College, and founder of the Lyceum of Natural History, a man of prodigious learning in the field of natural science (see E. F. Smith's "Samuel Latham Mitchill, a Father in American Chemistry," N. Y., Columbia Univ., 1922). A mighty contest of argument then ensued between Dr. Mitchill on the stand and counsel for the complainant, Mr. Sampson, in which the world's literature was ransacked, beginning with the Book of Genesis and ranging through Pliny, Newton, Linnaeus, Cuvier, Lamarck, and less known authors; such a debate, no doubt, was never listened to in a court-room before or since, and must have been both astounding and amusing.

For *quotations* by counsel to show *literary usage*, see *post*, § 1807. For quotation of other people's utterances to show *moral* or *political standards* of action, see *ante*, § 461.

[2] The following cases will suffice to illustrate the practice: ENGLAND: 1789, Answer of the Judges to the House of Lords, 22 How. St. Tr. 302 ("Judges can collect the intrinsic sense and meaning of a paper in the same manner as other readers do; and they can resort to grammars and glossaries, if they want such assistance").

UNITED STATES: *Federal:* 1893, Nix *v.* Hedden, 149 U. S. 304, 13 Sup. 881 (dictionaries resorted to for defining "fruit" and "vegetables"); 1893, Mutual Ben. L. Ins. Co. *v.* Robison, 19 U. S. App. 266, 272, 7 C. C. A. 444, 58 Fed. 723 (to determine what "spitting of blood" was, Quain's Dictionary of Medicine and the Century Dictionary were cited); 1898, Koechl *v.* U. S., 28 C. C. A. 458, 84 Fed. 448 (dictionaries used to define "vaccine"); 1913, Merriam Co. *v.* Syndicate Pub. Co., 2d C. C. A., 207 Fed. 515 (a dictionary — author's prefatory recital of the sources used by him, admitted; sensible opinion by Hand, D. J., approved in the C. C. A.); *Alabama:* 1892, Dantzler *v.* D. C. & I. Co., 101 Ala. 309, 314, 14 So. 10 (various dictionaries quoted); 1896, Cook *v.* State, 110 Ala. 40, 20 So. 360 (definitions taken from Webster's International Dictionary and Century Dictionary); *California:* 1885, Gallagher *v.* R. Co., 67 Cal. 16, 6 Pac. 869 (meaning of words and allusions in ordinary dictionaries and authenticated books of general literary history, allowable); *Connecticut:* 1897, State *v.* Main, 69 Conn. 123 37 Atl. 80 (definitions taken from Century Dictionary and Webster's International Dictionary); *Illinois:* 1895, Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1003 (Webster's Dictionary, for a definition); *Virginia:* 1897, Kimball *v.* Carter, 95 Va. 77, 27 S. E. 823 (Webster and Worcester referred to).

Interest (*ante*, §§ 1586, 1598) will admit many treatises. Apart from these two principles, it is doubtful where there is any general exception in favor of works of history.[3]

§ 1700. **Same: (4) Sundry Instances; Quotation of Books by an Expert; Counsel's Use in Cross-Examination or in Contradiction; Counsel Reading to the Jury; Judicial Reference to Authorities.** There are also to be noted sundry instances in which a few Courts have seen fit to allow further infringements of the principle.

(*a*) The *expert witness* is by a few Courts allowed to *cite the writers* of his profession, either specifically by quotation, or generally by referring to professional opinion as corroborating his views.[1]

(*b*) It has been in some Courts held that counsel *on cross-examination*, may, for discrediting purposes, read a passage from a professional treatise as opposing the statement of an expert on the stand, or ask whether a contradictory opinion has been laid down by others.[2] But this is generally

[3] 1856, Darby *v.* Ouseley, 1 H. & N. 12 (the fact that Popes have excommunicated sovereigns; histories resorted to); 1909, In re Najour, C. C. N. D. Ga., 174 Fed. 735 (Keane's The World's People, quoted to prove the classification of world races, in a naturalization case); 1862, Charlotte *v.* Chouteau, 33 Mo. 194, 201 (Garner's History of Canada read); 1892, Steinbrunner *v.* R. Co., 146 Pa. 504, 515, 23 Atl. 239 (Encyclopaedia Britannica quoted to show the mode of preparing life-tables); 1902, Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660 ("works of history and church records and journals," held admissible, under Rev. St. § 3400, cited *ante*, § 1693, to show the meaning of "sealing" in the Mormon church).

In Moore's Trial (N. Y. 1824), 13 Amer. St. Tr. 189, 191, being a charge of assault in an affray between Orangemen and Catholics on the anniversary of the Battle of the Boyne, will be found an interesting colloquy between two celebrated counsel, Thomas Addis Emmet and William Sampson, arising over an offer to read "Plowden's History of Ireland."

§ 1700. [1] 1921, Cochran *v.* Gritman, — Ida. —, 203 Pac. 289 (counsel allowed to read medical authorities stated by expert witnesses' answers to be standard authorities); 1851, Carter *v.* State, 2 Ind. 619; 1886, State *v.* Baldwin, 36 Kan. 17, 12 Pac. 318; 1882, Pinney *v.* Cahill, 48 Mich. 586, 12 N. W. 862, *semble;* 1903, Scott *v.* R. Co., 43 Or. 26, 72 Pac. 594 (an engineer allowed to name the authors on whom he relied; whether he could read excerpts, not decided); 1836, Earl's Trial, Pa., 36 (reading or quotation by a medical witness, allowed).

Contra: cases cited *ante*, § 1693, n. 3, § 1696.

Yet in Michigan direct quotation seems to be not allowed in later cases: 1884, People *v.* Millard, 53 Mich. 76, 18 N.W. 562; 1891, Fox *v.* Peninsular Works, 84 Mich. 681, 48 N. W. 203. But this must be distinguished from the question of the sufficiency of the witness' *qualifications as based on books only* (*ante*, § 687), for in theory we may refuse to let him state the effect of professional opinion, and yet may admit his own opinion though it is based solely on the reading of professional books.

So, too, must be distinguished the reading of a book as authority and the use of its expressions or its diagrams, by way of *illustrations* merely: 1870, Ordway *v.* Haynes, 50 N. H. 164. Compare § 790, *ante*.

[2] 1825, Gardner Peerage Case, LeMarchant's Rep. 22 ("Do you not know it was the opinion of Dr. Hunter that, etc.", allowed on cross-examination); 1890, Brownell *v.* Black, 31 N. Br. 594 (good opinion by Tuck, J.); 1885, Hess *v.* Lowery, 122 Ind. 233, 23 N. E. 156; 1896, Louisville N. A. & C. R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584; 1898 Williams *v.* Nally, — Ky. — 46 S. W. 874; 1913, Travelers' Ins. Co. *v.* Davies, 152 Ky. 600, 153 S. W. 956 (following Williams *v.* Nally); 1913, Eckels & S. I. M. Co. *v.* Cornell E. Co., 119 Md. 107, 86 Atl. 38 (asking an expert whether he would adhere to his opinion if a writer in a certain article stated the contrary, but not showing the article, though it was at hand; held that counsel not having objected to the question, could not inspect the article; clearly unsound; the method of the cross-examiner was capable of being a mere lying insinuation that the article did contradict the expert; and the only fair course was to compel counsel to read it or to let the opposite counsel inspect it to discover the trick if there was one); 1920, Schumaker *v.* Murray Hospital, 58 Mont. 457, 193 Pac. 397 (on examination in chief, medical text-books cannot be read from; otherwise on cross-examination, to test knowledge or to discredit reference to the books' authority); 1921, State *v.* Bess, — Mont. —, 199 Pac. 426

repudiated.[3] There is here, however, a legitimate use, *i. e.* where a witness has been allowed to refer to a specific treatise (or to treatises generally) as corroborating him, the treatise may be read to show that it does not contain such corroboration, on the principle (*ante*, § 1000) of discrediting a witness by showing misstatements on a material point. This orthodox purpose, as expressly distinguished from the indirect introduction of the books on their own credit (as above noted), is fully recognized:[4]

1882, GRAVES, C. J., in *Pinney* v. *Cahill*, 48 Mich. 587, 12 N. W. 862: "It was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it."

(opposing counsel having questioned an expert as to the views of a treatise, under the rule of Schumaker *v.* Hospital, *supra*, the calling counsel was allowed to read the whole of the passage and ask about it); 1909, MacDonald *v.* Metropolitan St. R. Co., 219 Mo. 468, 118 S. W. 78 (the cross-examiner may frame questions in the language of books held in his hand, and ask the witness whether he agrees to that view); 1873, State *v.* Wood, 53 N. H. 495; 1914, Kerston *v.* Great Northern R. Co., 28 N. D. 3, 147 N. W. 787 (whether or not certain medical writers sustained the witness, the books being shown him, allowed); 1895, Byers *v.* R. Co., 94 Tenn. 569, 29 S. W. 128; 1900, Sale *v.* Eichberg, — Tenn. —, 59 S. W. 1020 (cross-examination "to test the experience of the witness and his familiarity with the leading authorities," allowable); 1901, Clukey *v.* Electric Co., 27 Wash. 70, 67 Pac. 379.

[3] See the cases cited in the next note.

[4] Some of the following cases merely recognize this use, others merely repudiate the above-mentioned use, and others do both:

CANADA: 1856, Brown *v.* Sheppard, 13 U. C. Q. B. 178; 1914, R. *v.* Anderson, 16 D. L. R. 203, Alta. (cross-examination to a medical text-book, allowable to ascertain the witness' agreement or disagreement with other person's opinions, but not so as "practically to give in evidence opinions of absent authors at variance with those of the witness"); 1918, R. *v.* Neigel, 39 D. L. R. 154 (murder, R. *v.* Anderson affirmed).

UNITED STATES: *Colorado:* 1912, Denver City T. Co. *v.* Gawley, 23 Colo. App. 332, 129 Pac. 258 (a physician may not on cross-examination be asked if he agrees with the view of a certain other not cited by him); *Florida:* 1899, Eggart *v.* State, 40 Fla. 527, 25 So. 144 (abortion; defendant testified to having read in U. S. Dispensatory that cotton-root extract was only an emmenagogue, not an abortifacient; U. S. Dispensatory read to contradict him); *Idaho:* 1915, Osborn *v.* Cary, 28 Ida. 89, 152 Pac. 473 (reading to an expert and asking as to his agreement or dissent, allowed); *Illinois:* 1878, Connecticut M. L. Inc. Co. *v.* Ellis, 89 Ill. 519; 1884, Bloomington *v.* Schrock, 110 Ill. 222; 1907, Chicago Union T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816 (Bloomington *v.* Schrock followed); 1914, Ullrich *v.* Chicago City R. Co. 265 Ill. 338, 106 N. E. 828 (a cross-examination which asks the expert whether he is familiar with specified books and implies that he is contradicted by the statements made in those books, held improper; Bloomington *v.* Schrock followed and Chicago Union T. Co. *v.* Ertrachter distinguished); 1917, Wilcox *v.* International Harvester Co., 278 Ill. 465, 116 N. E. 151 (injury by lead-poisoning; scientific books allowed to be read to contradict a witness citing them); 1918, Doyle *v.* Wilcockson, 184 Ia. 757, 169 N. W. 241 (cross-examination to a medical text-book, held improper); *Iowa:* 1904, Cronk *v.* Wabash R. Co., 123 Ia. 349, 98 N. W. 884; 1905, State *v.* Thompson, 127 Ia. 440, 103 N. W. 377; 1907, State *v.* Blackburn, — Ia. —, 110 N. W. 275 (cross-examination to books stated by the witness to be standard authorities, allowed); 1908, State *v.* Blackburn, 136 Ia. 743, 114 N. W. 531 (a cross-examination of a medical man held improper, in which the question continually assumed that universal professional opinion was contrary to his); *Kentucky:* 1901, Clark *v.* Com., 111 Ky. 443, 63 S. W. 740 ("otherwise, an ignoramus in the profession might by an assertion of learning declare the most absurd theories to be the teachings of the science"; contradiction allowable either by cross-examination or by reading the book); 1906, Harper *v.* Weikel, — Ky. —, 89 S. W. 1125; *Maryland:* 1873, Davis *v.* State, 38 Md. 36; *Massachusetts:* 1911, Com. *v.* Jordan, 207 Mass. 259, 93 N. E. 809 (whether he would change his opinion if Professor B. said the contrary, not allowed); 1911, Com. *v.* Phelps, 210 Mass. 109, 96 N. E. 69 (reading from another expert to contradict the expert testifying, excluded on mixed grounds); 1912, Allen *v.* Boston Elevated R. Co., 212 Mass. 191, 98 N. E. 618 (similar); *Michigan:* 1883, Marshall *v.* Brown, 50 Mich. 150, 15 N. W. 55; 1888, People *v.* Vanderhoof,

(*c*) That *counsel* may *read to the jury* learned treatises is regarded as allowable in one jurisdiction at least;[5] in effect, the treatise is thus used evidentially. In a few jurisdictions a hazy distinction is made between their use in "illustration" and their use as evidence, the former being sanctioned.[6] But the general opinion discountenances any such uses.[7]

(*d*) Finally (and apart from the use, already referred to, of literary works and dictionaries) there is often found an open and deliberate *citation by the Court* itself to encyclopedias, medical works, and the like, as giving a foundation of fact for subjects involved in their decisions.[8] Of course the incon-

71 Mich. 179, 39 N. W. 28; 1897, Hall *v.* Murdock, 114 Mich. 233, 72 N. Y. 150 (excluded, where the counsel read extensive passages, under guise of cross-examination); 1913, In re Dubois, 164 Mich. 8, 128 N. W. 1092 (like Hall *v.* Murdock, *supra*); 1916, Sykes *v.* Portland, 193 Mich. 86, 159 N. W. 325 (certain cross-examination to medical works in general, held improper); *Montana:* cases cited *supra*, n. 2; *Nebraska:* 1922, Oliverius *v.* Wicks, — Nebr. —, 187 N. W. 73 (appendicitis caused by assault and battery; quotation of medical books on cross-examination to contradict a witness citing medical authority in support, allowed); *New Jersey:* 1896, New Jersey Zinc & I. Co. *v.* L. Z. & I. Co., 59 N. J. L. 189, 35 Atl. 915; 1914, State *v.* MacRorie, 86 N. J. L. 401, 92 Atl. 578 (reading statements from a book on cross-examination, not allowed); *North Carolina:* 1902, Butler *v.* R. Co., 130 N. C. 15, 40 S. E. 770; 1916, Tilgham *v.* Seaboard Air Line R. Co., 171 N. C. 652, 89 S. E. 71 (cross-examination to the views of authorities not already cited by the witness, held not allowable); 1917, State *v.* Summers, 173 N. C. 775, 92 S. E. 328 (cross-examination by reading a contradictory book, not allowed); *North Dakota:* 1914, State *v.* Brunette, 28 N. D. 539, 150 N. W. 271 (usable only in the manner mentioned above in the text); *South Carolina:* 1904, Mitchell *v.* Leech, 69 S. C. 413, 48 S. E. 290; *Vermont:* 1917, Baldwin *v.* Gaines, 92 Vt. 61, 102 Atl. 338 (expert contradicted by producing the books cited by him); *Washington:* 1903, Stone *v.* Seattle, 33 Wash. 644, 74 Pac. 808; *Wisconsin:* 1872, Ripon *v.* Bittel, 30 Wis. 619; 1882, Knoll *v.* State, 55 Wis. 256, 12 N. W. 369; 1919, Bell *v.* Milwaukee E. R. & L. Co., 169 Wis. 408, 172 N. W. 791 (medical witness not allowed to be asked whether he has read a certain passage read aloud from a named author).

[5] 1878, State *v.* Hoyt, 46 Conn. 337 (conceded on local precedent only); 1899, State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (medical works may be read in the trial Court's discretion only).

[6] 1853, Legg *v.* Drake, 1 Oh. St. 288; 1857, Wade *v.* DeWitt, 20 Tex. 400; 1854, Cory *v.* Silcox, 6 Ind. 40 (Hovey, J.: "Reason is neither more nor less than reason because it happens to be read from a book"); 1872, Harvey *v.* State, 40 Ind. 518; 1882, Baldwin *v.* Bricker, 86 Ind. 223 (allowing it "only for the mere purposes of illustration and never as statements of fact or as the expressions of opinion, . . . concerning the particular case in bearing or cases of a like character"); 1893, State *v.* O'Neil, 51 Kan. 651, 674, 33 Pac. 287 (not allowed except to illustrate a process of reasoning).

In Illinois it has been said that they may be read as showing "theories," but not as evidence: 1868, Yoe *v.* People, 49 Ill. 412.

[7] 1844, R. *v.* Crouch, 1 Cox Cr. 94; 1875, R. *v.* Taylor, 13 Cox Cr. 77, 78, Brett, J.; 1882, People *v.* Wheeler, 60 Cal. 4; 1904, Quattlebaum *v.* State, 119 Ga. 433, 46 S. E. 677; 1853, Ashworth *v.* Kittredge, 12 Cush. Mass. 195; 1854, Com. *v.* Wilson, 1 Gray Mass. 338; 1857, Washburn *v.* Cuddihy, 8 Gray 431; 1882, People *v.* Hall, 48 Mich. 490, 12 N. W. 665; 1883, Marshall *v.* Brown, 50 Mich. 150, 15 N. W. 55; 1884, People *v.* Millard, 53 Mich. 77, 18 N. W. 562; 1854, Melvin *v.* Easly, 1 Jones L., N. Y. 388; 1877, Huffman *v.* Click, 77 N. C. 56; 1893, State *v.* Rogers, 112 N. C. 874, 877, 17 S. E. 297; 1895, Byers *v.* R. Co., 94 Tenn. 350, 29 S. W. 129, *semble;* 1883, Boyle *v.* State, 57 Wis. 480, 15 N. W. 827.

Compare the general rule for *counsel's argument* (*post*, § 1806).

[8] The following are some illustrations: 1905, Jacobson *v.* Massachusetts, 197 U. S. 11, 25 Sup. 358 (cyclopedias quoted on the experience of foreign countries as to vaccination against smallpox); Sinnott *v.* Colombet, 107 Cal. 187, 40 Pac. 329 (to determine the meaning of "kindergarten," citing Compayre's History of Pedagogy, Payne's translation, and Sonnenschein's Cyclopedia of Education); 1857, Lumpkin, J., in Smith *v.* State, 23 Ga. 297, 306 (citing Dr. Gooch's Lectures on Midwifery); 1868, Cooley, C. J., in Garbutt *v.* People, 17 Mich. 9, 17 (citing works on medical jurisprudence as to the physiological effect of insanity); 1897, Steenerson *v.* R. Co., 69 Minn. 353, 72 N. W. 713 (in determining the reasonable income on a railway investment, the Court cited facts and doctrines from the Yale Review, the London Economist, Bradstreet's Journal, the Bankers' Magazine, the

sistency is particularly palpable when the Court (as has happened more than once) has in the same case expressly declared that learned treatises cannot be resorted to for information.[9]

Topic X: COMMERCIAL AND PROFESSIONAL LISTS, REGISTERS, AND REPORTS

§ 1702. **In General.** In a few narrow and usually well-defined classes of cases, recognition has been given, by way of exception to the Hearsay rule, to certain commercial and professional lists, registers, and reports. Their admissibility in some instances is placed upon judicial principle, in others arises solely from statutory innovation; but in most of the classes statute has carried out hints originally given judicially.

The Necessity (*ante*, § 1421) in all of these cases lies in part on the usual inaccessibility of the authors, compilers, or publishers in other jurisdictions; but chiefly in the great practical inconvenience that would be caused if the law required the summoning of each individual whose personal knowledge has gone to make up the final result. The necessity therefore is of the sort that is recognized in the preceding two Exceptions, *i. e.* a practical inconvenience existing generally for the statements as a class; and hence it is not required that the death, insanity, absence from the jurisdiction, or the like, of the author shall be shown before the statement can be used.

The Circumstantial Guarantee of Trustworthiness (*ante*, § 1422) is found in the considerations that these lists, registers, reports, etc., are prepared for the use of the trade or profession, and are therefore habitually made with such care and accuracy as will lead them to be relied upon for commercial and professional purposes. There is a subjective test of trustworthiness, in that the author knows beforehand that his work will have no commercial or professional market unless it is found to have usual accuracy and that its inaccuracies will probably be discovered; and further in that there is ordinarily no motive to deceive. There is an objective test, in that the habitual use of the work by the trade or profession has tested its usual and practical accuracy and has sanctioned its trustworthiness. Thus the chief considerations which are recognized as the source of trustworthiness for the other Exceptions (*ante*, § 1422) are found to exist here also. Upon some such reasons

works of J. S. Mill, Adam Smith, David A. Wells); 1836, Walworth, C., in Devenbagh *v.* Devenbagh, 5 Paige Ch. N. Y. 554, 557 (citing Beck's Medical Jurisprudence).

[9] In Washburn *v.* Cuddihy, 8 Gray Mass. 431 (1857), the Court first ruled out a scientific book on the question of horse-cribbing as constituting unsoundness and then proceeded to cite Oliphant's "Horses" and Stephens' "Adventures of a Gentleman in Search of a Horse" to show that it could not be ruled as a matter of law that cribbing was not unsoundness. In State *v.* Baldwin, 36 Kan. 17, 20, 12 Pac. 318 (1886), the trial Court accepted the rule excluding medical works, and then proceeded to sanction an instruction on the subject of poisons, in which a dictionary and a cyclopedia were quoted from. The Supreme Court said: "It is true the Court quoted the definitions" (but the passages were in reality descriptions and lists of poisons) "given in Webster's Dictionary and the American Cyclopedia, but there is no claim that the definitions are incorrect in any way. What cause then is there for complaint? . . . The Court approved them and made the language employed in them its own." But the fact remains that the Court accepted one anonymous scientific writer, while it excluded other well-known writers.

may easily be justified the admission of standard price-lists, of printed reports of judicial decisions, of deed-abstracts, and of sundry publications such as speed-registers, pedigree-registers, and the like, now to be considered.

§ 1703. **Reports of Judicial Decisions.** Printed reports of domestic decisions, as reproducing merely the law which the Court is supposed to know judicially, have not often suggested the need of a specific exception to the Hearsay rule. But their true aspect, as real instances of such an exception, has been perceived in the case of reports of decisions of *foreign courts*, — which include, of course, the courts of other of the United States. So far as these reports are prepared and published, according to modern practice, by official reporters appointed for the purpose, they are easily seen to be admissible as Official Statements; and under that head (*ante*, § 1684) the statutes and decisions dealing with them from that point of view have been considered. But in most jurisdictions, the earlier decisions (including almost all of the English precedents down to 1865) were published by reporters having no official authority to do so; and in this country decisions are also regularly reported, even since the régime of official reporters, not only in private systems of comprehensive scope, but also in special collections on certain topics and in legal journals. If these are admitted to be read and consulted as evidence of the opinions and decisions reported, it cannot be under the Exception for Official Statements, just referred to, nor can it be under the Exception for Regular Entries (*ante*, § 1517); it must therefore be under the present Exception.

That such private reports of *judicial opinions* are customarily resorted to in arguments of law as correctly representing the opinions rendered, the arguments made, and the facts upon which the decision was made, is notorious. That this practice has long been sanctioned by the judges as a proper mode, for the Anglo-American common law, of proving the tenor of the precedents, is clear.[1] That the reports of decisions in courts of the

§ 1703. [1] ENGLAND: 1692, Stainer *v.* Droitwich, 1 Salk. 281, 12 Mod. 86 ("A year-book may be evidence to prove the course of the court"; the year-books were not official, so that this is perhaps a precedent); 1744, Hardwicke, L. C., in Gage *v.* Bulkeley Ridgw. Cas. t. Hardw. 276; see further, for English usage, the quotations of judicial comment on the various reporters, collected in Wallace's The Reporters, and Ram on Facts.

CANADA: 1916, Re Goodman, 28 D. L. R. 197, 29 id. 725, Man. (extradition; English and American reports consulted, to determine the U. S. law as to the crime charge).

UNITED STATES: *Fed.* 1872, The Pawashick, 2 Low. 148; 1873, Mackay *v.* Easton, 19 Wall. 632; 1846, Inge *v.* Murphy, 10 Ala. 885, 895 ("accredited reports" of Georgia decisions received; Goldthwaite, J.: "We every day elucidate our own common law by referring to these reports, and it would seem a singular anomaly if they cannot be admitted as evidence to show" decisions of another State); 1859, Stanford *v.* Pruet, 27 Ga. 243, 247 ("We admit their reports, without questioning their authenticity"); 1858, Kingsley *v.* Kingsley, 20 Ill. 202 (construction of foreign statutes; "reports of such tribunals" may be looked to); 1867, McDeed *v.* McDeed, 67 Ill. 548; 1862, Charlotte *v.* Chouteau, 33 Mo. 194, 201 (printed books of English decisions, read); 1885, Kennard *v.* Kennard, 63 N. H. 308; 1879, State *v.* Moy Looke, 9 Or. 57; 1908, Latimer *v.* Elgin, 4 Desauss. S. C. 32.

Contra: 1819, Barbour *v.* Archer, 2 A. K. Marsh. 9 (printed report of a decision of this Court, containing the opinion as part of the record, excluded); 1848, Gardner *v.* Lewis, 7 Gill 394 (Magruder, J.: "We can only know from them that the printer said that the reporter said that the judge said that the law is as he is made to say that it is").

Continent, administering an alien system of law, would equally be included by the principle, seems also clear, provided the report offered was proved to be one in use among the profession in that jurisdiction. Statute has in most jurisdictions expressly removed all possible doubt by providing for the admission of such books of reports from any jurisdiction.[2]

In Baltimore & O. R.Co. *v.* Glenn, 28 Md. 323 (1867), resort to decisions was had by consent.

Undecided: 1847, Territt *v.* Woodruff, 19 Vt. 182, 185 (whether reported decisions are receivable "does not appear to have been determined"; but the Court then proceeds to cite Cowen's and Wendell's reports in evidence of New York law); 1856, State *v.* Abbey, 29 Vt. 60, 65 (left undecided).

[2] To the following statutes add those cited *ante*, § 1684, which in sanctioning an officially printed book of *statutes* also sometimes provide for any book "commonly admitted" in its own jurisdiction:

CANADA: *Manitoba:* Rev. St. 1913, c. 65, § 32 (for foreign or domestic law, the judge may refer to "reports of cases and works upon legal subjects").

UNITED STATES: *Arizona:* Rev. St. 1913, Civ. C. § 1736 ("books of reports of cases adjudged" in another State, admissible); *California:* C. C. P. 1872, § 1902 ("printed and published books of reports of decisions of courts of such [sister] State or [foreign] country, or proved to be commonly admitted in such courts" are admissible); § 1963 (there is a presumption "that a printed and published book purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published contains correct reports of such cases"); *Connecticut:* Gen. St. 1918, § 5727 ("the reports of the judicial decisions of other States and countries" may be judicially noticed); *Florida:* Rev. G. S. 1919, § 2716 ("books of reports of cases adjudged in courts of the U. S. or a State or Territory thereof, admissible); *Idaho:* Comp. St. 1919, § 7946 (like Cal. C. C. P. § 1902, omitting "or proved to be," and inserting "Territory"); *Indiana:* Burns' Ann. St. 1914, § 499 ("books of reports of cases adjudged" in the courts of "any other State, Territory, or foreign government, may also be admitted); *Kentucky:* Stats. 1915 § 1640 ("the printed books of cases adjudged in the courts of a sister State," admissible); *Maine:* Rev. St. 1916, c. 87, § 130 ("books of reports of cases adjudged" in another State or Territory of the United States, admissible); *Massachusetts:* Gen. L. 1920, c. 233, § 71 ("books of reports of cases adjudged" in the U. S., admissible); 1858, Penobscot & K. R. Co. *v.* Bartlett, 12 Gray 244, 248 ("books of reports of cases adjudged" in a sister State, admitted under the statute); 1863, Cragin *v.* Lamkin, 7 All. 395, 396 (similar); 1878, Ames *v.* McCamber, 124 Mass. 85, 91 (similar); *Michigan:* Comp. L. 1915, § 12515 ("books of reports of cases adjudged" in another U. S. State or Territory or "any foreign State or country," admissible); *Minnesota:* Gen. St. 1913, § 8417 ("the books or reports of cases adjudged" in the courts of "any other State," admissible); *Missouri:* Rev. St. 1919, § 5388 ("the printed books of cases adjudged in the courts of a sister State," admissible); *Montana:* Rev. C. 1921, § 10552 (like Cal. C. C. P. § 1902); § 10606, par. 36 (like Cal. C. C. P. § 1963); *Nebraska:* Rev. C. 1922, § 8903, Comp. St. 1899, § 5970 ("books of reports of cases adjudged" in the courts of "any other Territory State, or foreign government," admissible); § 8927 (similar); *New Jersey:* Comp. St. 1910, Evid. § 26 ("reports of judicial decisions of other States and countries" may be judicially noticed; the "usual printed books of such reports" to be "plenary evidence"); *New York:* C. P. A. § 391 ("books of reports of cases adjudged" in State, Territory, or foreign Courts, admissible); *North Carolina:* Con. St. 1919, § 1749 ("books of the reports of cases" of a State, Territory, or foreign country, admissible); *North Dakota:* Comp. L. 1913, § 7910 (like Okl. Stats. § 4260); *Ohio:* Gen. Code Ann. 1921, § 11499 ("books of reports of cases adjudicated" in the courts of another State, Territory, or foreign government, receivable); *Oklahoma:* Comp. St. 1921, § 636 ("books of reports of cases adjudged" in a State, Territory, or foreign government, admissible); *Oregon:* Laws 1920, § 749 (like Cal. C. C. P. § 1902); *Philippine Islands:* C. C. P. 1901, § 302 (like Cal. C. C. P. § 1902); § 334, par. 34 (like Cal. C. C. P. § 1963, par. 36); *Porto Rico:* Rev. St. & C. 1911, § 1470 (like Cal. C. C. P. § 1963); *Rhode Island:* Gen. L. 1909, c. 292, § 49 ("published reports" of decisions of courts of the U. S., a State, Territory, or country, admissible); *South Carolina:* C. C. P. § 1922, § 707 ("the books of reports of cases adjudged" in courts of a domestic or foreign State, receivable); *South Dakota:* Rev. C. 1919, § 2718 (like N. D. Rev. C. § 5690); *Utah:* Comp. L. 1917, § 7085 ("printed and published books of reports of decisions" in another State, Territory, or foreign country, "commonly admitted in such courts," admissible); *West Virginia:* Code 1914, c. 13, § 4 (in noticing foreign law, judge "may consult any printed book purporting to contain" the same); *Wisconsin:* Stats. 1919, § 4138 ("books of reports of cases adjudged" in the courts of a U. S. State or Territory, admissible); *Wyoming:* Comp. St. 1920, § 5810 (like Oh. Rev. St. § 11499).

Reports of *trial-proceedings and testimony*, however, stand on a different footing. They are ordinarily not printed as a part of the business of furnishing reports for use in the profession, nor are they in fact habitually resorted to and tested by professional use. Moreover, in past generations at least, they were often printed in condensed or fragmentary form only, on behalf of a party, for the purpose of vindicating his claim before the public, and were thus often garbled and untrustworthy. It was not the custom in England as late as the 1700s to receive such private reports to prove the testimony given at a prior trial,[3] and to-day it cannot be supposed that, as a general rule, they would be received. Nevertheless, where a stenographic 'verbatim' report, or one purporting to be such, made by an indifferent person or by one employed on behalf of both parties, and accepted in the profession as trustworthy, is available, there is no reason why the principle already considered should not suffice to admit it. That the celebrated Mr. Gurney's stenographic reports of English trials, or such a trusted document as Mr. Bemis' report of Webster's Trial, should be rejected, would be an extreme instance of pedantry.[4]

§ 1704. **Standard Price-Lists and Market Reports.** A printed list of prices at which a class of goods is for sale to any purchaser, or a printed report of the prices obtained at actual sale in an open market, may become trustworthy so far as it is intended to be consulted by all persons who care to know the prices, and has been exposed to a test of accuracy by dealings with such persons on the faith of it, and has further been in their experience found generally reliable (*ante*, § 1702). A price-current list or a market report which fulfils these conditions and has thus sufficed for the correct information of persons who transact commercial operations on the faith of it may well suffice for informing a court of justice. It would not be necessary that the compiler of it should have personal observation of each dealing reported or going to make up the market price reported, because the practical equivalent of personal observation here exists; a report based on direct consultation with dealers or with the officers of an exchange or a market is in commercial circles taken as equally reliable (*ante*, § 719). Such standard price-lists and market reports, indorsed by trade experience, ought to be admissible on the principle of the present exception:

1866, Cooley, J., in *Sisson* v. *Cleveland & T. R. Co.*, 14 Mich. 496: "Evidence of the state of the markets as derived from the market reports in the newspapers should not have been excluded. . . . The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources

For cross-references to other rules concerning *proof of foreign law*, see *ante*, § 1684, note 15.

[3] *E. g.*, 1685, Fernley's Trial, 11 How. St. Tr. 381, 434; and there are other instances.

[4] For reports of former testimony *not printed*, see *ante*, §§ 1666–1669.

of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

1875, MILLER, J., in *Whelan* v. *Lynch*, 60 N. Y. 474: "The Court was also in error, I think, in admitting the shipping and price-current list as evidence of the value of the wool without some proof showing how or in what manner it was made up, where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise. It is not plain how a newspaper containing the price current of merchandise, of itself and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depends entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out."

1882, SMITH, J., in *Fairley* v. *Smith*, 87 N. C. 367, 371 (rejecting a cotton-quotation in a Charlotte newspaper for Boston prices): "The evidence received in the present case has none of those essential safeguards to ensure the accuracy of the published information as to the state of a distant market, to warrant its unqualified submission to the jury. It does not appear that business men acted upon this information, as truthful and correct, in their dealings with each other; nor from what source the information itself comes. . . . [It was thus improper to admit the evidence] without any proof, outside the paper, of its trustworthiness and recognition as such by business men dealing in cotton."

Upon these principles, a number of Courts have recognized for price-lists and market reports an Exception whose limits, more or less indefinite, are suggested by the above passages.[1]

The Exception for Regular Entries (*ante*, § 1517) must of course be distinguished; its most marked difference is (*ante*, § 1521) that there the entrant must specifically be shown to be deceased or otherwise unavailable. Distinguish also the question whether a witness called to the stand to testify to prices is qualified if his only source of knowledge is a price-list consulted by him (*ante*, § 719).

§ 1704. [1] *Federal:* 1865, Cliquot's Champagne, 3 Wall. 114, 117, 121, 141 (printed price current given by a French firm to an inquirer, and stating the prices of their goods, admitted; "it is as little liable to that objection [of hearsay] as the entries in the books of the dealer"); 1865, Fenneretsin's Champagne, 3 Wall. 145 (preceding case approved; written letters from foreign dealers stating prices, here admitted on the principle of regular entries, *ante*, § 1525; three judges dissenting as to such letters); *Alabama:* Code 1907, § 3977 ("prices current and commercial lists, printed at any commercial mart, are presumptive evidence of the value of any article of merchandise specified therein, at that place, at the date thereof, and of the rate of exchange between that and other places; also of the rates of insurance, freights, and the times of arrival and departure of ships and other vessels"); 1898, Tyson v. Chestnut, 118 Ala. 387, 24 So. 73 (Statute applied to exclude certain postal cards); 1905, Kentucky Ref. Co. *v.* Conner, 145 Ala. 664, 39 So. 728 (certain letters held not to be within the statute); *Colorado:* 1894, Willard *v.* Mellor, 19 Colo. 534 (daily price-circulars by wool-buyers, excluded; but the principle of admission conceded for prices in a commercial journal); *Illinois:* 1896, Nash *v.* Classen, 163 Ill. 409, 45 N. E. 276, *semble* (admissible; here a trustworthy newspaper, giving in the morning the quotations of corn in the Chicago market for the day before); *Maine:* 1878, Washington Ice Co. *v.* Webster, 68 Me. 463, *semble* (prices current admissible); *Maryland:* 1880, Munshower *v.* State, 55 Md. 24, *semble* (prices current, admissible); 1908, Mount Vernon B. Co. *v.* Teschner, 108 Md. 158, 69 Atl. 702 (newspaper accepted by the trade as trustworthy in stating market prices, admissible, without any showing of the publisher's method of obtaining the information;

§ 1705. **Abstracts of Title.** In the practice of conveyancing, the attorney in charge of a transfer of real property does not make anew for each client's title a search of the deed-register for the preceding documents in the chain of title, but relies upon a written book, which contains abstracts of the preceding documents and records and has been handed along to each transferee; provided at least that the abstract appears to have been kept up by competent hands and that no questions of special difficulty appear to be involved. Furthermore, the persons engaged solely in the occupation of searchers of title or abstract-makers, and particularly the corporations making a business of guaranteeing land-titles, have compiled in the course of their business comprehensive collections of such abstracts, which are used from time to time as a settled basis in keeping up abstracts of subsequent transfers. Besides this, other attorneys often possess full abstracts of particular titles, of equal trustworthiness and general use with these larger collections. Such abstracts (including copies of record-entries, notes of surveys, and the like) fulfil the requirements of trustworthiness above indicated for this Exception (*ante*, § 1702). They are made by persons who have professional skill and actual knowledge of the documents abstracted; they are intended for use in professional work, and are made by persons usually having no motive to deceive; they are ordinarily expected to be tested by other professional persons, not through the latter's direct perusal, but through such examination and collation as these other persons may and often do make of the same original deeds, records, and entries; and, so far as they have survived this test unquestioned, they stand approved and accepted by the profession as trustworthy. As a class, then, they seem to

careful and liberal opinion by Boyd, C. J.); *Massachusetts:* 1900, National Bank of C. *v.* New Bedford, 175 Mass. 57, 56 N. E. 288 ("newspaper reports purporting to contain stock quotations furnished by named N. B. stockbrokers, who could have been called," excluded; general principle left undecided); *Michigan:* 1866, Sisson *v.* R. Co., 14 Mich. 96 (quoted *supra*); 1868, Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296 ("such newspapers as the commercial world would rely on," admissible to show prices); 1883, Peter *v.* Thickstun, 51 Mich. 594, 17 N. W. 68 (similar); 1893, Aulls *v.* Young, 98 Mich. 231, 234, 57 N. W. 119; 1906, Tri-State Milling Co. *v.* Breisch, 145 Mich. 232, 108 N. W. 657 (Sisson *v.* R. Co., followed; market quotations in a Detroit daily newspaper, received); *Missouri:* 1873, Golson *v.* Ebert, 52 Mo. 260, 270 (price current, unverified, excluded); 1905, Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393 (trade journals, not admitted without showing that reliable sources were used in their reports); *Nebraska:* 1905, Chicago, B. & Q. R. Co. *v.* Todd, 74 Nebr. 712, 105 N. W. 83 (Sisson *v.* R. Co., *supra*, followed; Daily Drovers' Journal-Stockman admitted to show sales of sheep on certain days); 1922, Trennt *v.* Chicago, B. & Q. R. Co., — Nebr. —, 186 N.W. 322 (shipment of cattle; market price evidenced by the Daily Drovers' Journal-Stockman, authenticated by the publisher); *New York:* 1875, Whelan *v.* Lynch, 60 N.Y. 474 (quoted *supra*); 1878, Harrison *v.* Glover, 72 N.Y. 454, *semble* (price-lists, admissible); *North Carolina:* 1882, Fairley *v.* Smith, 87 N.C. 367 (quoted *supra*); 1907, Moseley *v.* Johnson, 144 N.C. 257, 274, 56 S.E. 922 (value of Georgia corporate securities; the market reports of a newspaper admitted); *North Dakota:* 1922, Schnitz Bros. *v.* Bolles & Rogers Co., — N. D. —, 186 N. W. 96 (sale of hides; certain market reports made by a publishing company, excluded because not shown to be trustworthy, representing actual transactions, and obtained from reliable sources); *Utah:* 1919, Baglin *v.* Earl-Eagle Mining Co., 54 Utah 572, 184 Pac. 190 (to show the market price of certain stock, quotations sent from Boston by mail from the Boston Curb Association, and not shown to be customarily reliable, were excluded); *Washington:* 1913, Peters *v.* McPhadden, 75 Wash. 525, 135 Pac. 26 (newspaper advertisements of stock prices offered, here excluded).

come (so far at least as specific abstracts or collections of them may be shown to fulfil the above requirements) within the conditions of this Exception.

The principle of Producing the Original of a Writing (*ante*, §§ 1193, 1223) will of course ordinarily prevent the use of them until both the original deeds and the records of the deeds appear to be lost, destroyed, or otherwise unavailable. This much is always assumed. Furthermore, the principle of Completeness (*post*, § 2107) may forbid the use of abstracts so far as complete copies of the lost documents can be obtained; although the application of this principle might properly be less rigorous than that of the preceding one. It is partly because of the indefinite limits of this latter principle, and of the inconvenience of attempting to apply it to each document in a long chain of title before using an abstract, that has led to the necessity of enacting a simpler rule by statute. Finally, supposing the foregoing two principles to be satisfied, the Hearsay rule stands in the way; this, first of all, requires each person contributing to the abstract to be summoned if available, — a practically impossible task; or next, it requires that some established exception be found in which these abstracts may be classed, and none such appears; unless we can construe the Exception for Regular Entries in the Course of Business (*ante*, § 1517) as sufficing for the purpose.[1] It results, then, that if these abstracts are to be used without summoning the makers and proving regularity of entry, the use must form the subject of a separate Exception to the Hearsay rule. That it ought to be so treated, for certain classes of abstracts at least, in view of the conditions of their preparation and employment, has been already noticed.

Nevertheless, Courts do not seem anywhere to have reached this conclusion (as they did in the two preceding classes of cases under this Exception) upon common-law principles. Statutory enactment seems in every instance to have been waited for.[2] These statutes usually provide that the contents

§ 1705. [1] Such seems to have been the view taken in England: 1810, Ward *v.* Garnons, 17 Ves. Jr. 134 (L. C. Eldon; abstract of title made in the course of business by a deceased attorney, admitted to show contents and execution of lost deed). There is little direct authority in the United States: 1921, Miller *v.* Estabrook, 4th C. C. A., 273 Fed. 144 (West Virginia abstract of title to land in a county whose records were destroyed by fire, verified by the attorney making it, admitted); 1906, Einstein *v.* Holladay K. L. & L. Co., 118 Mo. App. 184, 94 S. W. 206 (lost deeds and burnt records; set of abstracts made partly by S., and partly by K., but verified by S. only, excluded).

[2] The rulings which specifically deal with the rule for *producing the original* (*ante*, § 1223) and the rule for a *complete copy* (*post*, § 2107) are placed under those heads; the remainder are placed here:

CANADA: *Alberta:* St. 1910, 2d Sess., Evidence Act, c. 3, § 48 ("an abstract of title or a general certificate under seal," by a land-title registrar, "shall be 'prima facie' evidence of the contents thereof").

UNITED STATES: *California:* St. 1906, Spec. Sess., c. 52, June 16, C. C. P. § 1855*a* (admitting, where conflagration or other public calamity has destroyed records, (*a*) abstracts of title made before such destruction by any person in the business of preparing abstracts, in the ordinary course of business, (*b*) abstract or other instrument made by a person engaged in insuring titles or issuing abstracts, whether before or after such destruction; no proof of loss of original need be made, but only that it is not known to be in existence; but notice of intention to offer in evidence, and an opportunity to inspect, must be given); *Colorado:* Comp. St. 1921, §§ 5029, 5030 (where records of deeds, etc., are destroyed, abstract-books, minutes, extracts, etc., "fairly made before the destruction of the records by any person or persons in the ordinary course of business," and bought by the county, are

and execution of deeds and records burnt or lost may be proved by specified kinds of abstracts, in general fulfilling requirements analogous to those

admissible where the original instrument "has been lost or destroyed or is not in the power of the party"); § 5035 (such a writing shall not be received "unless the same appear upon its face, without erasure, blemish, alteration, interlineation, or interpolation in any material part, unless the same be explained to the satisfaction of the Court, and to have been fairly and honestly made in the ordinary course of business"); § 5036 (when an original instrument affecting title is "lost or destroyed or not within the power of the parties to produce," and the record is destroyed, "any abstract of title made in the ordinary course of business prior to such loss or destruction . . . that may have been made and delivered to the owners or purchasers or other parties interested," is admissible);

Florida: Rev. G. St. 1919, § 2729 (where a record of deed has been burnt, and the original cannot be produced, and no certified copy is in the party's control, "any abstract of title, or letter-press copy thereof made in the ordinary course of business prior to such loss," or "any copy, extract, or minutes from such destroyed records or from the original thereof, which were at the date of such destruction in the possession of any person or persons then engaged in the business of making abstracts of title for others for hire," shall be admissible; or a sworn copy thereof, when the opponent has been given "a reasonable opportunity to verify the correctness of such copy"; but in either case a copy must be served on the opponent ten days before the offer in evidence); §§ 2730–2732 (further provisions for the use of such materials); § 3855 (similar provision for abstracts, etc., purchased by the county);

Idaho: Comp. St. 1919, §§ 2263, 2264 (abstract of title, certified by a duly bonded abstracter, to be evidence "of the existence of the record of deeds, mortgages, and other instruments, conveyances, or liens affecting the real estate mentioned"; the party using it in evidence to furnish a copy to the opponent three days before trial, and a sufficient additional number of days for land out of the county of trial);

Illinois: Rev. St. 1874, c. 116, § 13 (where official records of deeds, etc., are destroyed, judges are authorized to record and to approve the purchase of originals or copies of "any abstracts, copies, minutes, or extracts from said records existing after such destruction," if they "were fairly made, before the destruction of the records, by any person or persons, in the ordinary course of business, and that they contain a material and substantial part of such records"; and on petition of any owner of such abstracts, etc., if they are found to be "fairly made in the regular course of business before such destruction of the records," they may be recorded, and taken as 'prima facie' evidence, if they purport to recite "all deeds and mortgages," etc., and to describe "the several tracts of land, etc."; and "all abstracts to separate tracts of land made by the owner of said abstracts," etc., shall be taken as 'prima facie' evidence when accompanied by an affidavit of the owner that they contain "a full, true, and perfect copy of all transfers," etc.); § 14 (when such abstracts, etc., are bought and recorded, the recorder's certified copies shall be admissible "in case the originals have been lost or destroyed, or not in the power of the party asking to use the same"); § 28 (any writings thus made admissible shall not be received "unless the same appear upon its face without erasure, blemish, alteration, interlineation, or interpolation in any material part, unless the same be explained to the satisfaction of the Court, and to have been fairly and honestly made in the ordinary course of business"); § 29 (as amended July 15, 1887; where records are destroyed and original conveyances are lost or destroyed or not within the power of the party to produce, as shown by testimony or affidavit of party or agent, "any abstract of title, or letter-press copy thereof, made in the ordinary course of business prior to such loss or destruction" is admissible, as also "any copy, extracts, or minutes from such destroyed records, or from the originals thereof, which were, at the date of such destruction or loss, in the possession of persons then engaged in the business of making abstracts of title for others for hire"; so also a sworn copy of any such writing, made by the person having possession, is admissible when the offeror has "given the opposite party a reasonable opportunity to verify the correctness of such copy"); 1873, Richley *v.* Farrell, 69 Ill. 264 (abstract held sufficient under the statute); 1874, Russell *v.* Mandell, 73 Ill. 136, 137 (abstract held sufficient); 1874, King *v.* Worthington, 73 Ill. 161 (letter-press copy of abstract, not admissible); 1876, Smith *v.* Stevens, 82 Ill. 554 (abstract admitted); 1882, Miller *v.* Shaw, 103 Ill. 277, 285 (similar); 1882, Compton *v.* Randolph, 104 Ill. 555 (letter-press copy, or a copy of it, of an abstract, not admissible); 1884, Thatcher *v.* Olmstead, 110 Ill. 26 (copy of lost abstract, not admissible); 1883, Heacock *v.* Lubuke, 107 Ill. 396, 401 (abstract admitted); 1892, Converse *v.* Wead, 142 Ill. 132, 136, 31 N. E. 314 (St. 1887 applied; letter-press copy of abstract, admitted; extracts and minutes admitted); 1894, Sternheim *v.* Burcky, 149 Ill. 241, 244, 36 N. E. 1026 (extracts and minutes admitted; notice on the day before trial, sufficient on the facts); 1894, Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 417, 39 N. E. 33 (abstracts ad-

above-mentioned. The judicial rulings ordinarily are concerned merely with the construction of these statutes.

mitted; testimony founded on personal knowledge of their existence before the fire, etc., not required); 1899, Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367 (abstracts used); 1901, Glos *v.* Hallowell, 190 Ill. 65, 60 N. E. 62 (abstracts not proved according to statute, excluded); St. 1903, pp. 121, 122 (amending St. 1897, May 21, §§ 7, 18, being Hurd's Rev. St. 1903, c. 30, § 61, concerning title-registration, so as to permit the use of abstracts of title); 1903 Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634 (abstract rejected because it was not on file in the recorder's office and the loss of originals was not proved); 1904, Glos *v.* Paterson, 209 Ill. 448, 70 N. E. 911 (certain abstracts held sufficiently shown to be within the description of the statute); 1904, Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707 (certain abstracts held improperly admitted without proof of loss of the original, preparation in the course of business, etc.); 1906, Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80 (abstract excluded, for lack of statutory compliance); 1906, Messenger *v.* Messenger, 223 Ill. 282, 79 N. E. 27 (the above statute of 1903 held not to have been lawfully adopted in Cook Co., and certain abstracts therefore rejected); 1907, Glos *v.* Wheeler, 229 Ill. 272, 82 N. E. 234 (abstract rejected because the original deed or record was not accounted for); 1909, McMahon *v.* Rowley, 238 Ill. 31, 87 N. E. 66 (certain abstracts admitted); 1911, Culver *v.* Waters, 248 Ill. 163, 93 N. E. 747 (abstracts must be "made by the abstracters" in the ordinary course of business, not "ordered by the owner" in the ordinary course of his business); 1911, Hammond *v.* Glos, 250 Ill. 32, 95 N. E. 39 (copy of an uncertified copy not admitted); 1911, Caswell *v.* Glos, 251 Ill. 505, 96 N. E. 251 (abstracts admitted, the witness' personal knowledge of their mode of compilation being sufficient on the facts); 1916, Harts *v.* Glos, 271 Ill. 376, 111 N. E. 125 (certain abstracts, partly by private makers, and partly by the county recorder, offered in a title-registration proceeding, under St. 1903, held not authenticated according to the statute; incidentally, the opinion makes the statement that "an abstract of title is not admissible in evidence . . . except in applications to register title under the Torrens law," which is obviously erroneous); 1916, Hartz *v.* Glos, 272 Ill. 395, 112 N. E. 74 (abstract from the county recorder's office, excluded); 1917, Brummel *v.* Glos, 278 Ill. 552, 116 N. E. 216 (copy of abstract, excluded on the facts);

Michigan: Comp. L. 1915, § 371 (condemnation of land; abstract of title, certified by county register of deeds or deputy, admissible);

Minnesota: Gen. St. 1913, § 8435 (on affidavit that an instrument or court records affecting a landed interest "are lost or destroyed and not within the power of such party to produce," and that the record of it is "destroyed by fire or otherwise," the Court may receive "any abstract of title to such lands made in the ordinary course of business before such loss or destruction," and also "any copy, extract, or minutes from such destroyed records or from the original thereof, which were, at the date of such destruction or loss, in the possession of any person then engaged in the business of making abstracts of title for others for hire"); § 8436 (a sworn copy of any such writing, made by the possessor, is receivable, provided reasonable notice is given to the opponent for verifying its correctness); St. 1915, c. 283, § 1 ("any abstract of title, duly certified by any bonded abstractor or by any register of deeds," etc., admissible to prove "all instruments therein referred to");

Mississippi: Code 1906, § 3171, Hem. § 2512 (in any county where a record of deeds is destroyed, the chancellor "if he find any abstracts, copies, minutes, or extracts from said records existing after such destruction, he shall appoint two persons learned in such matters to act with him, and the three shall investigate the same; and if they find that the abstracts," etc., "were fairly made before such destruction of the records, and that they contain material and substantial parts of the destroyed records," they may so certify to board of supervisors, who may purchase them or copies); § 3172, Hem. § 2513 (such abstracts, etc., to be filed and recorded; "and in case the originals have been lost or destroyed, or are not in the power of the party asking to use the same," certified copies of such abstracts, etc., are admissible, and are 'prima facie' evidence of instruments' execution);

Missouri: Rev. St. 1919, § 5472 (where records affecting real estate are destroyed, etc., circuit judges may certify that abstracts etc. "were fairly made before such loss" etc. "in the ordinary and usual course of business," and that they "tend to show a connected chain of title," and thereupon such abstracts etc., or "authenticated copies" are to be admissible); § 5474 (any abstracts, etc. "which are fair upon their face" and "made by any person" etc. "in the usual and ordinary course of business prior to the loss" etc., are admissible, upon proof that the origiral deeds etc. "are lost, destroyed, or so injured as to be illegible or that the said originals are not within the power of the party to produce," and that the records are lost, etc.); 1909, Nall *v.* Conover, 223 Mo. 477, 122 S. W. 1039 (certain entries in "Carleton's Abstract Books," under St. 1901, Mar. 28, making such books admissible for Pemiscot Co.); 1909, Whitman *v.* Gleising, 224 Mo. 600, 614, 123 S. W. 1052 (similar);

§ 1706. **Sundry Commercial and Professional Registers (Stock-Pedigree, Business Directory, Shipping List, etc.).** There are many other kinds of registers, records, reports, compilations, and the like, which may in a given case fulfil the requirements already indicated (*ante*, § 1692) as sufficient for this exception.[1] A printed *pedigree-register* of blooded animals, for example,

Nebraska: Rev. St. 1922, § 8926 (abstracts of title, *semble* usable after notice to opponent); § 5691 (abstracts of title by duly bonded persons, to be 'prima facie' evidence "of the existence of the record of deeds," etc., mentioned therein);
New Mexico: Annot. St. 1915, § 2188 ("Any abstract of the title to real estate, located in the State of N. M., certified to as correct by the secretary, and under the seal of the title abstract company, incorporated and doing business under the laws of this State, shall be received in all the courts of this State as evidence of the things recited therein, in the same manner and to a like extent that the public records are now admitted");
New York: C. P. A. 1920, § 385 ("searches affecting property situate in any county in which the office of county clerk or register is a salaried one," when made and certified to be domestic title insurance, etc. companies, are admissible, wherever "official searches" may be used);
North Dakota: Comp. L. 1913, § 5547 (lost or destroyed records; "the abstract of a regular bonded abstractor orabstractors" of the county to be admissible);
Ohio: Gen. C. Annot. 1921, §§ 12362–12365 (certain abstracts of records, etc., made by private persons, to be admissible);
Oklahoma: Comp. St. 1921, § 9554 (similar to Ill. Rev. St. c. 116);
Texas: Rev. Civ. Stats. 1911, § 3705 ("All abstracts of land-titles or land abstract-books to lands in this State compiled from the records of any county in this State prior to the year 1890, which said records were partially or wholly destroyed or lost from any cause during the months of May 1874, March 1876, and January 1889," admissible for matters compiled prior to 1890; provided the compiler has made affidavit before officer authorized to take acknowledgments of deeds that the compilation is correct and was made before loss of records, and a copy of the abstract is filed with papers of the cause and notice given to opponent five days before trial; and provided the offeror makes affidavit that the original instrument "is not then on record, that he has made diligent search and inquiry for the same in places and from persons where and in whose possession it would most probably be found, and has been unable to find the same, that to his best knowledge and belief the same is lost or destroyed"; and provided the owner of the abstract has filed an application, which has been granted, to record in the county commissioners' court his contract binding him to permit the use of such abstracts by interested parties, for fees specified, to answer in damages for failure to produce on demand, etc.; provided this article shall not apply "if it can be shown by competent evidence that any such deeds were improperly recorded"; when such abstracts are used, a party may offer evidence "tending to show the compiler thereof to have been incompetent or unreliable, or competent and reliable"; other detailed conditions specified);
Utah: Comp. L. 1917, § 1590 ("any abstract of title to any piece, parcel, or parcels of real estate or mining claim or claims, certified to by any licensed abstractor or county recorder of the State of Utah" shall be admissible; the abstractor or recorder to certify to it under hand and seal);
Wisconsin: Stats. 1919, § 4151 *i* (substantially like Ill. R. S. c. 116, § 13, down to the provision for filing a judicial opinion, and then, for a provision of purchase, substituting, "and thereupon said abstracts, copies, minutes, and extracts, or certified copies thereof, shall be admissible as 'prima facie' evidence"); § 4151 *p* (substantially like Ill. R. S. c. 116, §§ 28, 29, omitting the clause about parties' testimony, and inserting, before the proviso, "and shall receive as evidence any abstract of title made in the ordinary course of business prior to such injury, loss, or destruction, showing the title to such land or any part of the title thereto"; and adding, after the clauses for penalties and fees, that all persons engaged in such business shall file an assent to these provisions within thirty days of the filing of an opinion under § 4151*i supra*, no abstract or certified copy to be received until such assent is filed, except certified copies made before June 7, 1878).

§ 1706. [1] With the following compare some of the cases cited *ante*, § 1698 (scientific tables) and § 665 (scientific instruments).

ENGLAND: 1800, Abel *v.* Potts, 3 Esp. 242 (Lloyd's register, admitted to prove a capture, in an action on a policy); 1829, Bain *v.* Case, 3 C. & P. 496 (Lloyd's list, admitted to prove a Chilean declaration of blockade; but here treated as an admission); 1877, St. John Gaslight Co. *v.* Clerke, 17 N. Br. 516 (record of a gas meter duly verified and stamped according to law is admissible; but here on the theory that the contract made the meter "the sole arbiter").

UNITED STATES: *California:* 1894, People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538 (forgery

made by a person having more or less direct acquaintance with the subject-matter, intended to be publicly circulated and consulted by persons interested and informed, tested by their use, and found by their experience to be trustworthy and actually relied upon as the basis of transactions in the trade, is a typical illustration. The principle, indeed, has large possibilities, which have already been recognized, though with due caution, by the Courts and in a few statutes. The application of the principle might well be left largely in the hands of the trial Court.

§ 1707. **Hospital Records.** The medical records of patients at a hospital, organized on the usual modern plan, especially a hospital supported by the Government or affiliated with a university medical school, deserve to be placed under the present principle. They should be admissible, either on identification of the original by the keeper, or on offer of a certified or sworn copy. There is a Necessity (*ante*, § 1421); the calling of all the individual attendant physicians and nurses who have coöperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness (*ante*, § 1422); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from

in the name of "M. Howell & Co."; a city directory admitted to show "that there was no such firm as M. H. & Co."); *Iowa:* 1885, Kuhns *v.* R. Co., 65 Ia. 528, 22 N. W. 661 ("the Herd Book," admitted as "an historical work of a particular subject," under Code § 4618, quoted *ante*, § 1693, to show certain registered heifers to be full blood of a certain breed); 1907, Warrick *v.* Reinhardt, 136 Ia. 27, 111 N. W. 983 (killing of a thoroughbred sow; a certificate of registry in the Iowa Breeders' Association, admitted); *Kentucky:* 1901, Louisville & N. R. Co. *v.* Kice, 109 Ky. 786, 60 S. W. 705 (American stud-books, compiled by experts and universally accepted by dealers as trustworthy, admitted to show a horse's pedigree); 1903, Louisville & N. R. Co. *v.* Frazee, — Ky. —, 71 S. W. 436 (plaintiff's "private catalogue" of a horse's pedigree, not personally known to him, excluded); Stats. 1915, § 2572 *d* (livery-keeper's register; cited more fully *ante*, § 1639, n. 2); 1904, Marks *v.* Hardy's Adm'r, 117 Ky. 663, 78 S. W. 864, 1105 (reports of mercantile agency, not admitted as reputation to show a partnership); *Louisiana:* 1886, State *v.* Hahn, 38 La. An. 169, 171 (a city directory, in a prosecution for forging with a fictitious drawer's name, admitted to show merely "that M.'s name was not in it"); *Michigan:* Comp. L. 1915, § 12533 (breeding of a horse, provable by Wallace's year-book, Wallace's American trotting register and other named registers); *Minnesota:* 1866, Payson *v.* Everett, 12 Minn. 137 (bank-note "detectors," excluded); *Missouri:* Rev. St. 1919, § 3669 (in trials for certain kinds of false dealing at horse-racing, the "records and books of racing and fair associations" are admissible); *New York:* 1888, Slocovich *v.* Ins. Co., 108 N. Y. 62, 14 N. E. 802, *semble* (the American Lloyds and other shipping registers, to show the condition, capacity, age, and value of ships, admissible); N. Y. St. 1921, c. 44, amending Cons. L. c. 1, Agriculture, adding § 322 (certificates of registry and of transfer of domestic animals, by a corporation, etc., for registering pure-bred domestic animals, admissible to prove "the facts and circumstances stated therein"); *North Carolina:* 1921, Buchan *v.* King, 182 N. C. 171, 108 S. E. 635 (false representations as to age of a race-horse; a year-book of race-horses, not published by a recognized trotting association, nor accepted by the racing community, rejected); *Ohio:* 1897, Pittsburg C. C. & L. R. Co. *v.* Sheppard, 56 Oh. 68, 46 N. E. 61 (the speed record of a famous horse, allowed to be shown by the annual reports of the American Trotting Association); *Tennessee:* 1898, Citizens' R. T. Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790 (register of pedigree of dogs, accepted in the community as evidence of pedigree, admitted); *Texas:* 1899, Pacific Express Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 898 (American Berkshire Association's registered pedigree of a hog, admitted to show value).

Compare the cases cited *ante*, § 1621 (reputation of an animal's character).

actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone.

Accordingly, in some States, such hospital records have by statute been made admissible.[1]

No Court seems yet to have sanctioned such an exception on common-law principles. Moreover, several Courts have so illiberally applied the exception for Official Records (*ante*, § 1639) and for Regular Entries in the Course of Business (*ante*, § 1530) that many classes of reliable hospital records have been virtually excluded from use. The situation is a reproach to the common law; and such statutes should receive universal sanction.[2]

§ 1708. **Common Carrier's Records of Liquor Transported, etc.** The present principle is capable of liberal expansion to include other classes of commercial and industrial records, made by persons disinterested in the particular litigation, published or kept accessible to third persons, and customarily relied upon by them in the conduct of particular occupations.

§ 1707. [1] *Massachusetts:* St. 1905, c. 330 (hospitals supported by State or town or offering public charitable treatment, given a duty "to keep records of the cases under their care, and the history of the same, in books kept for the purpose," and these books to be admissible "as to all matters therein contained"; St. 1908, c. 269 amending St. 1905, c. 330, by extending it to "similar records kept prior to Apr. 25, 1905"); 1909, Delaney *v.* Framingham G. F. & P. Co., 202 Mass. 358, 88 N. E. 776 (certain hospital records, of the kind described in St. 1905, held properly excluded, because St. 1905 was passed only after the records were made and St. 1908 was passed only after the trial took place); St. 1912, c. 442, now Gen. L. 1920, c. 233, § 79 (amends foregoing statutes to read "records of the treatment of the cases under their care and the medical history of the same," and to substitute for "all matters therein contained" the terms "so far as such records relate to the treatment and medical history of such cases, but nothing herein contained shall be admissible as evidence which has reference to the question of liability"; this childish way of trying to keep out things that do not suit the interest of one party — like leaving out the joker in a pack of cards, or abolishing foul balls because the pitcher's skill needs a counterpoise — is unworthy of our profession in this age); 1917, Raymond *v.* Flint, 225 Mass. 521, 114 N. E. 811 (records of Danvers State Hospital, for 1896, admitted under St. 1912, c. 442, which expressly covered records "kept previous to April 5, 1905"); 1920, Leonard *v.* Boston Elev. R. Co., 234 Mass. 480, 125 N. E. 592 (under St. 1912, c. 442, § 2, amending St. 1905, c. 330, an entry relevant to the medical history and treatment of the case on the issues, is admissible, even though incidentally it bears on the defendant's liability; here an entry recording "odor of alcohol on breath" was held admissible on the facts, in an action for personal injury by running over the plaintiff on a car-track); *Minnesota:* St. 1921, c. 41, § 54 (workmen's compensation; "The records kept by a hospital of the medical or surgical treatment given to an employee in such hospital shall be admissible as evidence of the medical and surgical matters stated therein, but shall not be conclusive proof of such matters"); *Missouri:* Rev. St. 1919, § 13605 (workmen's compensation; records of "every hospital or other person furnishing the employee with medical aid," admissible by certified copy); *New York:* Cons. L. 1909, Insanity, §93 (on habeas corpus, a patient's "medical history . . . as it appears in the case-book" of a State hospital is admissible); St. 1919, c. 633, being Cons. L. 1909, c. 71, Mental Deficiency, § 35 (mentally defective person committed to custody may apply for habeas corpus; "the history of the patient as it appears in the case records shall be given in evidence"); *Pennsylvania:* St. 1919, June 26, § 6, Dig. § 22044, Workman's Comp. (workmen's compensation; "the records kept by a hospital of the medical or surgical treatment given to an employee in such hospital shall be admissible as evidence of the medical and surgical matters stated therein").

[2] For judicial rulings dealing with hospital records on common law principles, see *ante*, § 1639 (official records) and *ante*, § 1530 (regular entries).

For the privilege of *patient and physician* as here applicable, see *post*, § 2380.

For the privilege of *non-attendance*, as applied to a hospital superintendent, see *post*, § 2206.

For a medical expert *reading his report*, see *ante*, § 1385.

The *records* of *transportation* by *common carriers* would seem to fulfil these conditions. But it has been left to the ingenuity of the legislators framing the statutes against alcoholic intemperance to recognize this expansion of the principle, — though in that field only. By the modern prohibition statutes, the *common carrier's records of liquor transported* are admissible to evidence the fact of transportation, the name of the consignor and the consignee, and other details.[1]

On the principle of the Exception for Regular Entries in the Course of Business (*ante*, § 1530), it would have been necessary to call to the stand or account for the absence of all persons who contributed their knowledge to the record; but not so under the present principle; hence, a notable facilitation of proof.

Moreover, this rule may also involve a deviation from the testimonial principle of Personal Knowledge. The device amounts to evidencing no more than the consignor's admissions, when the consignor is the defendant on a criminal charge; for the consignor signs the order for carriage; thus the carrier's record testifies to no more than the agent's personal observation justifies, except that some evidence of identity (*e. g.* of handwriting of the consignor) is in theory requisite. But in so far as the record is admitted to evidence the actual contents of the articles transported, or the identity of a consignee not signing, or the identity of any party signing without other evidence of identity, the statutory rule is a distinct inroad on the principle of requiring personal knowledge from every witness (*ante*, § 657).

§ 1708. [1] CANADA: *Manitoba:* St. 1917, c. 92, § 122 (temperance act; express company's record of liquor delivered; verified copy given to an inspector, to be evidence "that the parcel or package contains liquor"); The Ontario provision is a peculiar one: *Ontario:* St. 1916, c. 50, Temperance Act, § 48 ("for the purpose of evidence," every person licensed to sell liquor shall enter the name, etc. of the vendee; the failure of "such person" to make and produce such record shall be 'prima facie' evidence of illegal sale).

UNITED STATES: *Federal:* St. 1919, Oct. 28, c. 83, 41 Stat. 305, §§ 13, 34 (liquor prohibition Act; "every carrier is to make a record of liquor carried and delivered and of the consignee and his identifying witness; all records and reports kept or filed under the provisions of this Act" are open to inspection, and certified copies are admissible "with like effect as the originals"); *Alaska:* U. S. St. 1917, Feb. 14, c. 53, § 7 (intoxicating liquor in Alaska; carrier's record of shipments, provable by agent's certified copy, to be "evidence of the facts stated therein"); *Colorado:* Comp. L. 1921, § 3707 (liquor traffic; common-carrier's required record of liquor transported, filed monthly as "public records," to be admissible); *Idaho:* St. 1913, c. 27, p. 126, § 6 (carriers of liquor, the record required to be kept may be evidenced by the carrier's agent's transcript); 1917, State *v.* Maguire, 31 Ida. 24, 169 Pac. 175 (St. 1913, p. 126, c. 27, § 6, applied; the carrier's record is evidence of delivery to the consignee without evidencing the consignee's signature to the receipt); *Louisiana:* St. 1915, No. 23 (common carrier shall not deliver liquor without taking a written receipt signed by the consignee; receipt is to be sent to the local clerk of court, and to be admitted in evidence); 1917, State *v.* Ferris, 142 La. 198, 76 So. 608 (St. 1915, No. 23, applied to admit receipts for liquor, signed by defendant and forwarded by the carrier to the court); *South Dakota:* St. 1919, Feb. 21, c. 246 (intoxicating liquors; amending Rev. C. § 10282; carrier's record book of liquors transported to be admissible); *Utah:* Comp. L. 1917, § 3364 (common carrier's record of liquor carried, to be "'prima facie' evidence of the facts therein stated"); *Virginia:* 1917, Cochran *v.* Com., 122 Va. 801, 94 S. E. 329 (receiving delivery of liquor from an express company; the express record "was indeed sufficient independent evidence of the corpus delicti both by St. 1916, c. 146, § 40, and independent of statute").

Topic XI: AFFIDAVITS.

§ 1709. **Affidavits inadmissible at Common Law; Exceptions Recognized.** The requirement of cross-examination, or an opportunity therefor, which is the essential feature of the Hearsay rule (*ante*, § 1362), is clearly not satisfied when an affidavit is offered; because, though under oath, it is uttered 'ex parte,' without notice to the opponent to afford him the opportunity of cross-examination. Even if notice were in fact given in a particular case and the opportunity of attendance thus afforded, the sworn statement thus made would not of itself satisfy the rule; for unless the officer before whom the oath was taken were one empowered by law to supervise and direct the procedure of taking the testimony, it could not be conceded that there was a real opportunity for a cross-examination in a true and adequate sense. So that, in order truly to furnish such an opportunity, the officer must be thus empowered, and then the sworn statement becomes in effect a deposition, which is conceded at common law to be admissible. Thus, where a statute empowering an officer taking affidavits provides for notice and cross-examination, the case is assimilated to a deposition, even though the name "affidavit" is used; and such statutes have been included in §§ 1380–1382, *ante*.

At common law, then, an affidavit, *i. e.* a mere sworn statement made out of court, is inadmissible, for lack of the opportunity of cross-examination. This rule, with the authorities, has been already examined (*ante*, § 1384).

The *exceptions* to this rule at common law were rare. There was of course a considerable recognition of affidavits in certain classes of proceedings with which the present exposition is not concerned,[1] namely, in the courts of Chancery,[2] in the Ecclesiastical courts (including admiralty matters[3] and testamentary and matrimonial matters), and in non-responsory proceedings (motions, and the like) in the Common-Law courts.[4] But in *trials by jury* in the Common-Law courts, there seem to have been but two excepted cases, one of which was purely local.

(1) In *proving the loss of the original of a document* in order to admit a copy, the *party himself*, though interested, was allowed to testify to the loss; the hardship of proving it otherwise being thought to justify an exception to the rule of disqualification by interest. The party thus admitted was by some Courts allowed even to take the stand as a witness, but by all it was conceded that at least his affidavit might be received.[5] Thus the result was

§ 1709. [1] As explained *ante*, § 4.

[2] *Ante*, §§ 1377, 1384.

[3] 1860, Dr. Lushington, in The Peerless, 1 Lush. 30, 41.

[4] 1841, R. *v.* Ryle, 9 M. & W. 227, 238; the statutes cited *post*, § 1710; and the authorities cited *ante* §§ 4c–4g (rules of evidence before administrative tribunals, etc.).

For the authorities on the rule for *habeas corpus* proceedings, see a careful opinion by Lumpkin, J., in Robertson *v.* Heath (1909), 132 Ga. 310, 64 S. E. 73. For the use of affidavits before commissioners of *immigration*, see Choy Gum *v.* Backus, 9th C. C. A., 223 Fed. 487.

[5] Cases cited *ante*, § 1196. The affidavit could not be received to prove the document's *contents*: 1873, McFarland *v.* Dey, 69 Ill. 419, 421.

reached, in most Courts, on the general principle of necessity (*ante*, § 1421); the party's incompetency to take the stand created a necessity for resorting to his extrajudicial statement. It would follow that, since parties have been made competent by statute, there is no longer a necessity for resorting to his affidavit. This is probably the law, for all ordinary cases (*ante*, § 1196) of proof of loss of a document; but the statutes which regulate the recording of deeds and the proof of a recorded deed (*ante*, § 1225) have in many States perpetuated for that class of documents the common-law exception and have expressly sanctioned the use of a party's affidavits.[6] But neither at common law nor in the rule's perpetuation under these statutes about recorded deeds is there any authority for giving similar sanction to a *third person's affidavit* to prove the document's loss; for this would fall quite without the reason of the exception.[7]

(2) In Pennsylvania, a long-standing tradition admits an affidavit from a *foreign country* to prove *facts of family history*, and particularly the copy of a parish-register or a family Bible.[8]

§ 1710. **Exceptions created by Statute (Publication of Notice, Attesting Will-Witness, Accounts, Foreclosure Sale, Copies of Bank and Corporation Books, Official Analyses, Forgery of a Bond, Translations, Ex Parte Proceedings, etc.).** The general principle of Necessity (*ante*, § 1421), underlying the Exceptions to the Hearsay rule, has been exemplified in many statutes sanctioning the use of affidavits in various classes of cases where serious and frequent inconvenience would be caused by requiring the calling of witnesses in court and where under the special circumstances (*ante*, § 1422) there is little reason to fear false testimony and little need for the searching process of cross-examination.

The subjects of these statutes are too casual and varied to admit of a systematic classification, and in only a few instances has there been a general

[6] Statutes and cases cited *ante*, § 1225.

[7] 1870, Becker *v.* Quigg, 54 Ill. 390, 394 (the common-law allowance of affidavits by the party, who was incompetent to testify, and the statutory continuance of this, does not admit the affidavit of a third person); 1873, McFarland *v.* Dey, 69 Ill. 419, 421 (same); 1829, Poignand *v.* Smith, 8 Pick. Miss. 272, 277 ("The affidavit of a party on the question of loss of a paper may be admitted, to exclude any presumption that he may have it in his possession or know where it is; but those who may be admitted as witnesses must testify in the usual form, in order that the advantage of cross-examination may be preserved"); 1841, Viles *v.* Moulton, 13 Vt. 510, 515 (third person's affidavit not admitted).

Contra, but unsound; 1852, McCann *v.* Beach, 2 Cal. 25, 30, *semble;* 1858, Bagley *v.* Eaton, 10 Cal. 126, 146 (affidavit of one competent to testify on the stand is receivable; though the Court may require examination on the stand); 1880, Taylor *v.* McIrwin, 94 Ill. 488, 491 (affidavit of search for a deed, by a recorder in another State, admitted).

[8] 1759, Hyam *v.* Edwards, 1 Dall. 2 (affidavit before the Mayor of London, received to prove a copy of a birth-and-death register there); 1791, Douglass *v.* Sanderson, 1 Yeates 15 (affidavit of authenticity of a leaf of a family Bible, made before the borough burgess and notary of Wilmington; admitted "under the special circumstances of the case in proof of pedigree"): *post* 1776, Fockler *v.* Simpson, 1 Yeates 17 ("an 'ex parte' affidavit made in England was good evidence in case of pedigree"); 1823, Kingston *v.* Lesley, 10 S. & R. 383, 387 (affidavit of a copy of a parish-register in the Barbadoes, sworn before the deputy-secretary there, received; "the case of Hyam *v.* Edwards is law," though "there is no more reason to admit 'ex parte' affidavits in cases of pedigree than in other cases").

recognition of the exception in many jurisdictions. The statutory use of affidavits to prove the *loss of a recorded deed* has been already examined (*ante*, §§ 1709, 1225); the remaining instances concern chiefly the following subjects:[1] *service* or *publication of notice*, particularly *publication in a news-*

§ 1710. [1] The statutes, with a few interpreting rulings, are as follows; compare the statutes *ante*, § 1674 (admitting certain certificates without oath).

ENGLAND: for some English statutes, see *ante*, § 1380 (summons for cross-examination).

CANADA: for other Canadian statutes, see *ante*, § 1380. *British Columbia:* 1918, Macdonald *v.* Macdonald, 18 D. L. R. 308, B. C. (Divorce Act, § 21, allowing proof of adultery by affidavit, applied);
Manitoba: Rev. St. 1913, c. 65, § 55 (affidavits of service of notice, filed or deposited in a local land titles or registry office, admissible); c. 46, Rule 476 (the judge may admit proof by affidavits, on such terms as he thinks reasonable; except where the other party "'bona fide' desires the production of a witness for cross-examination and such witness can be produced"); R. 479 (affidavits may be used by consent or by leave of Court); c. 47, § 56 (affidavits in surrogate courts);
Newfoundland: Consol. St. 1916, c. 83, Rules of Court Ord. 33, R. 1, Ord. 33, R. 1, 22 (Court may receive affidavits, but may order the witness to be produced for cross-examination);
Northwest Territories: Consol. Ord. 1898, c. 21 Rules 263, 286, 293 (affidavits may on special conditions be received);
Nova Scotia: Rules of Court 1900, Ord. 35, R. 1 (like Man. Rule 476); Ord. 36, R. 1 (upon motions, etc., affidavits may be used; but the Court may order attendance for cross-examination); R. 28 (regulations for cross-examination of affiants); Crown Rules 5 (applies Ord. 36, *supra*);
Ontario: Rev. St. 1914, c. 63, § 119 (money actions under $25; affidavit of a person "resident without the limits of the county" may be received; but the judge may before judgment require the person to answer interrogatories); Rules of Court 1914, R. 269 (cited *ante*, § 1380); c. 166, § 46 (sworn documents by surveyor, and evidence taken by him, filed in registry office, to be admissible).

UNITED STATES: *Alabama:* Code 1907, § 2491 (plaintiff's affidavit of loss, etc., contents, and non-payment of a mercantile instrument, admissible); § 5275 (printer's affidavit of publication of newspaper notice of limited partnership, admissible); § 4431 (admissible in guardian's settlements); § 2674 (admissible in administration settlements); § 3970 (in suits upon accounts, an affidavit by a competent witness to an itemized statement of account, admissible on certain conditions); § 4667 (publisher's affidavit as to notice, etc., of deposition *in perpetuam*, receivable); § 2993 (publication of any notice in a newspaper is provable by affidavit of the printer, publisher, clerk, or superintendent); § 2994 (posting of any required notice is provable by affidavit with copy filed in court); St. 1915, No. 805, p. 919 (affidavits of relationship of parties to conveyances, filed for record, are admissible, if the affidavit is deceased or non-resident, or of unknown residence, or too old, sick, or infirm to attend court, or female);
Alaska: Comp. L. 1913, § 884 (proof of service of a summons may be made by affidavit of person serving or, in case of publication, by affidavit of printer or foreman or principal clerk); §§ 1470, 1472 (like Or. Laws 1920, §§ 831–833); § 497 (married woman's recorded affidavit listing personalty etc. as separate property, to be 'prima facie' evidence of the facts stated);
Arkansas: Dig. 1919, § 4199 (affidavit allowable "to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, a stay of proceedings, or a warning order, or upon a motion"); § 4200 (affidavit sufficient to establish an account in a suit thereon, unless denied on oath);
California: C. C. P. 1872, § 2009 ("An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion"); § 2010 (publication of a document, or notice required to be published in a newspaper, provable by affidavit of the printer or his foreman or principal clerk, annexed to a copy); § 465 (proof of service may be made by affidavit of the person serving or of the printer publishing); Pol. C. § 3769 (collector's affidavit of publication of notice of sale for taxes, admissible); § 1117 (affidavit of registration is evidence of the affiant being an elector of the county); P. C. 1872, § 1204 (when the judge considers circumstances affecting sentence, no affidavit is to be received); Civ. C. §§ 2471, 2484 (affidavit of publication of change of partnership, by the newspaper's printer, publisher, or chief clerk, admissible); § 1426 *m* (affidavit or county recorder's copy, of labor done on mining-claim, admissible);
Colorado: Comp. St. 1921, § 6549 (notice required to be published in a newspaper provable by the printer's or publisher's certificate; compare the statutes *ante*, § 1674); §§ 1764, 1770 (publication of notice of irrigation claim; for a newspaper, provable by the "sworn

paper; attesting witness' proof of a will's execution; items of an account; proceedings of a *foreclosure* or *probate sale;* copies of *bank-books* and *corporation records; chemical analysis of foods, fertilizers*, and the like; genuineness or forgery of a *government bond or note; non-residence of a witness; age* of an

certificate of the publisher of such newspaper"; for posted copies, "by the affidavit of some credible person, certified to be such" by the officer administering the oath); § 6569 (service of subpœna, provable by server's affidavit);
Connecticut: Gen. St. 1918, § 4949 ("any or all of the attesting witnesses" may make affidavit, at request of testator or executor, which "shall be accepted" as if the oath had been taken in court); 1901, Vivian's Appeal, 54 Conn. 257, 50 Atl. 797 (affidavit of attesting-witness, admitted under the statute); § 5723 (court stenographer's notes of testimony, "verified by oath," admissible);
Florida: Rev. G. S. 1919, § 3937 (when a marriage certificate was not made, or is lost, or "by reason of death or other cause" cannot be obtained, "the marriage may be proved by affidavit" "made by two competent witnesses who were present and saw the marriage ceremony performed," filed and recorded like a certificate); § 6084 (in a prosecution for forging, etc., a note, etc., of the U. S. or a State or Territory, a certificate under oath of the secretary of the treasury of the respective government is admissible to prove the forged nature of the note, etc.); § 79 (publisher's or bill-poster's affidavit, admissible to prove notice of special legislation asked); § 3576 (habeas corpus; "when it shall be inconvenient [to whom?] to procure the personal attendance of a witness," his affidavit, taken on notice, may be used);
Georgia: Rev. C. 1910, § 3200 (limited, partnership notice; affidavit of "printers publishers, or editors of the newspapers," admissible);
Hawaii: Rev. L. 1915, § 3395 (newspaper printer's or publisher's affidavit of publication of partnership notice, admissible);
Idaho: Comp. St. 1919, § 7994 (like Cal. C. C. P. § 2009); § 7995 (like id. § 2010); § 3259 (tax-collector's affidavit of publication of notice of tax-sale, admissible); § 6680 (service of summons may be proved by affidavit; when made by publication, by affidavit of printer or his foreman or principal clerk); § 9037 (fixing sentence; like Cal. P. C. § 1204);
Illinois: Rev. St. 1874, c. 100, § 1 (when a notice is required by law, court order, or contract, to be published in a newspaper, and no other mode of proof is provided, "the certificate of the publisher, by himself or his authorized agent," with copy annexed, is admissible); c. 88, § 4 (certificate of "one or more of his neighbors" of a buyer branding or marking stock, admissible to prove the time of branding, nature of brand, and previous branding, but not to prove ownership); 1869, Kettering *v.* Jacksonville, 50 Ill. 39, 41 (city ordinance; newspaper publisher's affidavit received under a charter);
Indiana: Burns' Ann. St. 1914, § 489 ("acts and proceedings of corporations," provable by sworn copy); § 496 (whenever notice is required to be published in a newspaper, the affidavit of the printer or his employee being clerk or printer, is admissible with a copy of the notice); § 504 (similar for published service of process or notice; ordinary service, provable by affidavit of the server); § 8314 (affidavit admissible to prove notice, etc., of lien of a mechanic, etc.);
Iowa: Code 1897, § 3536, Rev. Code § 7181 (service of notice of action, by publication in newspaper; proof allowable "by the affidavit of the publisher or his foreman"); § 4634, Rev. Code § 7341 (like Nebr. Rev. St. 1922, § 8912); §§ 4677, 4678, Rev. Code §§ 7384, 7385 (providing for notice and cross-examination, in the officer's discretion, of an affiant); § 4680, Rev. Code § 7387 (publications "required to be made in a newspaper," provable "by the affidavit of any person having knowledge of the fact," if made within six months); § 4681, Rev. Code § 7388 (affidavit of "any competent witness," admissible to prove the "posting up or service of any notice or other paper required by law"); Rev. Code, § 7169 (proof of service of process may be made by affidavit); 1878, Farrell *v.* Leighton, 49 Ia. 174, 176 (Code § 4680, formerly 3697, applied; publisher's affidavit under § 3536, formerly 2620, not required); 1921, Schultz' Estate, — Ia. —, 185 N. W. 24 (proof of publication made by affidavit under Code 1897, §§ 4680–4683, is not the exclusive method of proof);
Kansas: Gen. St. 1915, § 7254 (affidavit allowable to verify a pleading, to prove service of a summons, notice, or other process, "to obtain a provisional remedy, the examination of a witness, a stay of proceedings, or upon a motion"); § 7283 ("written evidence" in a language not English; a translation is provable by the translator's affidavit); § 7282 (religious society's register of marriages, etc., provable by affidavit-copy by the pastor, clerk, or other keeper); § 6972, St. 1909, c. 182, § 21 (service by publication, provable by affidavit of "the printer, or his foreman or principal clerk, or other person knowing the same");
Kentucky: C. C. P. § 547 (substantially like Cal. C. C. P. § 2009); Stats. 1915, § 14 (publication of notice, provable by affidavit of newspaper publisher or proprietor);
Maine: Rev. St. 1916, c. 76, § 24 (affidavit of

employed minor; copy of a *church register; translation* of testimony in a *foreign language; ancillary* or *preliminary proceedings* in general; and *inventories* by an *executor* or *administrator*. The wider extension of these statutory exceptions is to be approved; for in most of these instances, and others as yet

notice of sale of deceased's estate, admissible); c. 87, § 127 (plaintiff's affidavit to account in action on itemized account, admissible); c. 123, § 8 (forgery of bank-bills, etc.; like Mass. Gen. L. 1920, c. 267, § 15);

Maryland: Ann. Code 1914, Art. 35, § 48 (oath of a "disinterested credible witness" before a justice or other officer, admissible to prove goods sold, work done, money paid, and the value thereof and promise to pay; provided the party-claimant makes affidavit of 'bona fides' before the first day of the trial term); § 49 (creditor's account for money, goods, or other account-items, sworn before an officer, admissible); Art. 73, § 8 (newspaper editor's or disinterested person's affidavit of publication of notice of terms of partnership, admissible); Art. 84, § 8 (vessel-captain's affidavit giving a copy of a shipping-article, admissible to prove subscription by a seaman); Art. 93, § 8 (administrator's affidavit-list of debts of a decedent, admissible on a plea of insufficient assets); §§ 351, 353 (affidavit of a foreign will's execution by a subscribing witness, or of the hand-writing of a testator or deceased subscribing witness, admissible);

Massachusetts: Gen. L. 1920, c. 255, §§ 6, 8 (same for mortgagee's notice of intention to foreclose, and pledgee of personalty's notice); c. 202, § 15 (same for notice of sale by executor, administrator, or guardian); c. 60, §§ 57, 80 (same for collector's demand of payment of taxes, notice of sale, etc.); c. 267, § 15 (in charges connected with counterfeit Government securities, certificate under oath of certain appropriate Government officers is admissible to prove forgery); c. 195, § 12 (affidavit of an executor's notice of appointment, admissible in certain cases); c. 233, § 77 (copy of a domestic bank's, etc. books, under affidavit of the bank custodian, admissible on certain conditions); c. 192, § 2 (subscribing witness' affidavit, admissible in the uncontested probate of wills); c. 231, § 125 (Supreme Court on appellate proceedings may take supplementary evidence by affidavit);

Michigan: Comp. L. 1915, § 2789 (affidavit admissible to prove notice in village condemnation proceedings); § 2822 (village or city condemnation proceedings, etc.; notice provable by affidavit of the printer of the newspaper or "some person in his employ knowing the facts," or by the person posting it); §§ 4349, 4364 (election for county road system or order to lay out road; notice provable by the affidavit of any one "knowing the facts"); § 6980 (township resolution licensing peddlers, etc.; affidavit of notice by one posting it, admissible); § 8977 (affidavit of notice of meeting of a mining company alienating lands, admissible); § 11232 (same for a corporation for treating disease); § 14007 (affidavit of an executor or administrator or "some other person having knowledge of the facts," admissible to prove notice of sale); §§ 12523–12526 (publication of a newspaper-notice, provable by affidavit of the printer or foreman or principal clerk); §§ 14963, 14965 (affidavit of notice of a foreclosure sale, by the printer of a newspaper or some one in his employ knowing the facts, or an affidavit of sale, by the auctioneer, admissible); § 14801 (affidavit of service of a lien-notice by "such person serving or posting the same," admissible); § 15442 (in prosecutions for forging, etc., bills of credit issued for U. S. or any State or Territory, the certificate under oath of the secretary of the treasury or treasurer of such government is admissible to prove "the same to be forged"); § 12536 (affidavit admissible to prove partnership); § 11738 (affidavits of identity, etc. recorded with register of deeds; quoted *ante*, § 1644);

Minnesota: Gen. St. 1913, § 8421 (affidavit of a printer or his foreman or clerk of the publication of any notice, advertisement, etc., which by law is required or authorized to be published in such newspaper, admissible); § 8422 (affidavit by an officer of the State Historical Society, recorded with the register of deeds, of a legal notice in a newspaper purporting to be published in this State before 1900, admissible as to certain specified facts); § 8460 (in prosecutions for forging, etc., any bill, etc., issued for the U. S. or any State, a certificate under oath of the U. S. secretary of treasury or treasurer, or of the secretary or treasurer of the State, admissible to prove the forged character); § 8138 (to prove a sale on foreclosure, an affidavit of publication of notice, by the printer of the newspaper or "some person in his employ knowing the facts," admissible; and to prove the facts of sale, an affidavit by a person acting as auctioneer thereat, admissible); § 7740 (service of papers, provable by affidavit of person serving, or of printer or his foreman or clerk, or of person mailing);

Mississippi: Code 1906, § 1980, Hem. § 1640 (publication of notice in a newspaper required by law or court order, provable by copy with affidavit of "the printer, publisher, clerk, or superintendent of the newspaper"); § 1981, Hem. § 1641 (posting of notice required by law or court order, provable by copy with affidavit of posting); § 1992, Hem. § 1657 (affidavit of a

unrecognized, the general and uniform adoption of this simple mode of proof would bring great advantage without incurring appreciable risk.

Affidavits are of course sometimes available in evidence upon other principles than the present Exception, *i. e.* in cases where they are *not offered as*

subscribing witness, before an officer in the State, admissible if no contest);
Missouri: Rev. St. 1919, § 77 (affidavit of the editor or publisher of a newspaper, admissible to prove publication of notice by an executor or administrator); §§ 192, 197 (affidavits admissible in certain cases for claims against a deceased's estate); § 5353 (church register of marriages, etc., kept in the State, provable by copy verified by the affidavit of the pastor or other head of the society or by the clerk or other keeper of the register); § 5380 (affidavit of a "competent witness" admissible to prove "an assignment of or an indorsement on any bond, bill, or note"); § 5381 (so also to prove the existence of a partnership; the details of statement being prescribed); § 5384 (such affidavits must be filed a specified number of days before trial); § 5397 (when written evidence is in other than the English language, a competent translator's affidavit of translation may be received); § 10614 (when a marriage record is destroyed and the celebrant is dead, cannot be found, or refuses to give a certificate, the affidavits of "two credible persons who witnessed such marriage" may be recorded and admitted); § 3000 (demand in forcible entry and detainer, provable by a private person's sworn return); § 10404 (affidavit of a printer or publisher, admissible to prove publication of any notice required by law or court order, or done under a deed of trust or power of attorney);
Montana: Rev. C. 1921, §§ 10636–7 (like Cal. C. C. P. §§ 2009, 2010); § 8023 (affidavit of publication of a partnership notice, by the "printer, publisher, or chief clerk of a newspaper," admissible); § 9122 (proof of service may be made by affidavit of the printer serving or by affidavit of the printer, etc., showing publication); § 12068 (affidavits not admissible on a hearing to fix sentence);
Nebraska: Rev. St. 1922, § 8878 (affidavits allowable as in Cal. C. C. P. § 2009); § 8908 ("publications required by law to be made in a newspaper," provable by affidavit "of any person having knowledge of the facts," if sworn within six months of the last day of publication); § 8909 (posting or service of any paper required by law, provable by affidavit of "any competent witness," made within six months); § 8912 (copy of field-notes or plat of a county surveyor, "certified under oath," admissible to prove "the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation"); § 5652 (recorded affidavits "explaining or correcting any apparent defect in the chain of title to any real estate," admissible); § 8586 (service by publication, provable by affidavit of printer or foreman or principal clerk or "other person knowing the same"); 1903, Home Ins. Co. *v.* Clark, — Nebr. —, 95 N. W. 1056 (affidavit of the publishing company's president, received);
Nevada: Rev. L. 1912, § 5904 (on application of a non-resident for administration, affidavit sufficient to prove identity on certain conditions); § 5873 (subscribing will-witness' affidavit; cited *ante*, § 1310); § 2914 (affidavits of publication of notice of partnership, by printer, publisher, or chief clerk of a newspaper, admissible); § 5032 (proof of service of summons; like Cal. C. C. P. § 415);
New Hampshire: Pub. St. 1891, c. 56, § 17 (affidavit of notice of taxation, admissible); c. 61, § 7 (affidavit of notice of sale for taxes, admissible); c. 139, § 16 ("the affidavit of the party making an entry into real estate, under the second method of foreclosure, and of the witnesses thereto," and a copy of the notice under the second and third methods, "verified by affidavit," when recorded, "shall be evidence of entry, possession, and publication"); 1861, Wendell *v.* Abbott, 43 N. H. 68, 73 (affidavit of entrant and witnesses in foreclosure of mortgage; the exception is to be strictly construed, and an affidavit of one witness merely, without that of the party, is sufficient);
New Mexico: Annot. St. 1915, § 1601 (in prosecutions for counterfeiting, etc., a note, etc., issued on behalf of the U. S. or any State or Territory, the certificate under oath of U. S. treasurer or secretary of the Treasury, or State or Territorial secretary or treasurer, is admissible);
New York: C. P. A. § 367 ("Where a public officer is required or authorized to make a certificate or affidavit," it is admissible; see quotation in full *ante*, § 1674); § 370 (affidavit of newspaper publication of notice, by the printer, etc., admissible); § 371 (affidavit of service of notice, by the person serving, admissible if the person is dead or insane or his attendance is not compellable with due diligence); Cons. L. 1909, Real Property, § 551 (recorded affidavit of foreclosure-sale, admissible);
North Carolina: Con. St. 1919, § 46 (publication of notice to decedent's creditors, provable by clerk's certified copy of affidavit of proprietor, etc., of newspaper, filed with clerk of court); § 3266 (publication of notice of partnership, provable by affidavit of newspaper proprietor); 1915, Nall *v.* Kelly, 169 N. C.

the assertions of the affiant to prove the fact stated. These other available modes are three in number: (1) where an affidavit filed by an opponent, in the same or another litigation, is offered as his *admission* (*ante*, § 1075); (2) where the opponent's affidavit, in the present trial, that an *absent witness*

717, 86 S. E. 627 (applying St. 1897, c. 480, Rev. 1905, § 1625, as to verified itemized statements of account);
North Dakota: Comp. L. 1913, § 6440 (like Cal. Civ. C. § 2484); § 7887 (substantially like Cal. C. C. P. § 2009, omitting "a paper in a special proceeding," putting "process" for "paper" in the next clause, and omitting "or special proceeding"); § 7913 (like Cal. C. C. P. § 2010, adding "publisher" and substituting "clerk or bookkeeper" for "principal clerk"); § 7436 (proof of service of summons, etc., may be made by affidavit); § 7887 ("An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process in any action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings or upon a motion and in any other case permitted by law");
Ohio: Gen. Code Ann. 1921, § 10713 (affidavit of publisher, admissible to prove publication of notice of appointment); § 11045 (affidavit of notice of eminent domain proceedings, admissible); § 2768 (affidavit of death of ancestor and of facts of heirship, recorded with deed of heir, to be 'prima facie' evidence "so far as competent"); § 11523 (ancillary proceedings; like Cal. C. C. P. § 2009);
Oklahoma: Comp. Stats. 1921, § 8146 (notice of dissolution of partnership, provable by affidavit of "the printer, publisher, or chief clerk of a newspaper"); § 610 (like Cal. C. C. P. § 2009, omitting "or a paper in a special proceeding" and "or special proceeding"); § 648 (when written evidence is in a language other than English, a competent translator's affidavit of translation into English is admissible);
Oregon: Laws 1920, § 831 (like Cal. C. C. P. § 2009, omitting the first clause as to verification); § 833 (like Cal. C. C. P. § 2010, but allowing use only within six months); § 2008 (in a prosecution for forging, etc., a note, bond, etc., of the U. S. or any State or Territory, "the certificate duly sworn to" of the U. S. treasurer or secretary of the treasury or of a State or Territorial secretary or treasurer, is admissible to prove the note's counterfeit character);
Pennsylvania: St. 1883, June 22, Dig. 1920, §§ 10343–10345, Evidence ("verified" copies of bank-book entries, receivable where the bank is not a party, unless against affidavit of injustice; nature of the verifying affidavit specified); 1865, Howser *v.* Com., 51 Pa. 332, 341 (to show that no effects of a murdered person were found, the sworn inventory of the administrator was received);
Philippine Islands: C. C. P. 1901, § 348 (substantially like Cal. C. C. P. §§ 2009, 2010); § 400 (service of process; like Cal. C. C. P. § 415);
Porto Rico: Rev. St. & C. 1911, §§ 1496, 1497 (like Cal. C. C. P. §§ 2009, 2010);
Rhode Island: Gen. L. 1909, c. 173, § 10, c. 174, § 5 (sworn certificate of the analyzer of milk or of vinegar submitted for analysis by the inspector, admissible); c. 253, § 15 (affidavit of notice of sale, by a person causing a sale of an administrator, guardian, sheriff, mortgagee, etc., admissible);
South Carolina: Civ. C. 1922, § 5527 (sworn return of a surveyor appointed by the parties or the Court, admissible on an issue of title or boundary); C. C. P. 1922, § 372 (proof of service of summons, etc., may be made by affidavit of person serving, and of publication, by affidavit of printer or foreman or principal clerk); Crim. L. 1922, § 712 (violation of shipping law; ship's articles, by copy authenticated by the affidavit of the captain, admissible to prove "that any seaman whose name appears subscribed thereto has signed the agreement");
South Dakota: Rev. C. 1919, §§ 1339, 1347 (like Cal. Civ. C. §§ 2471, 2484); § 2721 (publication of any notice, etc., required by law in any newspaper, provable by affidavit of "any printer, foreman of any printer, or publisher of any newspaper published in this State"); § 2754 (admissible to verify a pleading, prove service of process, obtain a provisional remedy, a witness' examination, a story of proceedings, or upon a motion, "and in any other case permitted by law"); § 2892 (recorded affidavits of foreclosure sale); § 3262 (administrator's appointment; nonresident's affidavit, admissible to evidence identity); § 8812 (printer's affidavits, admissible to evidence publication of notice of sale of stock-shares); § 10324 (illegal sale of liquor; quoted *ante*, § 1680);
Tennessee: Shannon's Code, § 7343 (affidavit of defendant in bastardy denying intercourse in the period of gestation, admissible);
Texas: Rev. Civ. St. 1911, § 3267 (affidavit of a subscribing witness, made "in open court," admissible to prove a will; such affidavits are also admissible for the two witnesses to handwriting of testator and subscribing witnesses);
Utah: Comp. St. 1917, §§ 3442, 3443 (like Cal. C. C. P. §§ 2009, 2010); § 3895 (affidavit of mining improvements, admissible); § 7866 (publication or posting of probate notice "required to be published or posted may be given by the affidavit respectively of the publisher or principal clerk of the newspaper in which notice was published, or of the person who

would testify to a certain tenor, is *judicially admitted* to be true in order to prevent a continuance (*post*, § 2595); (3) where an affidavit furnished by the beneficiary to the *insurer* as a *proof of loss* is received as a *verbal act* fulfilling the conditions of the insurance contract (*post*, § 1770) or as an *admission* (*ante*, § 1073).

Topic XII: STATEMENTS BY A VOTER.

§ 1712. **Voter's Declarations as to Qualifications, Domicil, or Bribery.** In order to ascertain the *qualifications of a voter*, for the purpose of striking out a vote if found to have been cast by a disqualified person, resort is sometimes desired to be made to the extrajudicial declarations of the voter himself. Such declarations can be available, upon the general principles of evidence, in only one of three ways.

(1) If the qualification depends upon the voter's *domicil*, then his declarations, at the time of an act of residence, or removal of residence, stating his intent as to the purpose or permanency of the act, are receivable, in the same way that any person's declarations of domiciliary intent are receivable, namely, as statements of a mental condition (*post*, § 1727), or as verbal acts (*post*, § 1784). The rule here would be neither more nor less favorable for the

posted the notices"); § 918 (notice of corporate stock assessment; affidavits of printer, foreman, or principal clerk of newspaper, and of secretary or auctioneer, admissible);
Virginia: Code 1919, § 6224 (affidavit that a witness or party is or resides without the State, receivable; "certificate" of an editor, or affidavit of any other person, as to publication in a newspaper as required by law, receivable); 1841, Cunningham *v.* Smithson, 12 Leigh 32, 38, 67, *semble* (the certificate under Code § 2358 must be on oath);
Washington: R. & B. Code 1909, § 237 (like Wis. Stats. § 2642);
West Virginia: Code 1914, c. 130, § 32 (that a witness or party resides or is out of State, is provable by affidavit; that notice was published as required in a newspaper, is provable by "certificate" of the editor or publisher or by affidavit of any other person); c. 121, § 1 (return of any legal notice, provable by affidavit);
Wisconsin: Stats. 1919, § 2642 (proof of service of civil summons, etc., may be made by affidavit of the person serving or of the publisher or printer, or his foreman or principal clerk, in case of publication); § 3537 (proof of foreclosure sale may be made by affidavit of publication of notice by the newspaper printer or "some person in his employ knowing the facts," and by affidavit of sale by the auctioneer, or "in case of his death or other disability," by "any person having knowledge of the facts"); § 925 (47) (publication of a municipal ordinance, provable by the filed affidavit of the printer or his foreman); § 4164 (substantially like N. Y. C. P. A. § 367); § 4173 (notice required by law to be published, provable by affidavit of the printer or foreman of "any newspaper in the State"); § 4173 *a* (service of notice required, provable by affidavit of the person serving it, where no other mode is expressly prescribed); §§ 4174, 4175 (notice of application to court or of sale of realty, provable by affidavit of the printer or foreman or principal clerk of the newspaper, recorded respectively with the clerk of court or the register of deeds); § 418 *a* (notice required by corporate by-laws, provable by affidavit of the person giving it, filed with the corporate clerk); § 4627 (substantially like Minn. Gen. St. § 8460); Wis. St. 1921, c. 425, amending Stats. 1919, § 2238 *a* (admitting recorded affidavits duly witnessed and acknowledged and stating facts "as to possession of any premises, descent, heirship, date of birth, death or marriage or as to the identity of a party to any conveyance of record, or . . . that . . . any such party . . . is single or married, or as to the identification of any plats of subdivisions of any city or village");
Wyoming: Comp. St. 1920, § 4642 (publication notice of foreclosure sale, etc., provable by recorded affidavit of the proprietor or manager of the newspaper or "some person in his employ knowing the facts"; sale provable by the auctioneer's recorded affidavit); § 5829 (affidavits allowable in certain ancillary proceedings); § 6180 (affidavits may be used on application for injunction).

statements of voters in election controversies than for others' statements in other controversies.

(2) If the qualification depends upon any *other circumstances*, or if, though it depends upon domicil, the statement is of an external fact (such as the place of residence, and not of an existing intent), then the voter's statement presents the ordinary case of an assertion of fact obnoxious to the Hearsay rule; and it can be made available only (*a*) as being the admission of a party or privy (*ante*, § 1076), or (*b*) as coming under a special and separate exception to the Hearsay rule. The statements ordinarily presenting this question are statements that the voter has not the requisite *property-holding* or is *not a citizen* or has been *bribed*.

(*a*) In England, the theory that such statements may be treated as a *party's admissions* has always been advanced as the correct one:

> 1837, Mr. *Thesiger*, arguing, in *Nowlan's Case*, Falc. & Fitzh. 70, 73: "A voter who has voted for the sitting member is always considered as a party, and it is on that ground that his declarations are admissible. The question is always considered to be between the voter and the party questioning his vote, and not merely between the sitting member and the petitioner."

It seems clear, however, that the voter is in no accurate sense a party to the proceedings; nor is he, after casting his vote, even indirectly or equitably interested in the controversy between rival claimants to the office:

> 1833, Serjt. *Merewether*, arguing, in *Southampton Case*, 2 Cockb. & R. El. C. 100, 114: "The rule of law is that no evidence can be received except upon oath. . . . The principle [as to a party's admissions] does not apply to the case in question, for the voter, having once given his vote, has no longer any interest in it; his interest has been transferred to the sitting member. He has therefore no longer such an inducement to speak the truth, arising from a sense of his own interest, as would make it safe to receive his declarations as to his own right divested of the sanction of an oath."

This theory of a party's admissions sufficed, nevertheless (though with occasional modifications), to establish the rule in English parliamentary practice; and that practice has been followed by the English courts, since electoral controversies have been placed in their jurisdiction.[1]

§ **1712.** [1] 1775, Milborne Port Case, 1 Doug. El. C., 2d ed., 97, 102, 134 (declarations of intention to commit a fraud, by one apparently an agent of a candidate, were admitted; no reason stated); 1775, Petersfield Case, 3 Doug. El. C. 3, 11 (declaration by a voter of having been bribed, not admitted in order to prove the fact upon the candidate, but admitted to disqualify the declarant as voter); 1775, Ivelchester Case, 3 Doug. El. C. 151, 159 (same; the result being that the question "Whose money did the voters say they had received?" was excluded, but the question "In whose interest did they say that they were to vote in consequence of their taking this money?" was allowed); 1775, Shaftesbury Case, 2 Doug. El. C. 303, 309 (same ruling, even after a voter had taken oath denying bribery); 1776, Worcester Case, 3 Doug. El. C. 239, 276 (same ruling); 1785, Bedford Case, 2 Luders, 381, 411 (*semble*, declarations admissible); 1796, Leominster Case, 2 Peckw. 391, 395 (a "declaration of a voter which tends to destroy his vote, is admissible whether made before or after the election," unless it involves penal consequences); 1804, Middlesex Case, 2 Peckw. 1, 141 (declarations as to property disqualification, held inadmissible; no reason

(*b*) There remains the possibility of recognizing a *distinct exception to the Hearsay* rule, for the purpose of admitting such declarations. If we recur to the fundamental policy of the exceptions (*ante*, §§ 1420–1422), we find two general requirements to be fulfilled; first, there must be a necessity for the hearsay, *i. e.* an impossibility of obtaining 'viva voce' in court from the same source any testimony or, at least, as good testimony; and, secondly, the hearsay statement must have been uttered under circumstances rendering it fairly trustworthy. Would these requirements be fulfilled, in the case of a voter's extrajudicial statements as to his disqualifications? It would seem that they are not, and that it is undesirable to recognize such an exception. The reasons have nowhere been better set out than in the following congressional report:

1872, Mr. *George F. Hoar*, reporting for the House Committee on Elections, in *Cessna* v. *Meyers*, Smith's Digest Congress. El. C. 60, 65: "Another question of importance which has arisen in the discussion of the cause is the question whether evidence of the declarations of alleged voters, made not under oath, in the country [*sic?*], should be received to show the fact that they voted, or for whom, or that they were not legally entitled to vote. Some of the Committee think that such evidence ought in no case to be admitted; except, of course, so far as declarations, made at the time, of the party's intent or understanding as to his then present residence or his purpose in a removal, are admissible as part of the 'res gestæ.' All of the Committee are of opinion that such evidence is to be received with the greatest caution, to be resorted to only when no better is to be had, and only acted on when the declarations are clearly proved and are themselves clear and satisfactory. As this question has been quite fully considered, it may be proper briefly to discuss it here. . . . [1] The general doctrine is usually put upon the ground that the voter is a party to the proceeding, and his declarations against the validity of his vote are to be admitted against him as such. If this were true, it would be quite clear that his declarations ought not to be received until he is first shown 'aliunde,' not only to have voted, but to have voted for the party against whom he is called; otherwise it would be in the power of an illegal voter to neutralize wrongfully two of the votes cast for a political opponent, first, by voting for his own candidate, secondly, by asserting to some witness afterward that he voted the other way, and so having his vote deducted from the party against whom it was cast. But it is not true that a voter is a party in any such sense as that his declarations are admissible on that ground. His interest is not legal or personal. It is frequently of the slightest possible nature. If he were a party, then his admissions should be competent as to the whole case — as to the votes of others, the conduct of the election officers, etc.; which, it is well settled, they are not. [2] Another reason given is that the inquiry is of a public nature, and that it should not be limited to the technical rules of evidence established for private causes. This is doubtless true. It is an inquiry of a public nature, and an inquiry of the highest interest and consequence. Some rules of evidence applicable to such an inquiry must be established; it is nowhere, so far as we know, claimed that in any other particular the ordinary rules of evidence should be relaxed

given); 1804, Weymouth Case, 2 Peckw. 195, 227 (similar declarations, held admissible); 1833, Southampton Case, Cockb. & R. 100, 114; Per. & Kn. 213, 222 (declarations as to illegal voting, admissible if made before the striking of the ballot); 1837, Nowlan's Case, Falcon. & Fitzh. 70, 72 (declarations as to property-disqualifications, admitted; the Committee declaring that in courts of law they had found, on inquiry, "the practice not uniform"); 1869, Windsor Case, 1 O'M. & H. 1, 5 (voter's declaration of corruption, admissible on the issue of striking out his vote); King's Lynn Case, 1 O'M. & H. 206, 208 (same; but not admissible to prove bribery against candidate).

in the determination of election cases. . . . [3] The practice of admitting this kind of evidence originated in England. So far as it has been adopted in this country, it has been without much discussion of the reasons on which it was founded. In England, as has been said, the vote was 'viva voce'; the fact that the party voted, and for whom, was susceptible of easy and indisputable proof by the record. The privilege of voting for members of Parliament was a considerable dignity, enjoyed by few. It commonly depended on the enjoyment of a freehold, the title to which did not as with us appear on public registries, but would be seriously endangered by admissions of the freeholder which disparaged it. An admission by the voter of his own want of qualification was therefore ordinarily an admission against his right to a special and rare franchise and an admission which seriously imperilled his title to his real estate; an admission so strongly against the interest of the party making it would seldom be made unless it were true. It furnishes no analogy for a people who regard voting, not as a privilege of a few, but as the right of all; where the vote, instead of being 'viva voce,' is studiously protected from publicity, and where such admissions, instead of having every probability in favor of their truth, may so easily be made the means of accomplishing great injustice and fraud without fear either of detection or of punishment. [4] It may be said that the principle of the secret ballot protects the voter from disclosing how he voted, and, in the absence of power to compel him to testify and furnish the best evidence, renders the resort to other evidence necessary. The Committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is, it cannot protect the illegal voter from disclosing how he voted. If it is, it would be doubtful whether the same policy should not prevent the use of the machinery of the law to discover and make public the fact, in whatever way it may be proved. It is the publicity of the vote, not the interrogation of the voter in regard to it, that the secret ballot is designed to prevent. There would seem to be no need to resort to hearsay evidence on this ground, unless the voter has first been called and, being interrogated, asserts his privilege and refuses to answer.[2] Even in that case a still more conclusive objection to hearsay testimony of this character is this: it is not at all likely to be either true or trustworthy. . . . [Hearsay evidence] is only admitted in cases where hearsay evidence is in the ordinary experience of mankind found to be generally correct, — as in matters of pedigree and the like. But a man who is so anxious to conceal how he voted as to refuse to disclose it on oath, even when the disclosure is demanded in the interest of public justice, and who is presumed to have voted fraudulently (for otherwise, in most cases, the inquiry is of no consequence), would be quite as likely to have made false statements on the subject, if he had made any. To permit such statements to be received to overcome the judgment of the election officers, who admit the vote publicly in the face of a challenge and with the right to scrutinize the voter, would seem to be exceedingly dangerous. . . . [But, on account of the precedents and of the preparations of both parties in this case,] we have applied the English rule to the evidence, with the limitation (of the reasonableness of which it would seem there can be no question) that evidence of the hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence 'aliunde' and when the declarations have been clearly proved and are themselves clear and satisfactory."

In the United States, the Courts have naturally been much influenced by the orthodox English practice. Yet the cogent reasoning of the Congressional Committee has in more recent rulings tended to prevail.[3] The law differs

[2] For this privilege, see *post*, § 2215.

[3] *U. S. Congress:* 1836, Newland *v.* Graham, 1 Bartl. Cong. El. C. 5, 6 (declarations of tenor of vote, excluded); 1840, New Jersey Case, 1 Bartl. Cong. L. C. 19, 24 (declarations as to the fact of voting, excluded); 1858, Vallan-

in the different States; in a few Courts the rule has been left unclear in successive precedents.

§ 1713. **Voter's Declarations as to Tenor of Vote or Intent of Words.** (1) Under the modern system of balloting, the ballot contains nothing to identify the ballot with a particular voter. Where a voter is found to have been disqualified, and it is desired to reject his vote, the question therefore arises whether his *extrajudicial assertions* as to the *tenor of his ballot* may be received.

Here the same considerations apply, though more forcibly. The voter's statements cannot be considered as the admissions of a party-opponent, because it does not yet appear how he has voted, and therefore it cannot be said that he is opposed in interest to the party who wishes the vote to be

digham *v.* Campbell, 1 Bartl. Cong. El. C. 223, 230 (declarations "touching their qualifications and the candidates for whom they voted," admitted, on the theory that "each voter challenged is a party to the proceeding"); 1872, Cessna *v.* Meyers, Smith Dig. Congr. El. C. 60, 65 (quoted *supra*); *Alabama:* 1901, Black *v.* Pate, 130 Ala. 514, 30 So. 434 (declarations as to qualifications, made after the election, held inadmissible); *Arizona:* 1899, Providence G. M. Co. *v.* Burke, 6 Ariz. 323, 57 Pac. 641 (declarations as to citizenship, by a voter not found, admitted); *Arkansas:* 1883, Patton *v.* Coates, 41 Ark. 111, 130 (declarations as to voting twice, admitted, not to show the vote void, but as conduct exhibiting a conspiracy); 1891, Rucks *v.* Renfrow, 54 Ark. 409, 411, 16 S. W. 6 (declarations "showing their want of qualifications to vote," inadmissible); *California:* 1866, Norwood *v.* Kenfield, 30 Cal. 393, 398 (left undecided); 1898, Smith *v.* Thomas, 121 Cal. 533, 54 Pac. 71 (declarations as to tenor of vote, inadmissible, except to impeach by self-contradiction); 1898, Lauer *v.* Estes, 120 Cal. 652, 53 Pac. 262 (declaration as to tenor of vote, inadmissible); *Colorado:* 1883, People *v.* Commissioners, 7 Colo. 190, 2 Pac. 912 (declarations as to qualifications, inadmissible); 1896, Sharp *v.* McIntire, 23 Colo. 99, 46 Pac. 115 (declarations at time of voting, as to domicil, admitted); *Illinois:* 1875, Beardstown *v.* Virginia, 76 Ill. 34, 45 ("considering the voter as a party, then it consists with legal principle to receive in evidence his declarations against himself"; but here, the ballots being lost and the tenor of the votes not appearing otherwise, the declarations were rejected because it could not be known whether they were against interest); 1876, Beardstown *v.* Virginia, 81 Ill. 541, 549 ("We will not commit ourselves to any absolute rule of admission or rejection," but most of the declarations were rejected on the facts); 1888, Kreitz *v.* Behrensmeyer, 125 Ill. 141, 196, 17 N. E. 232 ("In Beardstown *v.* Virginia, we . . . held that the declarations of a voter subsequent to the election were incompetent" (?); but declarations of a mental state, affecting his domicil, are admissible; see *post*, § 1727); 1898 Eggers *v.* Fox, 177 Ill. 185, 52 N. E. 269 (declaration that he had voted twice, admitted the declarant refusing to testify on the stand); *Kansas:* 1872, Gilleland *v.* Schuyler, 9 Kan. 569, 582 (declarations as to illegal multiple voting, excluded); *Kentucky:* 1902, Edwards *v.* Logan, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257 *semble* (voter's declarations of the tenor of his vote, inadmissible); *Michigan:* 1868, People *v.* Cicott, 16 Mich. 283, 296 (People *v.* Pease, N. Y., disapproved, but on other grounds); *New Mexico:* 1892, Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936 (declarations showing disqualifications received, after evidence of the fact and tenor of vote; Illinois rule supposed to be followed); *New York:* 1863, People *v.* Pease, 27 N. Y. 45, 59, per Davies, J. (for rejecting illegal votes, "the declarations of the person casting the vote have been admitted and received as evidence of his qualification or want of qualification"; see this case in other aspects, *ante*, § 581, *post*, § 2214); *North Carolina:* 1890, Boyer *v.* Teague, 106 N. C. 623, 11 S. E. 665 ("the declarations of a voter as to his qualifications generally, if made at the time of voting, are competent as a part of the 'res gestae'"); *North Dakota:* 1900, Kadlec *v.* Pavik, 9 N. D. 278, 83 N. W. 5 (declarations of disqualification; not decided); *Wisconsin:* 1868, State *v.* Olin, 23 Wis. 309, 319 (voters' declarations as to alienage, admitted; "the reason is" that such a person "is always considered as a party when the result of the election is in controversy"); 1868, State *v.* Hilmantel, 23 Wis. 422, 426 (preceding case approved); 1900, State *v.* Conness, 106 Wis. 425, 82 N. W. 288 (declarations as to qualifications and tenor of vote; not admitted on the facts, because the offer was not definite enough); 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49 (State *v.* Olin, *supra*, followed).

discarded. Furthermore, án exception to the Hearsay rule would be highly impolitic, because this would virtually license a corrupt voter to vote for the contesting candidate and yet by his declarations to furnish evidence for striking out a vote for the successful candidate. These reasons have been sufficiently expounded in the Congressional report above quoted (*ante*, § 1712).

(2) Whether the voter may *on the stand testify* to the *tenor of his ballot* is an entirely different question; for the Hearsay rule is then satisfied. In the first place, there is a clear *privilege* (subject to certain limitations) not to testify against his will; but this privilege does not apply to unqualified persons (*post*, § 2215); so that such testimony would still be compellable in the class of cases here in question. But, in the next place, a few judges have been inclined to make this something more than a privilege, and to erect it into an absolute prohibition, whether the voter wishes or not to testify. In this view, the policy of this prohibition would equally exclude extrajudicial voluntary statements; this aspect of the subject is elsewhere treated (*post*, § 2215).

(3) Whether the voter may *on the stand testify* to his *intent or meaning* in the *words or initials on the ballot* is still a different question. (*a*) In the first place, the *parol-evidence* rule may be thought to forbid the use of the voter's private intent for the purpose of qualifying or interpreting the terms of the ballot; this question is elsewhere dealt with (*post*, § 2452). (*b*) In the next place, supposing the parol-evidence rule not to stand in the way, the notion that a person is not competent to *testify to his own intent* may be invoked to prohibit such testimony. No such rule of prohibition exists (except in Alabama); but there have nevertheless been many efforts to establish it; the rulings have been already examined (*ante*, § 581).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC XIII: DECLARATIONS OF A MENTAL OR PHYSICAL CONDITION

CHAPTER LVI.

§ 1714. **General Principle.** In four of the preceding Exceptions (Topics VIII–XI), it was noticed that the Necessity principle, justifying them (*ante*, § 1421), is regarded as satisfied by considerations somewhat different from those applied to the first six Exceptions (Topics I–VI). The necessity, in the first six, is found to lie in the *impossibility*, by reason of death, insanity, absence, or the like, of producing the declarant on the stand as a witness; so that the only evidence obtainable from that person was his hearsay statement. In the other four, the notion of *inconvenience* is substituted for that of impossibility; *i. e.* under all the circumstances, the inconvenience of obtaining the person's testimony on the stand is thought to create a sufficient necessity for resorting to his hearsay statements.

In the present and the two ensuing Exceptions, this Necessity principle presents itself in still a third and different form, viz. *relative value* of the

evidence. It rests on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable, yet the probability of there receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small; thus, while there is hardly a necessity in the strict sense, there is at least a desirability of resorting also to the hearsay statements.

Applied specifically to the present Exception, the judicial doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to a person's own *contemporary statements of his mental or physical condition.* It is indeed possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions. It might be argued, however, that the person's own statements on the stand would amply satisfy the need for his testimonial evidence. The answer is that statements of this sort on the stand, where there is ample opportunity for deliberate misrepresentation and small means for checking it by other evidence or testing it by cross-examination, are comparatively inferior to statements made at times when no inducement to misrepresentation existed and the probability of trustworthiness was greater.

For the use of such statements, then, made out of court and under certain circumstantial guarantees of trustworthiness, there is a fair necessity, in the sense that there is no other equally satisfactory source of evidence either from the same person or elsewhere. It follows that the *death, insanity,* or *non-residence* of the declarant is not a condition precedent; and this has not been questioned.

Such has been the general attitude of the Courts in sanctioning the use of this class of statements. They recognize the bearing both of a Necessity principle (*ante,* § 1421) and of a Circumstantial Guarantee of Trustworthiness (*ante,* § 1422). The two, however, are seldom distinctly separated in judicial utterances, and sometimes one, sometimes the other, receives the sole emphasis. These two broad aspects of the principle, as applicable to mental conditions in general, did not receive judicial formulation until the middle of the 1800s. Up to that time there was merely an indefinite doctrine, not distinguishing clearly between this and the Exception for Spontaneous Declarations (*post,* § 1745), and resting chiefly on an opinion of Lord Ellenborough's:

1805, *Aveson* v. *Kinnaird,* 6 East 195; evidence was offered of declarations on a sick-bed by the plaintiff's wife that she was not well on the previous Tuesday, when she went to be insured. ELLENBOROUGH, L. C. J.: "A witness has been received to relate that which has always been received from patients to explain, — her own account of the cause of her being in bed at an unseasonable hour with the appearance of being ill. . . . What were the complaints, what the symptoms, what the conduct of the parties themselves at

the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. . . . The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in Skinner which I have alluded to." [1]

From this precedent and opinion was developed during the 1800s a broad doctrine admitting contemporary declarations of a mental or emotional condition in general. The judicial reasoning is illustrated in the following passages:

1876, MELLISH, L. J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154: "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions are."

1835, UPHAM, J., in *Hadley* v. *Carter*, 8 N. H. 42: "The evidence is admitted on the presumption, arising from experience, that when a man does an act his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting such intention."

1850, PEARSON, J., in *Biles* v. *Holmes*, 11 Ired. 20: "[It is] almost the only kind of evidence by which the condition of body or mind can be ascertained."

1859, REDFIELD, C. J., in *State* v. *Howard*, 32 Vt. 380, 404: "The present state of health or feeling is always allowed to be proved in this way, since it is the only mode in which it can be shown."

1869, SWAYNE, J., in *Insurance Co.* v. *Mosley*, 8 Wall. 397: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be impossible to show by other testimony. . . . As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. . . . Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, not to the past. Anything in the nature of narration must be excluded."

1875, BENNETT, J., in *Sanders* v. *Reister*, 1 Dak. 173: "I incline to the opinion that all that the Courts can mean by the use of the phrase under consideration ['from the necessity of the case'] is that necessity growing out of the inherent difficulties connected with an inquiry into, and the very nature of the proof required to show, the mental and physical condition of an individual. From the nature of the case, that condition can only be known as it finds its expression in external symptoms and in the common complaints of pain and distress which are the natural concomitants of illness and physical injury."

1890, HOLMES, J., in *Elmer* v. *Fessenden*, 151 Mass. 359, 24 N. E. 208: "Such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."

1892, GRAY, J., in *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 12 Sup. 909: "A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written."

1892, FIELD, C. J., in *Commonwealth* v. *Trefethen*, 157 Mass. 185, 31 N. E. 961: "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or

§ 1714. [1] This was Thompson *v.* Trevanion, quoted *post*, § 1747, which became the foundation of the Exception for Spontaneous Declarations.

body, or some act or speech; and that proof of either or all of these for the purpose of showing the state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred." [2]

§ 1715. **Circumstantial Evidence and Res Gestæ Rule, distinguished.** (1) The condition of a person's mind may be indicated by his *conduct* or by his *assertions*. The former evidence is of an indirect or circumstantial nature, and the various uses of it have already been considered (*ante*, §§ 225–406). The latter evidence is of a direct or testimonial nature; the Hearsay rule therefore applies to it (*ante*, § 1361), and some Exception to the Hearsay rule must therefore be invoked in order to admit it. That the Hearsay rule does not apply to conduct used evidentially is elsewhere noted (*post*, § 1788), in discussing the applicability of the Hearsay rule in general; but, since the distinction between conduct and assertions is for the present Exception of particular importance, it may be here also briefly examined. The practical result of the difference, of course, is that, so far as the evidence is in truth conduct and not assertions, the present Exception need not be invoked to admit it. Between conduct in general and plain assertions it is easy to distinguish; but articulate or verbal utterances are often employed, like wordless conduct, as indicating circumstantially a condition of mind; and utterances so used must be distinguished from utterances used purely testimonially, *i. e.* as a direct assertion of the state of mind. A reference to the general distinction between circumstantial and testimonial evidence (*ante*, § 25, *post*, § 1768) will serve to make this clear; but its application to the present Exception may now be more particularly noted.

The statement "I met your friend J. S. this morning" is in one aspect testimonial, *i. e.* as evidence that the fact asserted is true, namely, the meeting with J. S. But in another aspect it is merely circumstantial, *i. e.* as indicating that the speaker is acquainted with the features of J. S. and is aware of J. S.'s friendship. Again, an anonymous picture exhibited is charged as a libel on Doe; the remarks of spectators, that "Doe ought to bring an action against the painter Roe," are admissible circumstantially as revealing that the picture was believed by them to represent Doe; [1] though as assertions of what Doe ought to do or of what Roe had done, the remarks would be inadmissible as hearsay. Again, suppose that on a trial for murder of a woman by a seducer the defence of suicide is set up, and the woman's knowledge of her pregnancy, as creating in her mind a motive for suicide, became material; then the fact "that she had said that she was pregnant would be some evidence that she knew it," though not that she was pregnant.[2] Or, in an

[2] For the reasons of the rule as shown in decisions on statements other than those of physical suffering, see also: Wright *v.* Tatham, 5 Cl. & F. 683; Gilchrist *v.* Bale, 8 Watts Pa. 356; Jacobs *v.* Whitcomb, 10 Cush. Mass. 257; Day *v.* Stickney, 14 Ali. Mass. 258; Hunter *v.* State, 40 N. J. L. 5; Lake Shore R. Co. *v.* Herrick, 49 Oh. 25, 29 N. E. 1052; Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901.

§ 1715. [1] 1810, Du Bost *v.* Beresford, 2 Camp. 511.

[2] 1892, Field, C. J., in Com. *v.* Trefethen, 157 Mass. 188, 31 N. E. 961.

action on an insurance policy, the insured's knowledge of the existence of a disease being material on the issue of false representations, his statements that he had the disease would indicate circumstantially that he was aware of it, though they might not be admissible as assertions of the fact.[3]

All such indirect uses of verbal utterances must be distinguished from direct assertions of the state of mind ("I know that I am ill," "I did not intend to injure Doe"), to which alone the Hearsay rule applies, and for which alone it is necessary to invoke the present Exception.[4]

In the same way, verbal utterances may indirectly evidence other kinds of mental condition, without being employed assertively. For example, the state of mind of a testatrix' relatives, whether affectionate or hateful, being in issue, the utterance of her sister about the testatrix, "She is too ugly to die yet," indicates indirectly her condition of feeling, and is of course not used as testimonial evidence of the fact asserted (*post*, § 1738); the cases dealing with a testator's statements (*post*, § 1734) illustrate this plentifully; and it is the commonest evidence of the bias of a witness (*ante*, § 950). So, too, insanity is indirectly evidenced by assertions (for example, "I am the Emperor of America") which are not offered in any way for their assertive or testimonial value (*ante*, § 228). In the following sections, then, it is to be understood that there is no need of resorting to the present Exception to secure the admission of verbal utterances as circumstantial evidence of a mental condition, but only so far as the utterances directly assert the existence of the condition and are offered as direct testimonial evidence of the fact asserted.

(2) The 'res gestæ' *phrase*, it will be noticed, is frequently invoked as the source and test of admissibility for declarations of a mental condition. It is true that at certain points the Verbal Act doctrine and the present Exception coincide practically and serve equally to admit certain sorts of statements; but they are nevertheless wholly distinct in their nature and in their right to exist. The fact, for example, of a prior accident in a highway may be admissible both to indicate the dangerous nature of the place and to indicate probable notice to the municipal officers (*ante*, §§ 272, 458); nevertheless the principles about showing notice admit other kinds of evidence and the principles about showing dangerous qualities admit other kinds of evidence; they merely happen to coincide at one point. So also the doctrine of verbal acts admits declarations on any subject that help to characterize the act, and not merely declarations of intent (*post*, § 1772); while declarations of a mental condition form an Exception to the Hearsay rule and cover broadly all kinds of mental conditions, not merely intent. These doctrines merely

[3] 1875, Swift *v.* Ins. Co., 63 N. Y. 187, *ante*, § 266.

[4] 1882, Bowen, L. J., in Edington *v.* Fitzmaurice, L. R. 29 Ch. D. 459: "The state of a man's mind is as much a fact as the state of his digestion"; 1901, Baldwin, J., in Vivian's Appeal, 74 Conn. 257, 261, 50 Atl. 797: "A feeling is a fact; and an ultimate fact. If one says that he loves another, he expresses a sentiment existing at the time when he speaks."

happen to coincide at one point. Neither is hampered nor helped by the limitations or the liberality of the other; each has an independent existence. Many Courts are inclined to treat the Hearsay Exception as though it were limited by the rule about Verbal Acts; but the passages quoted in the preceding section show this to be unnecessary and improper. It is too much to hope to see this tendency disappear; it is enough to call attention to its impropriety, and to warn against its consequences.

§ 1716. **Order of Topics.** The present Exception has been broadly formulated in only comparatively recent times. It has thus come to embrace a number of sub-varieties of hearsay statements, each involving a special form of mental condition. Moreover, the considerations affecting admissibility may be different for these different subjects of the statements, and for each class certain peculiar discriminations from other principles of Evidence must be observed. It is therefore necessary to treat separately the classes of statements thus separated in precedent and in judicial treatment.

The grouping must be somewhat arbitrary, but the most practicable seems to be the following:

A. Statements of Pain or Suffering.

B. Statements of Design, Intent, Motive, Feeling, etc., in General.

C. Statements by an Accused.

D. Statements by a Testator.

No doubt the generic phrase "mental or physical condition" is not correctly descriptive of all of these. Nevertheless, it sufficiently indicates the general nature of the class of facts stated, and for want of a better phrase must be retained.

A. Statements of Pain or Suffering

§ 1718. **General Principle.** It is for statements of physical pain or suffering that the exception has been longest recognized,[1] and the principle most fully and clearly reasoned out.[2] The general principle is illustrated in the following passages:

1845, Shepley, J., in *Kennard* v. *Burton*, 25 Me. 46: "If other persons could not be permitted to testify to them [complaints of suffering] when the person injured might be a witness, there might often be a defect of proof. The person injured

§ 1718. [1] 1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1325, 1327, 1331, 1336 (murder; deceased person's complaints of pain and the cause of the wound, made to bystanders and to a doctor, received; Counsel: "There are little circumstances which are always allowed for evidence in such cases, —where men receive any wounds, to ask them questions, while they are ill, about it, who hurt them"); 1754, Canning's Trial, 19 How. St. Tr. 478 and 'passim'; 1805, Aveson *v.* Kinnaird, 6 East 195, quoted *ante*, § 1714.

[2] The following cases merely illustrate the ordinary application of the rule: 1851, Rowland *v.* Walker, 18 Ala. 751; 1789, Goodwin *v.* Harrison, 1 Root Conn. 80 (action on the case for giving "a dose in some toddy"; plaintiff's "complaints" the next morning "and what she said about it," admitted "as being an exception from the general rule, founded upon the necessity of the case"); 1868, Gray *v.* McLaughlin, 26 Ia. 279; 1895, State *v.* Hutchison, 95 Ia. 566, 64 N. W. 610; 1881, Hatch *v.* Fuller, 131 Mass. 574; 1873, Johnson *v.* McKee, 27 Mich. 471; 1886, Mayo *v.*

might be unable to recollect or state them by reason of the agitation and suffering occasioned by it."

1851, BIGELOW, J., in *Bacon* v. *Charlton*, 7 Cush. 586: "Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. . . . Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady."

1854, DENIO, J., in *Caldwell* v. *Murphy*, 11 N. Y. 419: "It is one of the natural concomitants of illness and of physical injuries for the sick or injured person to complain of pain and distress. . . . I think such evidence is admissible from the necessity of the case."

1857, RICE, C. J., in *Phillips* v. *Kelly*, 29 Ala. 628: "In cases where the existence of pain in any particular part of the body is in its very nature incapable of proof except by the declarations of the sufferer, his declarations of its existence must, from necessity, be admitted as evidence of its existence, if its existence at the time such declarations were made be a material question. . . . The law is not so inconsistent with itself and with reason as to declare that a plaintiff may prove a thing and at the same time also to declare that the only proof of which the thing is in its nature capable shall not be heard or considered."

1858, REDFIELD, C. J., in *State* v. *Davidson*, 30 Vt. 383: "The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect."

1878, CAMPBELL, J., in *Grand Rapids & I. R. Co.* v. *Huntley*, 38 Mich. 543: "[Declarations of present suffering] are admitted from necessity. . . . It would be impossible in most cases to know of the existence or extent or character of pain without them. . . . The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, which if feigned he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion."

§ 1719. **Circumstances under which the Statement is made; Statements to a Physician or Layman.** The general requirement (as the preceding quotations indicate) is merely that the statements shall be the spontaneous and *natural* expressions of the pain or suffering. This principle has in some cases been applied with extreme liberality.[1] The main difficulty here has

Wright, 63 Mich. 32, 40, 29 N. W. 832 (statements of present pain, admitted, but not that a bandage "was too tight," this being opinion from a non-expert; the latter part is unsound); 1862, Perkins *v.* R. Co., 44 N. H. 225; 1869, Taylor *v.* R. Co., 48 N. H. 309; 1879, Plummer *v.* Ossipee, 59 N. H. 56; 1848, Raulhac *v.* White, 9 Ired. N. Car. 65; 1850, Biles *v.* Holmes, 11 Ired. 21; 1890, Thomas *v.* Herrall, 18 Or. 549; 1903, Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; 1903, Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76 (complaints as to "the nature and extent of his injuries," admitted).

Compare *conduct* as evidence of *physical condition* (*ante*, §§ 220, 223).

§ 1719. [1] 1883, Com. *v.* Fenno, 134 Mass. 218 (exclamations on meeting a friend in the street, admitted).

In a few rulings it seems to be required that the person be otherwise in an *apparent condition of bodily ailment*, of which his statements are the natural product: 1884, Penn. Mutual L. I. Co. *v.* Wiler, 100 Ind. 103 ("I have the asthma," excluded, because not accompanying an apparent diseased condition); 1890, McMurrin *v.* Rigby, 80 Ia. 325 (they must be "the natural result of suffering").

arisen over the question whether the rule is to be restricted to accounts of symptoms given *by a patient in consultation with a physician* for the cure of the illness. The origin of this supposed limitation seems to have been the language of Chief Justice Bigelow, in a much-cited Massachusetts opinion having some difficulties of interpretation:

1865, *Barber* v. *Merriam*, 11 All. 322: Declarations concerning the way in which an injury was done were admitted, because made to a physician and "for the purpose of receiving medical advice." BIGELOW, C. J.: "Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. . . . To the argument against their competency founded on the danger of deception and fraud, the answer is that such representations are competent only when made to a person of science and medicai knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth."

Now this language, though it may possibly have been intended to apply generally to all statements of pain, appears on a scrutiny of the opinion to have been applied by the judge in this case merely to statements of *past* "condition and symptoms" of suffering (which, as will be seen, are not admitted except in Massachusetts and a few other States). Such has been the construction of the language in Massachusetts; and a *general limitation to physicians* is to-day not recognized in that State, nor in most jurisdictions, as having anything to do with ordinary *present-pain* statements.[2]

But in New York, and a few other jurisdictions following the New York rulings, the doctrine has been established (apparently by a misconstruction of the widely quoted language in Barber *v.* Merriam) that all pain-statements whatever are subject to the general limitation that they *must have been made to a physician* during consultation; yet that *inarticulate exclamations* are admissible without this limitation. The passages expounding this peculiar doctrine are as follows:

1871, ALLEN, J., in *Reed* v. *R. Co.*, 45 N. Y. 578: "[Declarations as to pain, not made to a physician, are not admissible.] From the necessity of the case the statements of parties who could not be examined as witnesses in their own behalf as to bodily suffering

[2] Although this is undoubtedly so to-day in Massachusetts (Roosa *v.* Loan Co., *post*, § 1722), yet there are there two rulings in which the judge writing the opinion has carelessly borrowed the language of Barber *v.* Merriam, and limited the general rule, not to statements to a physician, but to a similar and narrow situation. This language cannot be regarded as law even in Massachusetts: 1880, Fay *v.* Harlan, 128 Mass. 244 (Ames, J.: "They are not to be considered as mere hear- say, if made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth"); *accord, semble:* 1891, Fleming *v.* Springfield, 154 Mass. 522, 28 N. E. 910.

The following ruling stands by itself: 1922, Estes *v.* Babcock, — Wash. —, 205 Pac. 12 (patient's statements to a physician, excluded; misunderstanding Barber *v.* Merriam, Mass.).

". . . have been received in evidence. . . . But by the amendment of the Code in 1869 (§ 368) there is no longer a necessity . . . and, the reason of the rule ceasing, the rule itself . . . should cease."

1885, *Per* CURIAM, in *Hagenlocher* v. *R. Co.*, 99 id. 136, 1 N. E. 536: "Screaming or some similar exclamation is the natural language of pain in all men, and in all animals as well. It usually and almost invariably accompanies intense pain. . . . While the necessity for the reception of such evidence is not so great since parties have been permitted to be witnesses in their own behalf as it was before, yet the rule allowing such evidence has not been abrogated and it must still have operation. . . . [Otherwise a party] would be deprived of that corroboration of his evidence to which he is justly entitled."[3]

1887, PECKHAM, J., in *Roche* v. *R. Co.*, 105 N. Y. 294, 11 N. E. 630 (admitting evidence of screams, groans, and the like): "It was an involuntary and natural exhibition and proof of the existence of intense soreness of pain therefrom [when even a sheet touched the foot]. True, it might be simulated, but this possibility is not strong enough to outweigh the propriety of admitting such evidence as fair, natural, and original and corroborative evidence of the plaintiff as to his then physical condition. Its weight and propriety are not therefore now sustained upon the old idea of the necessity of the case. . . . [But an assertion of pain made, not to a physician, while walking along the street some time after the accident,] is evidence of a totally different nature, is easily stated, liable to gross exaggeration and of a most dangerous tendency, while the former necessity for its admission has wholly ceased, [since the party himself may testify to the same effect, if living, and] . . . if dead, the suffering . . . cannot be compensated for."[4]

Upon the results and reasoning of this New York doctrine the following comments may be made: (1) The limitation was never heard of until Barber *v.* Merriam, and even in that case the opinion almost certainly meant to enlarge and not to restrict the Exception. In particular, the limitation had in prior New York rulings never made an appearance.[5] (2) The view that, since legislation has permitted parties to testify, there is no longer a necessity for their hearsay statements, rests on a misunderstanding of the Necessity principle, which has here in view, as already noted (*ante*, § 1714), not the non-availability, by incompetency or decease, of the person himself, but the impracticability of getting from him on the stand better evidence than his own spontaneous and contemporary expressions.[6] Moreover, the orthodox Exception availed to admit statements of third persons, not parties, wherever their pain or suffering was material; so that the Exception never rested on the common-law incompetency of parties. (3) To maintain, as in Roche *v.* R. Co., that even the party's decease does not admit the ordinary statements is singular; for (*a*) it is inconsistent with the supposed original reason for the

[3] The opinion not noticing Reed *v.* R. Co.

[4] *Accord:* 1891, Kennedy *v.* R. Co., 130 N. Y. 656, 29 N. E. 141; 1892, Davidson *v.* Cornell, 132 N. Y. 237, 30 N. E. 573; 1892, Link *v.* Sheldon, 136 N. Y. 1, 9, 32 N. E. 696.

[5] 1854, Caldwell *v.* Murphy, 11 N. Y. 419; 1863, Werely *v.* Persons, 28 N. Y. 345; 1865, Brown *v.* R. Co., 32 N. Y. 603; 1866, Matteson *v.* R. Co., 35 N. Y. 491; 1869, Teachout *v.* People, 41 N. Y. 13.

[6] 1888, Elliott, J., in Hancock Co. *v.* Leggett, 115 Ind. 547, 18 N. E. 53 (refusing to concede that the modern eligibility of parties affects the rule): "The change in the rule does not dissipate the reason, for latent injuries can only be fully known by declarations made at the time the injured person is suffering. But, however this may be, . . . [the Courts] have no right to abrogate it."

rule, namely, that the incompetency of the party created a necessity for these statements; and (*b*) the assumption which serves as its basis, namely, that no action survives for suffering followed by death, is not only incorrect for many jurisdictions, but ignores the existence of other kinds of claims for suffering for which an action may survive; moreover, it would equally exclude all testimony whatever as to suffering. (4) The distinction by which screams and other inarticulate exclamations are always admissible is utterly pedantic and impracticable.[7] Moreover the preference for them as comparatively not liable to simulation is plainly fallacious; for a little reflection shows that, if a person has determined to falsify, it is as natural and as feasible for him to lie with screams, groans, and cries, as with articulate assertions of pain.

The truth seems to be that the New York limitation is inconsistent alike with precedent, with principle, with good sense, and with itself. Unfortunately, however, its place as a local anomaly has not always been perceived, and Courts in several other jurisdictions have accepted the physician-limitation of the modern New York cases as if they represented the orthodox rule.[8] In a few other jurisdictions the limitation has been expressly or

[7] 1897, Canty, J., diss., in Williams *v.* R. Co., 68 Minn. 55, 70 N. W. 860: "So narrow and strict a rule is not practicable. The expression of suffering may be one-half groans and exclamations and one-half words or nine-tenths of the former and one-tenth of the latter, or *vice versa*. How can the law say how much of the utterance shall consist of words, and how much of groans, sighs, and exclamations, or that it may not all consist of words? Again, how can the law say with what degree of anguish the words shall be uttered? One person complains cheerfully, and even laughs and jokes, when he is suffering intense agony, while another complains most dolefully about the slightest affliction. For these reasons, I cannot agree with the majority or with the New York cases, which attempt to make a distinction between words describing present existing suffering and other exclamations indicating such suffering."

[8] In the following list are included Courts showing countenance at one time or another to the New York rule; though in some of these jurisdictions it does not yet appear which rule the Court has finally fixed upon:

Federal: 1894, Union P. R. Co. *v.* Novak 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 573 (declarations to a physician of present pains, etc., admissible; *semble*, not if made to others);
California: 1899, James' Estate, 124 Cal. 653, 57 Pac. 579 (by a deceased physician, the intestate, that he then had Bright's disease, dropsy, etc., excluded, apparently on this ground); 1900, Green *v.* Pacific L. Co., 130 Cal. 435, 62 Pac. 747 ("involuntary declarations and exclamations of a person's present pain and suffering" are admissible; following the Michigan and Wisconsin cases);
Connecticut: 1868, Kelsey *v.* Ins. Co., 35 Conn. 225, 236 (not clear); 1879, Wilson *v.* Granby, 47 Conn. 76, *semble* (admissible only when made to a physician); 1902, Martin *v.* Sherwood, 74 Conn. 475, 51 Atl. 526 (statements not to a physician must be "the natural and instinctive expressions of present suffering," to be admissible);
Delaware: 1898, Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418 (the plaintiff being alive and competent, his groans, etc., are admissible, but not his assertions of injury);
Georgia: 1894, East Tennessee V. & G. R. Co. *v.* Smith, 94 Ga. 580, 20 S. E. 127 (undecided); 1895, Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48 (New York rule accepted); 1896, Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389 (ordinary declarations of suffering, admissible only when made to a physician, except "involuntary and natural exhibitions of pain," *e. g.*, as here, where the person's injured arm was being examined and moved; following Roche *v.* R. Co., N. Y.); 1896, Savannah F. & W. R. Co. *v.* Wainwright, 99 Ga. 255, 25 S. E. 622 (same; allowing testimony by a husband as to bruises and swellings visible);
Illinois: 1896, Globe Accident Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563 (no different rule for statements to a physician); 1897, West Chicago St. R. Co. *v.* Carr, 170 Ill. 478, 48 N. E. 992 (1) declarations made to a physician during treatment, or upon an examination not 'pro lite' unless at the opponent's instance, are receivable; (2) exclamation of pain imme-

impliedly repudiated; in the remaining jurisdictions the orthodox rule, making no such limitation, would presumably be perpetuated.[9]

diately connected with the injury are receivable; (3) 'res gestæ' statements are receivable; the New York rule is in effect followed, and the scope of the orthodox rule is not understood; the rule is also obscurely stated; 1897, West Chicago St. R. Co. *v.* Kenelly, 170 Ill. 508, 48 N. E. 996 (declarations made to other than a physician when under treatment, not receivable, unless part of the 'res gestæ' at the time of the injury; nothing said as to class (2) in the preceding opinion; in the preceding case, the opinion says, of "a groan, a sigh, a scream," that "any competent witness . . . may certainly be allowed to testify to them"; yet in the present case, testimony that "she screamed with the ankle awfully" was held incompetent; these two opinions were written by different judges, but were filed on the same day; they are a striking instance of that judicial carelessness which tends to reduce the profession of giving legal advice to the status of a speculative occupation); 1898, Springfield C. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884 (the rule of the preceding two cases said to admit declarations of pain and suffering only when made at the time of the injury as 'res gestæ' or made to a physician during treatment); 1901, Cicero & P. S. R. Co. *v.* Priest, 190 Ill. 592, 60 N. E. 814 ("she groaned," admitted); 1901, Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 (plaintiff's statements to a physician, "describing his feelings," admitted); 1903, Lake St. El. R. Co. *v.* Shaw, 203 Ill. 39, 67 N. E. 374 ("she complained of pain in her right hip," to a layman, excluded); 1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (Carr case approved); 1909, Fuhry *v.* Chicago City R. Co., 239 Ill. 548, 88 N. E. 221 (a physician called to treat the injury testified to the patient's subjective symptoms among others; the opinion cites the Donworth and Greinke cases (*post*, § 1721, n. 1) for the rule that "a physician who has *not* treated the injured person, but has made an examination to enable him to testify on a trial as to his condition, must base his opinion on objective and not subjective conditions," but then proceeds to say that "the testimony as to the pressure of her hands . . . was incompetent;" such loose judicial opinions offer a premium to gamble on a decision); 1909, Schmidt *v.* Chicago City R. Co., 239 Ill. 494, 88 N. E. 275 (physician's testimony to a contraction of the muscles which might have been voluntary but was not, admitted; also to a limp); 1910, Louth *v.* Chicago M. T. Co., 244 Ill. 244, 91 N. E. 341 (see citation *post*, § 1721, n. 1).
Kansas: 1908, Federal Betterment Co. *v.* Reeves, 77 Kan. 111, 93 Pac. 627, *semble*;
Kentucky: 1905, Louisville & N. R. Co. *v.* Smith, 27 Ky. 257, 84 S. W. 755; 1913, Louisville & N. R. Co. *v.* Sealf, 155 Ky. 273, 159 S. W. 804;
Minnesota: 1893, Brusch *v.* R. Co., 52 Minn. 512, 513, 55 N. W. 57 (to a physician, admissible); 1895, Firkins *v.* R. Co., 61 Minn. 31, 63 N. W. 173 (rejecting the answer to the question "How badly are you hurt?" and approximating to the principle of Roche *v.* R. Co. (N. Y.); 1897, Williams *v.* R. Co., 68 Minn. , 70 N. W. 560 (distinguishes "mere descriptive statements of pain" and "spontaneous manifestations of distress"; the latter are always admissible; the former only when made to a medical attendant for the purpose of treatment and when he is called upon to give an expert opinion based in part upon them; the N. Y. cases are cited, but "we find no case which expressly and directly announces this proposition"; Canty, J., diss.);
South Dakota: 1905, Klingaman *v.* Fish & H. Co., 19 S. D. 139, 102 N. W. 601 (here the Court, while adopting the inferior rule, inexcusably cites the Massachusetts cases as if they supported it);
West Virginia: 1920, Wilson *v.* Elkins, 86 W. Va. 379, 103 S. E. 118 (personal injury; "manifestations of pain, suffering, and lameness, in his conduct, not his declarations," admitted);
Wisconsin: 1879, Quaife *v.* R. Co., 48 Wis. 524, 4 N. W. 668 (apparently making the physician-limitation); 1888, Bridge *v.* Oshkosh, 71 Wis. 363, 367, 37 N. W. 409 ("either to his attending physicians or to others," admissible); 1893, Hall *v.* Acc. Ass'n, 86 Wis. 518, 525, 57 N. W. 366 (that he was "feeling badly," said to a layman, admitted); 1896, Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800 ("exclamations, expressions, gestures, and complaints" of pain to anybody, admissible; but "statements of physical condition or feelings" in answer to questions or narrative in nature, admissible only when made to a physician); 1898, Curran *v.* Stange Co., 98 Wis. 598, 74 N. W. 377 (Keller *v.* Gilman approved); 1902, Bredlau *v.* York, 115 Wis. 554, 92 N. W. 261 ("expressions of pain," to a layman, admitted).

For an amusing parody in verse, ridiculing the two above Illinois opinions dated on the same day, see the Chicago Law Journal for June 10, 1898.

[9] *Federal:* 1893, Baltimore & O. R. Co. *v.* Rambo, 16 U. S. App. 277, 280, 8 C. C. A. 6, 59 Fed. 75 (declarations of present pain admissible, though not made to a physician); 1894, Northern P. R. Co. *v.* Urlin, 158 U. S. 273, 15 Sup. 840 (similar). *Alabama:* 1903, Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166 (complaints and crying, admitted); 1905, Kansas City M. & B. R. Co. *v.* Butler, 143 Ala. 262, 38 So. 1024; 1905, Kansas City M. & B. R. Co. *v.* Matthews, 142 Ala. 298, 39 So. 207; 1905, Birmingham R. L. & P. Co. *v.* Rutledge, 142 Ala. 195, 39 So. 338;

§ 1720. **Same: Other Principles affecting Statements to a Physician discriminated.** The language in Barber *v.* Merriam (*ante*, § 1719) has also introduced some confusion between the different evidential questions raised by statements to physicians. In the opinion in that case, the admission of such statements was apparently justified in part on the ground that the reasons for the physician's opinion can always be shown. There are several aspects of such evidence:

(1) A physician testifying as to a patient's health may be asked, like any other witness, for the *reasons for his conclusions*, — either on direct examination, to show his opinion well founded (*ante*, § 655), or on cross-examination, to show it ill founded (*ante*, §§ 992, 994); and incidentally the fact that it is in part or entirely founded on the statements of the patient or of others may thus be brought out. Here, of course, the patient's statement has no hearsay quality; without regard to its correctness or incorrectness, it enters

Indiana: 1888, Hancock Co. *v.* Leggett, 115 Ind. 547, 18 N. E. 53; 1892, Chicago St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 392, 33 N. E. 280, 34 N. E. 218; 1893, Cleveland C. C. & St. L. R. Co. *v.* Prewitt, 134 Ind. 557, 562, 33 N. E. 367; 1895, Louisville N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 559, 37 N. E. 343; 1902, Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; *Iowa:* 1881, Ferguson *v.* Davis Co., 57 Ia. 601, 605, 10 N. W. 906 (by a majority; complaints of suffering to a bystander, excluded, for a reason not stated); 1887, Armstrong *v.* Ackley, 71 Ia. 76, 78, 32 N. W. 180 (complaint to a physician admissible); 1888, Winter *v.* R. Co., 74 Ia. 448, 450, 38 N. W. 154 (complaints of pain and inability to work, excluded); 1890, Blair *v.* Madison Co., 81 Ia. 313, 316, 46 N. W. 1093 (complaint of pain, admitted; preceding cases ignored); 1891, Stone *v.* Moore, 83 Ia. 186, 189, 49 N. W. 76 ("It is competent for a physician to state the complaint made by a patient as part of the diagnosis of the case"); 1894. Aryman *v.* Marshalltown, 90 Ia. 350, 57 N. W. 867, *semble* (must be to a physician); 1899, Keyes *v.* Cedar Falls, 107 Ia. 509, 78 N. W. 227 (admissible "regardless of the person to whom made"; repudiating Ferguson *v.* Davis, *supra*); 1899 Crippen *v.* Des Moines. — Ia. —, 78 N. W. 688 (preceding case approved); 1901, Rupp *v.* Howard, 114 Ia. 65, 86 N. W. 38 (same); 1904, Buce *v.* Eldon, 122 Ia. 92, 97 N. W. 989; 1904, Battis *v.* Chicago R. I. & P. R. Co., 124 Ia. 623, 100 N. W. 543 (like Keyes *v.* Cedar Falls, *supra*); 1905, Fishburn *v.* Burlington & N. W. R. Co., 127 Ia. 483, 103 N. W. 481, *semble* (similar; out the point decided is left obscure); 1907, Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032; 1907, State *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634 (approving Keyes *v.* Cedar Falls); 1914, Langdon *v.* Ahrens, 166 Ia. 636, 147 N. W. 940; *Kansas:* 1887, Atchison, T. & S. F. R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237; 1908, St. Louis & S. F. R. Co. *v.* Chaney, 77 Kan. 276, 94 Pac. 126 (there must be preliminary evidence to indicate that the statements were spontaneous and not manufactured; explaining A. T. & S. F. R. Co. *v.* Johns; no authority cited for this novel requirement); 1912, State *v.* Buck, 88 Kan. 114, 127 Pac. 631 (murder by poisoning; deceased's statements that the doses burned her stomach, admitted); *Michigan:* 1915, Loose *v.* Deerfield Tp., 187 Mich. 206, 153 N. W. 913; *Missouri:* 1905, McHugh *v.* St. Louis T. Co., 190 Mo. 85, 88 S. W. 853; *Nebraska:* 1893, Hewitt *v.* Eisenbart, 36 Nebr. 794, 55 N. W. 252; 1905, Western Travelers' Acc. Ass'n *v.* Munson, 73 Nebr. 858, 103 N. W. 688; 1907, Nixon *v.* Omaha & C. B. St. R. Co., 79 Nebr. 550, 113 N. W. 117; 1916, Juckett *v.* Brennaman, 99 Nebr. 755, 157 N. W. 925 (death of plaintiff's husband by sale of liquor; deceased's statements as to "his health and physical condition" admitted, but erroneously referred to as "spontaneous declarations"); *Nevada:* 1910, Sherman *v.* Southern Pacific Co., 33 Nev. 385, 111 Pac. 416; *North Dakota:* 1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165; *Oregon:* 1909, Smith *v.* Smith, 55 Or. 128, 105 Pac. 706; *South Carolina:* 1902, Oliver *v.* R. Co., 65 S. C. 1, 43 S. E. 307 (admissible, though not made to a physician); 1922, State *v.* Herring, — S. C. —, 110 S. E. 668 (murder of alleged paramour of wife; the paramour's statement to an attendant physician that he was impotent, admitted); *Vermont:* 1896, Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287 (admissible though not made to a physician); 1897, Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69 (similar); 1902, Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322 (statements of mental suffering, admitted; obscure on this point); *West Virginia:* 1905, Stevens *v.* Friedman, 58 W. Va. 78, 51 S. E. 132 (battery; complaints "exhibiting the natural symptoms and effects of the injury," admitted).

merely as an observed fact forming part of the physician's data. It is possible to bring it forward in a testimonial shape; nevertheless, it is also possible, up to a certain point, to treat it merely as a fact affecting the weight of the physician's opinion.

(2) It may be argued, further, when the physician's opinion appears to have been founded on such statements, not merely that the weight of his testimony is affected, but that it should be entirely excluded, as not founded on *personal observation*. This is done by many Courts, particularly where the opinion is founded entirely on the statements of attendants or even of the patient himself (*ante*, § 688). This, however, is purely a question of the testimonial qualifications of the physician; and the patient's statements may be inquired about to determine whether the physician's testimony should be received at all; moreover, only the fact of the patient's statement, not the tenor of it, would need to be inquired about.

(3) Finally, there is the genuine *hearsay use of the patient's statements*, involving the Hearsay exception now under consideration. This use is distinct from the two preceding ones. But it brings up the question whether patients' statements, not admissible under the present Hearsay exception, can be admitted, under the first head above, as showing the physician's reasons. Now so far as the statements, though not admissible under (3), have a legitimate place under (1), *supra*, it would seem that they should be received, on the general principle of Multiple Admissibility (*ante*, § 13), that evidence admissible on any single ground must be received.[1] No doubt the principle must not be wrested from its proper purpose. Where under the pretext of (1), *supra*, not merely the fact of a patient's statement, but the details of it, are so offered that its use for that purpose is a mere pretence, and its real use and predominating effect would be that of hearsay testimony of the patient, then it should be excluded.

§ 1721. **Statements Post Litem Motam.** If the analogies of other Exceptions (*ante*, § 1422) be followed, all statements made 'post litem motam' are to be rejected as untrustworthy. But it is questionable whether an absolute exclusion based on this distinction is either just or necessary. After corporal injuries, the thought of making a claim for compensation and perhaps of bringing suit is apt (in these days) to occur almost immediately to the injured person. A strict application of the 'post litem' limitation would practically exclude entirely this class of evidence in the majority of cases, and would thus exclude even the most unfeigned statements of pain because of a mere general possibility of falsification. On the other hand, the fictitious and untrustworthy nature of a great deal of such evidence in personal-injury litigation is a matter of common knowledge, and some power to exclude it ought to exist. Its exclusion ought to depend on the circumstances of each

§ 1720. [1] In this view, the ruling in Hunt *v.* Boston, 152 Mass. 169, holding that the right to ask for reasons for an opinion does not include the right to extract facts otherwise inadmissible, seems unsound. Compare Cronin *v.* R. Co., Mass., *post*, § 1722.

case, and to be left to the trial Court's discretion. A flexible rule of this sort is indicated by some Courts:

1867, LAWRENCE, J., in *Illinois C. R. Co.* v. *Sutton*, 42 Ill. 440: "[The physician] may state what his patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of 'res gestæ.'"

1878, CAMPBELL, J., in *Grand Rapids & I. R. Co.* v. *Huntley*, 38 Mich. 544: "We cannot think it safe to receive such statements, which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here . . . were sent for merely to enable the plaintiff below to prove her case. . . . [The expressions] were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency if honest to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor. . . . It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain made under circumstances free from suspicion, even 'post litem motam.' The case must at least be a very plain one which will permit this."

By some Courts the circumstance that the declarations were 'post litem' is taken as not excluding them, but merely as affecting their weight. By still other Courts, representing the more common practice, the declarations are absolutely excluded if made to a physician at a consultation for the purpose of enabling him to testify to the injury, and otherwise may be admitted though made 'post litem.' In some jurisdictions it is difficult to say that any one of these three forms has definitely been adopted.[1]

§ 1721. [1] Add some of the cases cited *ante*, § 1719, note 8:

Federal: 1892, Kansas C. F. S. & M. R. Co. v. Stoner, 10 U. S. App. 209, 225, 2 C. C. A. 437, 51 Fed. 649 (the mere fact of 'post litem motam' is not decisive); 1895, Delaware L. & W. R. Co. v. Roalefs, 16 C. C. A. 601, 70 Fed. 22 (statements made at a consultation not with a view to medical aid, but to qualify the physician to testify, inadmissible); 1916, Chicago Railways Co. v. Kramer, 7th C. C. A., 234 Fed. 245 (the physician's testimony to complaints is admissible where the party went to him primarily for treatment, though also for qualifying him to testify);

Connecticut: 1884, Darrigan v. R. Co., 52 Conn. 291, 309 (inadmissible; in this case the statements were made during a consultation intended not to secure medical treatment but to enable the medical man to testify);

Illinois: 1867, Illinois C. R. Co. v. Sutton, 42 Ill. 440 (quoted *supra*); 1903, Chicago & E. I. R. Co. v. Donworth, 203 Ill. 192, 67 N. E. 797 (statements made to qualify the physician and not for treatment, excluded); 1904, Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (during treatment, but after action begun, admitted); 1908, Greinke v. R. Co., 234 Ill. 564, 85 N. E. 327 ("declarations of the injured party made to a physician who has made an examination of such party with a view to qualify himself to testify as a witness, only, are not admissible;" *semble*, movements controllable by volition are equally excluded); 1908, Shaughnessy v. Holt, 236 Ill. 485, 86 N. E. 256 (patient's expressed sensations and answers made at an examination by physicians solely for the purpose of qualifying as witnesses, excluded); 1908, Casey v. Chicago City R. Co., 237 Ill. 140, 86 N. E. 606 (similar); 1910, Louth v. Chicago M. T. Co., 244 Ill. 244, 91 N. E. 431 (personal injury; laymen who have observed the plaintiff in ordinary course of life may testify to his appearance and expressions with reference to nervousness and the like; Greinke v. R. Co. and Shaughnessy v. Holt distinguished as applying only to physicians consulted to qualify them for trial testimony);

Indiana: 1885, Cleveland C. C. & I. R. Co. v. Newell, 104 Ind. 271, 3 N. E. 836 ('post litem' does not exclude); 1894, Board v. Nichols, 139 Ind. 611, 38 N. E. 526 (statements up to time of action brought, admitted);

Iowa: 1909, Johnston v. Cedar Rapids & M. C. R. Co., 141 Ia. 114, 119 N. W 286 (undecided);

Maryland: 1903, Sellman v. Wheeler, 95 Md.

§ 1722. **Kind of Fact narrated; Statements of Past Events and Conditions excluded.** It is obvious that both of the general principles involved — that of Necessity and that of Circumstantial Guarantee of Trustworthiness — (*ante*, §§ 1718, 1421, 1422) require the exclusion of statements dealing with certain kinds of facts.

(*a*) Statements of the *external circumstances causing the injury*, namely, the events leading up to it, the immediate occasion of it (*e. g.* that the person was knocked down by a horse), or the nature of the injury (*e. g.* that a leg was broken), do not satisfy the Necessity principle, because they do not relate to an internal state, and thus other evidence is presumably available; moreover they have not the usual Guarantee of Trustworthiness, because they

751, 54 Atl. 512 (statements of suffering made to a physician three months after the injury, admitted);
Massachusetts: 1881, Hatch *v.* Fuller, 131 Mass. 574 ('post litem' does not exclude);
Michigan: 1878, Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 544 (quoted *supra*); 1890, Laughlin *v.* R. Co., 80 Mich. 154, 44 N. W. 1049 (statements after suit begun, and four years after the accident, excluded); 1891, Jones *v.* Portland, 88 Mich. 598, 600, 50 N. W. 731 (statements made 'post litem,' excluded); 1895, Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616 (not inadmissible solely because 'post litem motam'; here statements made by a child in his own home and not while examined 'pro lite' were admitted); 1896, McKormick *v.* West Bay City, 110 Mich. 265, 68 N. W. 148 (exclamations, and even appearances of inability to walk, at an examination made two days before the trial, excluded, the data at an examination "with reference to the trial of a pending case" being absolutely excluded, unless clearly involuntary); 1897, Heddle *v.* R. Co., 112 Mich. 547, 70 N. W. 1096 (inadmissible, if made to a physician called merely to examine for the purposes of the trial); 1898, Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872 (McKormick and Strudgeon cases approved); 1899, Mott *v.* R. Co., 120 Mich. 127, 79 N. W. 3 (plaintiff sent for a lawyer and a physician the day after the injury; declarations on and after that day, excluded); 1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (testimony as to an injured person's "flinching," etc., at the touch of a doctor called a week before trial, and not for treatment, excluded); 1905, McCormick *v.* Detroit G. H. & M. R. Co., 141 Mich. 17, 104 N. W. 390 (Strudgeon *v.* Sand Beach, *supra*, approved and applied); 1905, O'Dea *v.* Michigan C. R. Co., 142 Mich. 265, 105 N. W. 746 (statements to the defendant's physician, called in expectation of his giving testimony, excluded);
New Hampshire: 1868, Towle *v.* Blake, 48 N. H. 96 ('post litem' does not exclude); 1888, Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85 (same);
New Jersey: 1897, Traction Co. *v.* Lambertson, 60 N. J. L. 452, 38 Atl. 683 (declarations to a physician at an examination 'pro lite,' inadmissible; except so far as "natural expressions of present pain");
New York: 1866, Matteson *v.* R. Co., 35 N. Y. 491 ('post litem' does not exclude);
Ohio: 1902, Pennsylvania Co. *v.* Files, 65 Oh. St. 403, 62 N. E. 1047 (statements to a physician called in expressly to qualify as a witness, excluded);
Oregon: 1921, Yarbrough *v.* Carlson, — Or. —, 202 Pac. 739 (statements of pain, made to physician called for treatment, admitted);
Texas: 1901, Missouri K. & T. R. Co. *v.* Johnson, 95 Tex. 409, 67 S. W. 768 (declarations of pain when under examination for the sole purpose of qualifying the physician to testify, said to be inadmissible by authorities "which seem to be better supported by reason"; but the question not here decided);
Vermont: 1860, Kent *v.* Lincoln, 32 Vt. 591, 598 (statements made 'post litem' and in order to qualify the testifying physician, admitted); 1896, Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 285 ("post litem' does not exclude);
Wisconsin: 1879, Quaife *v.* R. Co., 48 Wis. 526, 4 N. W. 658 (declarations 'post litem' in the presence of physicians representing both sides, admitted); 1890, Stewart *v.* Everts, 76 Wis. 35, 42, 44 N. W. 1092 (statements to a physician, after action commenced, "for the sole purpose of calling such expert as a witness" to the nature and cause of the injury, inadmissible); 1893, Abbot *v.* Heath, 84 Wis. 320, 54 N. W. 574 (statements 'pro lite', excluded); 1894, Stone *v.* R. Co., 88 Wis. 98, 105, 59 N. W. 457 (admissible if not made after action brought, to qualify the physician as a witness); 1895, Rebo *v.* Augusta, 90 Wis. 408, 63 N. W. 1045 (following Stewart *v.* Everts); 1896, Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800 (following Stone *v.* R. Co.); 1904, Kath *v.* Wisconsin C. R. Co., 121 Wis. 503, 99 N. W. 217 (not admissible when made to a physician "after action is brought or threatened").

are not naturally called forth by the present pain or suffering (though this latter reason is rarely noticed):[1]

§ 1722. [1] See also the quotations in § 1718, *ante*. This limitation is mentioned in almost every case on the general subject; the following citations deal with it directly:

ENGLAND: 1825, Gardner Peerage Case, LeMarchant's Rep. 170, 174 (woman's statement, to a physician attending for child-birth, of the date of conception, excluded); 1888, R. *v.* Gloster, 16 Cox Cr. 471, 473 ("The statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them or how they were caused"); 1912, Amys *v.* Barton, 1 K. B. 40 (injury to a workman in a field; his statement that a wasp stung him, etc., held inadmissible).

CANADA: 1912, Youlden *v.* London G. & A. Co., Ont. H. C. J., 4 D. L. R. 721 (by a workman injured, that "he thought he had hurt himself," admitted, to show the internal condition, but not its cause; English cases under the Workmen's Compensation Act, examined).

UNITED STATES: *Arkansas:* 1913, St. Louis I. M. & S. R. Co. *v.* Williams, 108 Ark. 387, 158 S. W. 494;

Connecticut: 1860, State *v.* Dart, 29 Conn. 153, 155 (declaration by a deceased that she was subject to fits and had several times fallen, excluded); 1893, Rowland *v.* R. Co., 63 Conn. 415, 418, 28 Atl. 102 (that his ribs had been broken six months before and were healed, excluded);

Florida: 1903, Weightnovel *v.* State, 46 Fla. 1, 35 So. 856 (abortion; deceased's statements about the defendant's treatment of her a week before, excluded);

Illinois: 1867, Illinois C. R. Co. *v.* Sutton, 42 Ill. 438; 1897, West Chicago St. R. Co. *v.* Carr, 170 Ill. 478, 48 N. E. 992 ("not to the past, nor to the manner and circumstances of receiving the injury"); 1916, Chicago & Alton R. Co. *v.* Industrial Board, 274 Ill. 336, 113 N. E. 629 (employee's statement as to cause of injury, here by handling the engine, excluded); 1918, Peoria Cordage Co. *v.* Ind. Board, 284 Ill. 90, 119 N. E. 996 (deceased's statements as to the cause of a finger-cut, made to a physician, held inadmissible);

Indiana: 1885, Carthage Turnpike Co. *v.* Andrews, 102 Ind. 144, 1 N. E. 364; 1906, Indiana U. T. Co. *v.* Jacobs, 167 Ind. 85, 78 N. E. 325 ("She told me that she had an injured limb," admitted); 1919, Abendroth *v.* Fidelity & D. Co., — Ind. App. —, 124 N. E. 714 ("I fell," "I hurt myself," said some hours after the event, excluded);

Iowa: 1868, Gray *v.* McLaughlin, 26 Ia. 279; 1899, Keist *v.* R. Co., 110 Ia. 32, 81 N. W. 181; 1901, Hall *v.* Cedar R. & M. C. R. Co., 115 Ia. 18, 87 N. W. 739 (statements as to "how she had been hurt," excluded);

Kentucky: 1905, Shade's Adm'r *v.* Covington C. E. R. & T. & B. Co., 119 Ky. 592, 84 S. W. 733 (that she had fallen on the ice on the defendant's bridge, excluded);

Maine: 1921, Larrabee's Case, 120 Me. 242, 113 Atl. 268 (injured employee; on coming from the engine-room, deceased said, "The gas almost killed me"; excluded, as a "statement of the cause of the physical injury or condition");

Maryland: 1915, Commissioners *v.* Venables, 125 Md. 471, 94 Atl. 89 (exclamation at the time of an injury, "my thigh is broken all to pieces," admitted); 1916, Damm *v.* State, 128 Md. 665, 97 Atl. 645 (abortion; patient's statement to physician as to cause of the injury or the instrument used, inadmissible);

Massachusetts: 1851, Bacon *v.* Charlton, 7 Cush. 568; 1857, Chapin *v.* Marlborough, 9 Gray 244; 1868, Ashland *v.* Marlborough, 99 Mass. 48, *semble;* 1872, Morrissey *v.* Ingham, 111 Mass. 66; 1882, Roosa *v.* Loan Co., 132 Mass. 439; 1918, Keough *v.* Boston Elev. R. Co., 229 Mass. 275, 118 N. E. 524;

Michigan: 1914, Reck *v.* Whittlesberger, 181 Mich. 463, 148 N. W. 247 (claim under the Industrial Accident act; the deceased employee's statement as to the case of his injury, viz.: by running a nail into his hand, held inadmissible); 1885, Merkle *v.* Bennington, 58 Mich. 156, 160, 24 N. W. 776; 1889, Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011; 1898, People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730 (former vomiting);

Minnesota: 1891, Johnson *v.* R. Co., 47 Minn. 430, 50 N. W. 473 (not as to "past events or facts"); 1893, Cooper *v.* R. Co., 54 Minn. 379, 383, 56 N. W. 42 (preceding case approved.)

New Hampshire: 1919, Boulanger *v.* McQuestin, 79 N. H. 175, 106 Atl. 492;

New Jersey: 1921, State *v.* Gruich, 95 N. J. L. 263, 114 Atl. 547 (abortion; the woman's statement to a physician that "she went to a woman," excluded; following Roosa *v.* Loan Co.);

New York: 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (declarations to a physician, that the declarant had received by mail a box of powders, had taken a dose, and thought it the cause of his trouble, excluded; no authority cited);

Pennsylvania: 1917, Eby *v.* Traveler's Ins. Co., 258 Pa. 525, 102 Atl. 209 (deceased's statements to physician as to cause of an illness, excluded);

South Dakota: 1904, Fallon *v.* Rapid City, 17 S. D. 570, 97 N. W. 1009 (that a sprain was caused by a defective sidewalk, excluded);

Texas: 1867, Rogers *v.* Crain, 30 Tex. 284; 1884, Newman *v.* Dodson, 61 Tex. 95;

Vermont: 1873, Earl *v.* Tupper, 42 Vt. 284; 1882, Drew *v.* Sutton, 55 Vt. 586, 589; 1898,

1885, MITCHELL, J., in *Cleveland C. C. & I. R. Co.* v. *Newell*, 104 Ind. 269, 3 N. E. 836: "Expressions of present existing pain and of its locality . . . are admitted upon the ground of necessity as being the only means of determining whether pain or suffering is endured by another. . . . The rule is not to be extended beyond the necessity upon which it is founded," and therefore not to past events or the circumstances of the injury.

It is on this class of statements that attention has been focussed in demanding a relaxation of strict rules before State industrial commissions (*ante*, § 4*c*).

(*b*) Statements of *past sufferings, pain, or symptoms* are not excluded by the Necessity principle, for the necessity is equally the same for all internal conditions, whether past or present. They are, however, excluded by the principle of Guarantee of Trustworthiness (*ante*, § 1718), for they are not naturally caused by the existing pain or other symptoms, but, being deliberate accounts of past occurrences, are no better than statements of any other past events. They are, therefore, generally excluded:[2]

1852, RUFFIN, C. J., in *Lush* v. *McDaniel*, 13 Ired. 487: "The ground of receiving those declarations is that they are reasonable and natural evidence of the true situation and

Hawks *v.* Chester, 70 Vt. 271, 40 Atl. 727 ("I am terribly hurt," allowed); 1898, Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045 (injury by a dog's bite; plaintiff's expressions in sleep, "Take him off," etc., not admitted to show the plaintiff's mental and physical condition); *Virginia:* 1901, O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121 (deceased's declaration that her pain was due to a fall, excluded); *Wisconsin:* 1887, McKeigue *v.* Janesville, 68 Wis. 57, 31 N. W. 298; 1920, Maine *v.* Maryland Casualty Co., 172 Wis. 350, 178 N. W. 749 (deceased's declarations, some days later, as to being injured by the moving of an ice-box, excluded).

Contra: Ireland: 1911, Wright *v.* Kerrigan, 2 Ire. K. B. 301 (cause of employee's injury; deceased employee's statement to the doctor that "he met with an accident by the moving of a coffin," held admissible).

The word "narrative" is sometimes to stigmatize the class of statements excluded by this part of the rule; but of course it has no special propriety. All hearsay is narrative, *i. e.* assertion taken testimonially (*ante*, § 1361); if an utterance is not narrative, it is not covered by the Hearsay rule. A statement of present pain is just as truly "narrative" as a statement of the circumstances of the accident.

[2] *Accord: Alabama:* 1851, Rowland *v.* Walker, 18 Ala. 749; 1855, Eckles *v.* Bates, 26 Ala. 659; 1857, Wilkinson *v.* Moseley, 30 Ala. 572; 1859, Barker *v.* Coleman, 35 Ala. 225; 1861, Stone *v.* Watson, 37 Ala. 288; *California:* 1919, People *v.* Bray, 42 Cal. App. 465, 183 Pac. 712 (statements that "she had been delirious and had had fever," excluded); *Georgia:* 1897, Powell *v.* State, 101 Ga. 9, 29 S. E. 309; *Kansas:* 1882, Atchison T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463; 1900, St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439; *Massachusetts:* 1904, Cashin *v.* N. Y. H. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930; 1906, Weeks *v.* Boston El. R. Co., 190 Mass. 563, 77 N. E. 654 (certain complaints, held here not to state past pain); *Michigan:* 1878, Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 543; 1892, Girard *v.* Kalamazoo, 92 Mich. 610, 611, 52 N. W. 1021; 1892, Lacas *v.* R. Co., 92 Mich. 412, 416, 52 N. W. 745; 1896, Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; 1896, Burleson *v.* Reading, 110 Mich. 512, 68 N. W. 294 ("present pain and suffering"); *Mississippi:* 1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525 (poisoning; statements of symptoms a few days before, excluded); *New Hampshire:* 1868, Towle *v.* Blake, 48 N. H. 96; *Texas:* 1898, Wheeler *v.* R. Co., 91 Tex. 876, 43 S. W. 876; *Vermont:* 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178; 1908, Wilkins *v.* Brock, 81 Vt. 332, 70 Atl. 572.

Contra: 1899, Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358 (that the deceased was habitually not troubled by menstruation, admitted, though including a statement as to past conditions).

Failure to complain of pain would be receivable either as a *party's admission* (*ante*, § 1060), or under the present Exception: 1882, Warren *v.* Wright, 103 Ill. 298, 301 (sidewalk injury; to rebut testimony that the plaintiff had suffered from a weak back before the accident, testimony was thought admissible from persons who had never heard him complain of such an ailment). Compare the analogies of § 1556, *ante*.

feelings of the person for the time being. But in reference to past periods they have no such claim to confidence, as they are manifestly, to that purpose, but the narrative of one not on oath."

Expressions as to the *duration of an illness* are in effect statements of past feelings and symptoms, and should on principle be excluded in the same way; but they have usually been admitted without noticing this.[3]

(*c*) There is in Massachusetts (and a few other jurisdictions) a modification of the preceding rule where the statements are made to a physician. Statements of past facts in the shape of the circumstances of the injury are, as elsewhere, always rejected; but statements of *past suffering* and other symptoms in preceding stages of the illness are admitted *when made to a physician.* This peculiarity seems to have been the result of the suggestions in the obscure language of Bacon *v.* Charlton and Barber *v.* Merriam (quoted *ante,* §§ 1718, 1719); the rule finally taking this shape in Roosa *v.* Loan Co. The modification (which seems to rest on the peculiar strength of the Circumstantial Guarantee in such cases) is rational and practical, and has been followed in a few other jurisdictions:[4]

1882, ENDICOTT, J., in *Roosa* v. *Loan Co.*, 132 Mass. 439: "While a witness not an expert can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both these cases [physician and ordinary witness] these declarations are admitted from necessity, because in this way only can the bodily condition of the party . . . be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury . . . which may be proved by other evidence."

This modification extends only to past sufferings and symptoms, and does not include the past external events attending the injury or illness.[5]

[3] 1903, Wilkins *v.* Missouri Valley, — Ia. —, 96 N. W. 868 (by a physician, how long the plaintiff continued to suffer pain, allowed); 1845, Yeatman *v.* Armistead, 6 Humph. Tenn. 375; 1858, Looper *v.* Bell, 1 Head. Tenn. 373; 1867, Rogers *v.* Crain, 30 Tex. 284.

In Louisville & N. R. Co. *v.* Smith, — Ky. —, 84 S. W. 755 (1905), statements as to *mental suffering* were excluded, but improperly it would seem.

[4] *Accord: Ind.* 1885, Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; *Ia.* 1907, State *v.* Blydenburg, 135 Ia. 264, 112 N. W. 634 ("the clinical history of the case," allowed; following Roosa *v.* Loan Co., Mass.); *Ky.* 1897, Omberg *v.* U. S. Mut. Ass'n, 101 Ky. 303, 40 S. W. 909; 1905, Shade's Adm'r *v.* Covington C. E. R. & T. & B. Co., 119 Ky. 592, 84 S. W. 733 (perhaps qualifying the Omberg case); *Mass.* 1907, Com. *v.* Sinclair, 195 Mass. 100, 80 N. E. 799 (abortion; statements by the patient to a physician that she had been operated on for pregnancy and had had a miscarriage, not admitted under the rule of Roosa *v.* Loan Co.); *N. J.* 1881, State *v.* Gedicke, 43 N. J. L. 88; *Okl.* 1917, Chicago R. I. & P. R. Co. *v.* Jackson, 63 Okl. 32, 162 Pac. 823; *Vt.* 1875, Hathaway *v.* Ins. Co., 48 Vt. 335, 350 (to a physician in consultation, "that at times he felt as if he must take his [own] life," admitted on an issue of insanity); *Wyo.* 1912, Acme C. P. Co. *v.* Westman, 20 Wyo. 143, 122 Pac. 89.

Contra: 1897, Weber *v.* R. Co., 67 Minn. 155, 69 N. W. 716; 1897, Williams *v.* R. Co., 68 Minn. 55, 70 N. W. 860.

The principle of § 1720, par. 1, *supra*, may sometimes suffice to admit: 1895, People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315 (admitted as necessary to explain the physician's diagnosis).

[5] 1893, Rowland *v.* R. Co., 63 Conn. 415, 419, 28 Atl. 102; 1870, Collins *v.* Waters, 54 Ill. 485, 486 (statement to a physician that the injury had been caused by a kick, excluded) 1913, Louisville & N. R. Co. *v.* Sealf, 155 Ky.

§ 1723. **Other Statements about Health, discriminated.** (1) A *statement by a party*, as to his suffering, health, injury, or the like, may be receivable as an *admission* (*ante*, §§ 1048, 1060). Such an admission may be conveyed by silence or by conduct of various sorts; that a plaintiff, for example, now suing for a serious spinal injury has never been heard to complain of it under circumstances when complaint would have been natural, is receivable as an admission. When the party takes the stand *as a witness*, the same conduct may also be available to discredit him as being in effect an *inconsistent statement* (*ante*, §§ 1017, 1042). Under both of those principles, the limitations of the present Hearsay Exception have of course no bearing.

(2) Whether such admissions as to health, made by an *insured*, are available against the *beneficiary* of an insurance contract, is a matter of some controversy, already considered (*ante*, § 1081).

(3) On an issue, upon an insurance claim, of the *knowing falsity of an insured's representations* as to health, the general principles governing the use of conduct as evidence of knowledge allow the insured's statements of an ailment to be used as evidence that he was aware of its existence, even though the insured's admission is on the above principle not to be taken as affecting the beneficiary (*ante*, § 266).

B. STATEMENTS OF DESIGN, INTENT, MOTIVE, FEELING, ETC.

§ 1725. **Statements of Design or Plan.** It has already been seen (*ante*, § 102) that the existence of a design or plan to do a specific act is relevant to show that the act was probably done as planned. The design or plan, being thus in its turn a fact to be proved, may be evidenced circumstantially by the person's conduct (*ante*, §§ 253, 300). But, as a condition of mind, the plan or design may also, it is clear, be evidenced under the present Exception by the person's own statements as to its existence.

The only limitations as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this Exception (*ante*, § 1714), namely, the statements must be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion. The following passages expound and illustrate the principle:

1878, BEASLEY, C. J., in *Hunter* v. *State*, 40 N. J. L. 495 (admitting statements of the deceased at Philadelphia that he was then going to Camden with the accused on business): "In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends,

273, 159 S. W. 804 (not clear in its limitations); 1882, Roosa *v.* Loan Co., Mass., *supra*; 1889, Dundas *v.* Lansing, 75 Mich. 503, 42 N. W. 1011.

Contra: 1897, Omberg *v.* U. S. Mut. Ass., 101 Ky. 303, 40 S. W. 909 (statement that the suffering was caused by a mosquito bite, admitted); 1919, Eggers V. S. Co. *v.* Ind. Com. 168 Wis. 377, 170 N. W. 280 (employee's statement to physician of cause of injury, admitted).

The principle of § 1720, par. 1, *supra*, may sometimes serve to admit: 1902, Cronin *v.* R. Co., 181 Mass. 202, 63 N. E. 335.

or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong; and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. . . . If it was in the ordinary train of events for this man to leave word or to state where he was going, it seems to me it was equally so for him to say with whom he was going."

1892, FIELD, C. J., in *Com.* v. *Trefethen*, 157 Mass. 185, 31 N. E. 961: "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred. . . . Although evidence of the conscious voluntary declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expression of feeling which has always been regarded in the law, not as hearsay, but as original evidence; and when the person making the declarations is dead, such evidence is often not only the best, but the only evidence of what was in his mind at the time. . . . It is not necessary in the present case to determine what limitations in practice, if any, must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if one was made, is dead; . . . and the declaration, if made, was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial."

1892, GRAY, J., in *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 12 Sup. 909 (the whereabouts of the alleged deceased was in issue; letters of his were offered expressing an intention to leave Wichita, where he was, for Colorado): "Letters from him to his family and to his betrothed were the natural, if not the only attainable evidence of his intention. . . . A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. . . . The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

The use of such statements of design or plan is illustrated in a variety of precedents. The typical situation, it must be noted, involves (1) the doing of an act which is in some way part of the issue or relevant thereto, (2) the existence of a design or plan to do this act, as evidence (*ante*, § 102) of the probable doing of the act, and (3) the hearsay use, under the present Exception, of the person's statements of this design or plan.

In most of the precedents, the issue involves the conduct of a *victim of a crime*, or of an *insured person*, or of a *sufferer from an injury*.[1]

§ 1725. [1] With the following cases compare those cited *ante*, §§ 104, 112, 113 (design as evidence of the doing of an act):

ENGLAND: 1875, R. *v.* Buckley, 13 Cox Cr. 294 (to prove that a deceased constable was intending to be in the accused's vicinity on the night of his death, a report by the deceased to his superior was admitted, that the deceased "had had private intimation that the prisoner was at his old game of thieving again, and

that therefore the deceased intended to watch his movements that night").

UNITED STATES: *Federal:* 1892, Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 Sup. 909 (quoted *supra*); this 'cause célèbre' went through more than twenty-five years of litigation; there were three inquests and six jury trials; it even affected State politics; the setting aside of the verdict in the sixth trial was ordered in 1903, Connecticut M. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 Sup. 294; the history of prior stages is found in Mutual L. Ins. Co. *v.* Boyle, 1897, 82 Fed. 705 (application for a Kansas license); see also the report of the Texas insurance examiner for 1899, and the historical note to the case as printed in the present writer's Principles of Judicial Proof, 1913, p. 856; 1900, Sharland *v.* Ins. Co. 41 C. C. A. 307, 101 Fed. 206 (insured's expressions of intention to commit suicide, admitted); 1918, Chicago M. St. P. R. Co. *v.* Chamberlain, 9th C. C. A., 253 Fed. 429 (personal injury to passenger; to evidence plaintiff's status, his expressions of intention to make a certain trip were admitted); 1921, New York Life Ins. Co. *v.* Slocum, 9th C. C. A., 272 Fed. 28 (death by gunshot; deceased's expressions negativing intention of suicide, held admissible); 1921, Northwestern Mut. L. Ins. Co. *v.* Johnson, 8th C. C. A., 275 Fed. 757 (disappearance of insured; letters expressing intention to suicide, admitted);

Alabama: 1905, Nordan *v.* State, 143 Ala. 13, 39 So. 406 (murder by abortion: deceased's expression of intent to commit suicide, admitted);

California: 1903, Rogers *v.* Ins. Co., 138 Cal. 285, 71 Pac. 348 (letter of an insured planning suicide, admitted); 1920, People *v.* Northcott — Cal. App. — 189 Pac. 704 (murder by abortion; deceased's statement of intention to visit defendant to obtain an abortion, admitted);

Colorado: 1898, Denver & R. G. R. Co. *v.* Spencer, 25 Colo. 9, 52 Pac. 211 (to show that the deceased was at a place, his declarations of intention a few days previous were received); 1900, Denver & R. G. R. Co. *v.* Spencer, 27 Colo. 313, 61 Pac. 606 (plan to meet a person at a train, admitted);

Connecticut: 1881, State *v.* Smith, 49 Conn. 380 (murder of a chief of police; the deceased's declarations, when leaving the house, that he "was going to arrest Chip Smith," admitted; the 'res gestae' phrase resorted to); 1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (murder by poisoning; deceased's declarations of intention to commit suicide, held admissible, but confined in the trial Court's discretion to a period of two months before; good opinion by Prentice, J., on the subject of remoteness of time; Com. *v.* Trefethen, Mass. approved);

Florida: 1903, Weightnovel *v.* State, 46 Fla. 1, 35 So. 856 (abortion; the deceased's statements of an intention to submit to an abortion by the defendant, admitted);

Illinois: the rulings in this State are inconsistent, and are placed together under § 1726, *post*;

Indiana: 1903, Seifert *v.* State, 160 Ind. 464, 67 N. E. 100 (abortion; deceased's statement of a design to get rid of her child, admitted);

Iowa: 1912, State *v.* Beeson, 155 Ia. 355, 136 N. W. 317 (wife-murder; her expressions of intention to commit suicide, etc., admitted; approving Com. *v.* Trefethen, and the text *supra*); 1913, Ott *v.* Murphy, 160 Ia. 730, 141 N. W. 463 (libel on a candidate for public office; on the issue whether he was a candidate, his declarations of intention were admitted); 1914, Nolte *v.* Chicago R. I. & P. R. Co., 165 Ia. 721, 147 N. W. 192 (damages for the death of a married woman; her expressions of intention to continue her occupation as nurse, admitted);

Kansas: 1919, State *v.* Patterson, 105 Kan. 9, 181 Pac. 609 (manslaughter by abortion; deceased's statement that she was going to defendant for an operation for abortion; not decided on principle);

Kentucky: 1896, Walling *v.* Com., — Ky. —, 38 S. W. 428 ("technically competent"; a declaration of intention to spend the night at a place, admitted, as showing that the night was so spent);

Massachusetts: 1873, Alley's Trial, Mass., Pamph. 38 (secret murder; that the deceased on the same day had sought to find the defendant, admitted); 1892, Com. *v.* Trefethen, 157 Mass. 185, 31 N. E. 961 (quoted *supra*); 1897, Inness *v.* R. Co., 168 Mass. 433, 47 N. E. 193 (a statement, when leaving the house, that he was going to take the train, admitted); 1910, Com. *v.* Howard, 205 Mass. 128, 91 N. E. 397 (whether a deed was suicide or murder; the deceased's statements of intention in going to the place, admitted for the prosecution);

Michigan: 1912, People *v.* Fritch, 170 Mich. 258, 136 N. W. 493 (death by abortion; the deceased's declarations, before and after visiting the defendant, held admissible only so far as involving statements of her intention to have an operation, but not posterior statements of her transaction with the defendant); 1915, People *v.* Atwood, 188 Mich. 36, 154 N. W. 112 (murder; the deceased's body was found hanging, but an abortion had been performed; the issue being as to suicide, and the accused being her seducer; the deceased's declarations of intention to go for a walk with him were held admissible);

Minnesota: 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (murder; a statement of the deceased that she had an appointment to meet the defendant, admitted); 1896, Hale *v.* Life Co., 65 Minn. 548, 68 N. W. 182 (declarations of intention to commit suicide, admissible "if made under circumstances precluding any suspicion of misrepresentation"; following the Hillmon and Trefethen rulings); 1900, Matthews *v.* R. Co., 81 Minn. 363, 84 N. W. 101 (whether a person was law-

But the principle has no narrow limitations; for example, an *absence from the jurisdiction*, by a party or a witness,[2] or the *making of a contract* or a

fully on a train; his declarations of his purpose when boarding, admitted); 1915, State *v.* Hunter, 131 Minn. 252, 154 N. W. 1083 (manslaughter by abortion; deceased's declarations "that she was going to see Dr. H. that night, Dr. H. was coming down there, and she was going to take the last treatment"; admitted, to show deceased's intent, etc.);
Nebraska: 1918, Sutter *v.* State, 102 Nebr. 321, 167 N. W. 66 (murder; the deceased's letters, etc., expressing intention of suicide, admitted; liberal opinion by Cornish, J.); 1921, Fields *v.* State, — Nebr. —, 185 N. W. 400 (abortion; deceased's letter to her seducer stating her intention to go to defendant for an operation, admitted; "the letter is a part of the 'res gestæ'");
New Jersey: 1878, Hunter *v.* State, 40 N. J. L. 495 (quoted *supra*); 1909, State *v.* Kane, 77 N. J. L. 244, 72 Atl. 39 (burglary; declaration of intention, the prior day, as to a meeting at the place where arrested, admitted);
New York: 1903, People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624 (deceased's declaration of intention, three years before, to commit suicide, admissible);
North Dakota: 1905, Clemens *v.* Royal Neighbors, 14 N. D. 116, 103 N. W. 402 (note written by deceased just before death, admitted on the issue of suicide);
Ohio: 1892, Lake Shore R. Co. *v.* Herrick, 49 Oh. St. 25, 29 N. E. 1052 (admitting the statement of the plaintiff, made to a hotel-clerk at the time of leaving the hotel, that he was going to a place C.);
Oregon: 1919, State *v.* Butler, 96 Or. 219, 186 Pac. 55, 78 (murder; deceased's prior statements of intention as to his conduct, admitted; Burnett, J., diss.); 1916, State *v.* Farnam, 82 Or. 211, 161 Pac. 417 (homicide of a woman seduced; the woman's statement "she could not go home with the B. girls because R. [the accused] was coming that evening," admitted; liberal opinion by McBride, J.);
Pennsylvania: 1920, Com. *v.* Palma, 268 Pa. 434, 112 Atl. 26 (murder of S. by defendant and R.; the statements of S. to his wife, when leaving home an hour previously, that he intended to meet defendant and R., admitted);
Tennessee: 1842, Carroll *v.* State, 22 Tenn. 321 (statements as to destination, admitted);
Texas: 1871, Hamby *v.* State, 36 Tex. 523, 526 (statements of the deceased that he was looking for the defendant, who had taken his horse, admitted as indicating that he was in search of him); 1919, Porter *v.* State, 86 Tex. Cr. App. 23, 215 S. W. 201 (murder of a paramour; issue as to the woman meeting the defendant on the day of her disappearance; her statement on departing that she was going to meet W. P., the defendant, at the haystack, admitted, Davidson, P. J., diss.); 1922, Parker *v.* State, — Tex. Cr. —, 238 S. W. 943 (murder; deceased's statement of intention to drive to a place, admitted);
Utah: 1903, State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 563 (deceased's statements, when departing, as to his destination, admitted);
Vermont: 1859, State *v.* Howard, 32 Vt. 404 (statements as to destination, admitted);
Virginia: 1886, Cluverius *v.* Com., 81 Va. 787, 810 (letter of the deceased, stating her intention to meet the defendant, admitted); 1919, Karnes *v.* Com., 125 Va. 758, 99 S. E. 562 (murder of a woman; the woman's expressions of fear of one A., admitted "to show motive on A.'s part"; Ins. Co. *v.* Hillmon followed); 1922, Mohler *v.* Com., — Va. —, 111 S. E. 454 (murder; deceased's statement of intention to go to accused's place that evening, admitted);
Washington: 1901, State *v.* Power, 24 Wash. 34, 63 Pac. 1112 (abortion; deceased's statements of intention, while preparing for a journey, admitted);
Wisconsin: 1877, State *v.* Dickinson, 41 Wis. 299 (abortion; deceased's declarations that she was to go to the defendant for the purpose admitted); 1898, Rens *v.* Relief Ass'n, 100 Wis. 266, 75 N. W. 991 (statements of intention to commit suicide, admissible, when close in point of time and made under circumstances indicating truth).

[2] *Ala.* 1902, Jacobi *v.* State, 133 Ala. 1, 32 So. 158 (in proving a former witness' permanent absence from the State, her declarations of intention not to return were held admissible on the present principle); *Cal.* 1904, People *v.* Barker, 144 Cal. 705, 78 Pac. 266 (letters from the absent person, admitted to show his absence and intent not to return); 1919, McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (legitimacy; on the issue of separation and non-access of the parents, the husband's declarations, after the wife's departure, that he was going to R., admitted, as evidence that he did go); *Ind.* 1851, Timmons *v.* Timmons, 3 Ind. 250 (absence as affecting jurisdiction; defendant's declarations of intention when leaving, admitted); *Minn.* 1893, King *v.* McCarthy, 54 Minn. 190, 194, 55 N. W. 960 (whether a witness was likely to remain without the State; his statement of intention, in a deposition taken between different parties, admitted, in connection with the fact of departure or absence); 1898, Hill *v.* Winston, 73 Minn. 80, 75 N. W. 1030 (absent person's declarations as to residence, and the sheriff's return of not found, admitted); *Vt.* 1916, Wilbur *v.* Calais, 90 Vt. 335, 98 Atl. 913 (support of a pauper; to evidence domicile, a postcard stating an intention to go to C. was admitted).

deed,[3] may be evidenced by plan or design, and the latter is then provable by declarations. So, too, on an issue of murder, assault, or personal injury, the *deceased's threats* are admissible to prove him the aggressor (*ante*, § 110), as also the *accused's* (*ante*, § 105).

It is obvious, yet it needs to be emphasized, that the nature of the act to be evidenced by the design has nothing whatever to do with the admissibility of declarations of design. The latter are absolutely admissible as statements of a mental condition, under the present Exception, to prove the design; what the design evidences, or whether it is relevant at all, does not affect the broad scope of this Exception.

§ 1726. **Same: Contrary Rulings Explained.** (1) Where on a charge of murder the defendant seeks to prove that the *deceased killed himself* or that a *third person killed* him, this hypothesis is of course properly open to proof. Yet, as a matter of precaution, Courts usually require something more than a single piece of evidence; they will not admit, for example, the mere fact that the deceased was melancholy, or that a third person fled the country.[1] But, assuming that the data as to suicide or a third person's guilt are sufficient to be considered, and that the deceased's plan of suicide, or the third person's plan of killing, is one item herein, then the declarations of the deceased or the third person are a proper mode, under the present Exception, of proving the plan.[2] To this no objection seems to have been raised for a *third person's threats;*[3] but in a few rulings the *deceased's* declarations of *intention to commit suicide* have been excluded.[4] These rulings are entirely without foundation.

Contra: 1907, Cuff *v.* Frazee S. & C. Co., 14 Ont. L. R. 263 (unsound; no authority cited on this point).

But the present principle need not be strained in admitting such evidence, for the broader principle of § 1789, *post*, suffices.

For other cases in which this was incidentally sanctioned in accepting proof of a deponent's absence from the jurisdiction, see *ante*, § 1404.

[3] *Cal.* 1899, Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791 (whether a deed was given on a certain condition in view of death; grantor's declarations showing his intentions, admitted); *Conn.* 1908, Dunham *v.* Cox, 81 Conn. 268, 70 Atl. 1033 (issue of payment; the party's statements of intention to pay, while on the way with the money, held admissible, but here not properly offered); *Ill.* 1899, Riggs *v.* Powell, 142 Ill. 453, 456, 32 N. E. 482 (whether a note bearing the husband's disputed indorsement was a gift to his wife; his declarations of intention to provide well for her, admitted); 1921, Waters *v.* Lawler, 297 Ill. 63, 130 N. E. 335 (grantor's declarations of intent to deed land to son, admissible on issue of delivery); *Ky.* 1827, Smith *v.* Montgomery, 5 T. B. Monr. 502 (father's declaration, after giving slaves to two daughters, not to give during life to any other daughters, admitted, to show his intent in the transfer of a slave afterwards to another daughter); and some of the cases cited *post*, § 1777 (verbal acts), might be decided on this ground; *Minn.* 1919, Kessler *v.* Von Bank, 144 Minn. 220, 174 N. W. 839 (whether a deed was delivered; grantor's prior expression of intention, admitted); *S. C.* 1917, Ex parte McKie, 107 S. C. 57, 91 S. E. 978 (undue influence by J.; J.'s declarations of intention to secure changes by the testatrix when mentally weak, admitted).

Contra: 1896, Mack *v.* Porter, 18 C. C. A. 527, 72 Fed. 236, 241, 242 (to disprove the making of a contract as alleged, prior declarations during the negotiations that he would not make such a contract, excluded; "a statement of intention respecting it is no proof of the fact itself," a remark wholly unsound).

Compare the general subject of evidencing the making of a contract by the plan to make it *ante*, §§ 112, 377.

§ 1726. [1] The cases are collected *ante*, §§ 139–144.

[2] See the citations in the preceding section.

[3] Cases cited *ante*, § 140.

[4] ENGLAND: 1912, Thomson's Case, 7 Cr. App. 276, 3 K. B. 19 (abortion in March, 1912; the woman's statement in February that she intended to do it herself, excluded:

(2) In a number of precedents *sundry declarations of intention* (to make a journey, to pay money, or the like) have been excluded, usually without any other apparent reason than the supposed application of the 'res gestæ' *doctrine* (*post*, § 1772).[5] This doctrine, indeed, has also in some of the rulings

no authority cited: it is strange that in this day and generation an English court can be so uninformed upon the principles of the law of evidence; the K. B. report is not accurate).

UNITED STATES: *Illinois:* 1892, Siebert *v.* People, 143 Ill. 585, 32 N. E. 431 (murder by poison; deceased's declarations of intention to commit suicide, excluded, chiefly on the authority of Com. *v.* Felch, Mass., *infra*, later overruled by Com. *v.* Trefethen, cited *supra*, § 1725; the Trefethen ruling occurred two weeks before the Siebert ruling, and was of course then unreported and unknown to the Illinois Court; the latter, in the official report and in the bound volume of the Northeastern Reporter, inserted in the opinion a reference to the Trefethen case; but it is fair to suppose that, had the Trefethen case been originally before them, they might have decided differently); 1900, Howard *v.* People, 185 Ill. 552, 57 N. E 441, *semble* (foregoing case approved); 1904, Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042 (wife-murder by poisoning; deceased's expressions of intention to commit suicide, and of depression of mind, held admissible; Siebert *v.* People, *supra*, held to represent "undoubtedly the correct rule," but distinguished because here the declarations were "part of the 'res gestæ,'" explanatory of the acts of keeping liquor and strychnine in her room; this is a groundless distinction; the Court should have plainly abandoned the unsound ruling of Siebert *v.* People, instead of introducing new opportunity for confusion; Jumpertz *v.* People, *ante*, § 143, n. 1, is not cited); 1906, Clark *v.* People, 224 Ill. 554, 79 N. E. 941 (murder by attempted abortion; the deceased's declarations, over a year before her death, that she had committed an abortion upon herself "and would repeat it if necessary," held inadmissible, as "mere hearsay," following Siebert *v.* People); 1916, Greenacre *v.* Filby, 276 Ill. 294, 114 N. E. 536 (death on a railroad track at night; issue as to suicide; the defence offered recent statements by the deceased that "that train is apt to hit me any night," that he would like to jump in front of the train, that he was shipping his last load, and similar expressions; these were held properly excluded; but statements made by him, when going home that evening, that he intended to kiss his wife and babies goodnight and go to sleep, was admitted; the labored attempt by the Court to explain this distinction by a limitation as to words accompanying an act, has no rational force; it is a pity that the artificial rule of Siebert *v.* People could not have been repudiated instead of affirmed); 1917, People *v.* Ahrling, 279 Ill. 70, 116 N. E. 764 (murder of wife; her suicide being in issue, the defendant was held entitled to show that she shared certain morose hallucinations of his as to being suspected of crime by the neighbors; Nordgren *v.* People followed).

Massachusetts: 1882, Com. *v.* Felch, 132 Mass. 22 (murder by abortion; the deceased's statement of intention to perform the operation herself, excluded, for no intelligible reason; how valueless the opinion is may be seen in the circumstances that it seriously considers an argument to apply the pedigree exception, *ante*, § 1480).

Missouri: 1894, State *v.* Punshon, 124 Mo. 448, 457, 27 S. W. 1111 (wife-murder; threats by the deceased to kill herself, excluded, since "the State was not bound by anything she may have said"; this singular idea that the State could possibly be "bound" is without foundation).

Compare the cases cited *ante*, § 143.

[5] ENGLAND: 1875, R. *v.* Wainwright, 13 Cox Cr. 171 (murder of H. L.; on the last day when H. L. was seen alive, she made a statement, on departing from her house, declaring her intention; Cockburn, C. J., excluded the terms of the statement; a reporter's note cites R. *v.* Pook, 1871, before Bovill, C. J., as involving a similar ruling).

UNITED STATES: *Illinois:* 1897, Chicago & E. I. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. 269 (to show that the deceased was at the station as an intending passenger, her statements were not admitted, made about an hour before, while preparing for departure, that she was getting ready to take the 9 A. M. train; the 'res gestæ' rule alone considered; R. Co. *v.* Herrick, Ohio, the only case cited); 1913, Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411 (deceased's expressions of intention to spend the night at his mother's home, as evidence of his conduct in being later at a certain place, excluded, citing the Chancellor case; see an extended comment in 8 Illinois Law Review 203); *Indiana:* 1897, Hauk *v.* State, 148 Ind. 238, 46 N. E. 127 (abortion; a letter of the deceased, indicating an attempt to produce the abortion herself, excluded, following Com. *v.* Felch, and ignoring Com. *v.* Trefethen, Mass.); *Kentucky:* 1895, Com. *v.* Gray, — Ky. —, 30 S. W. 1015 (murder; the deceased's expressions of intention, after a prior quarrel, of giving up any further share in it, excluded); *Michigan:* 1897, Schultz *v.* Schultz, 113 Mich. 502, 71 N. W. 854 (issue of payment; the defendant's words as he took a sum of money and left his house, excluded); *New Hampshire:* 1873, State *v.* Wood, 53 N. H. 484, 494 (abortion; deceased's declarations

admitting this evidence (*ante*, § 1725) been taken as the source of admissibility. It would be well if the invocation of the 'res gestæ' doctrine in this connection could be wholly abandoned. The simple and sufficient reason for admission is the Hearsay Exception receiving statements of an existing mental condition. Whether these accompany some conduct relevant in the litigation, or any movement or "act," is wholly immaterial. The labor shown in certain judicial opinions to discover some "act" of which the declarations "are a part" is wasted; such speculations serve only to confuse an otherwise simple situation. For example, Doe is said to have been killed on Friday at Millville; to show that he was there on Friday, a design on Thursday to go there on Friday is relevant (*ante*, § 102). His declaration on Thursday of such a design, if made under circumstances of naturalness, is admissible; and it cannot make any difference whether, as in the Herrick case (*ante*, § 1725), he uttered it in the "act" of leaving the house, or whether, as he sat reading the paper, he said to his wife, "I see that Roe in Millville has failed; I shall go down there the first thing to-morrow morning." The departure from the house is no more a material "act" in the case than the reading of the newspaper; it might as well be argued that, if he wiped his forehead and said, "It is so hot that I shall run down to the seaside to-morrow," the wiping of his forehead was an "act" which his declaration characterized. An examination of the doctrine of Verbal Acts (*post*, § 1772) will show that its correct application gives no sanction to its use in the present connection. The sooner this doctrine is left to its own legitimate sphere, the better. Its invocation to determine the admissibility of declarations of design or plan serves only to confuse a simple question, and to narrow a broad and useful rule. In the following passage a judicial protest against this error has been recorded:

1895, START, C. J., in *State* v. *Hayward*, 62 Minn. 474, 65 N. W. 63 (in which evidence of the murdered person's statements as to having an engagement to meet the defendant was admitted as a "verbal act"): "It was not admissible, in my opinion, on the ground

of intention, excluded on the 'res gestæ' theory); *North Carolina:* 1913, Barker *v.* Massachusetts M. L. Ins. Co., 163 N. C. 175, 79 S. E. 424 (declarations of a husband, a fortnight before death, as to need of a pistol, excluded in an action on the policy with an issue of suicide; ill-considered opinion, citing a single authority); *Oregon:* 1882, State *v.* Anderson, 10 Or. 448, 454 (murder; defendant's declarations as to a plan to go hunting, not admitted for defendant on the facts); *Pennsylvania:* 1853, Hartman *v.* Ins. Co., 21 Pa. St. 466, 471, 479 (to rebut the argument that insurance was procured under a recent plan to commit suicide, the insured's declarations of intention at various times to insure when he got money enough were excluded); *Texas:* 1909, Clark *v.* State, 56 Tex. Cr. 293, 120 S. W. 179 (deceased's expressions of intention to arrest defendant, excluded, here on the ground that his intention was immaterial; unsound); *Virginia:* 1898, McBride *v.* Com., 95 Va. 818, 30 S. E. 454 (declarations of the deceased as to where he was going on the night of the murder, excluded; no authority cited); 1912, Mullins *v.* Com., 113 Va. 787, 75 S. E. 193 (murder; deceased's statement before leaving that accused was going with him, excluded; unsound).

Occasionally such statements are excluded merely because some other principle is alone invoked and the present one is ignored; *e. g.:* 1900, Jenkins *v.* Ins. Co., 131 Cal. 121, 63 Pac. 180 (chiefly on the narrow ground that they were not admissions usable against the beneficiary of an insurance policy; see this rule *ante*, § 1081).

For further distinctions as to declarations by an *accused* or a *testator*, see *post*, §§ 1732, 1734.

that it tended to 'characterize her subsequent acts and her departure on the fatal ride soon after she made the statement,' — that is, that it was a part of the 'res gestæ,' — for the reason that her statement neither accompanied nor characterized any act relevant to the issue. But it was relevant to the issue to show that she did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him. To sustain it on the ground that the statement of the deceased was a part of the 'res gestæ' is, in my judgment, to assign a wrong reason for a correct conclusion, which may lead to complications in future cases."

§ 1727. **Statements of Intent, in Domicil Cases.** In domicil cases the same class of facts is involved as in the preceding section, *i. e.* a condition of mind, here usually termed "intent." It is worth while to distinguish the two in treatment, because in the former class the state of mind is a plan, which is merely evidential (*ante*, § 102) towards showing that the act purposed was subsequently consummated, while here the state of mind is itself a fact in issue, a separate element of the legal situation. The principle of the Hearsay Exception is the same in both cases. But the judicial point of view, in receiving such statements, has almost always been that of the Verbal Act doctrine (*post*, § 1784), or sometimes that of the Spontaneous Declarations doctrine (*post*, § 1745). That the present is on principle their true place is shown by the frequent admission of expressions of an intent made some time before the act of moving; the process being thus to show by these statements the existence of a state of mind at the earlier time, and to argue therefrom to its continued existence at the later time, and thus to establish the then absence of the intent necessary for a domicil; this could not be allowed under the Verbal Act doctrine.[1]

That *declarations of intent as to residence* are in general admissible is nowhere questioned, and the main inquiry is merely as to the limits of time in which those declarations may be sought. Under the present Exception the scope of search, as above indicated, would be much broader than under the Verbal Act doctrine; and in a few opinions the true place of such evidence under the present Exception seems to have been accepted:

1865, Roberts, J., in *Ex parte Blumer*, 27 Tex. 743 (admitting declarations of an intention to return to a foreign country): "They are to be credited as the index of his intention when not unreasonable in themselves, not inconsistent with other facts in the case, and not under circumstances creating suspicion of insincerity."

1893, Knowlton, J., in *Viles* v. *Waltham*, 157 Mass. 542, 32 N. E. 901 (a notice to assessors before removing, and conversations with reference to establishing a residence after removing, were admitted): "The change in his place of abode might be temporary or permanent. It might indicate a change of domicil or not, according to the circumstances attending it. Declarations of a person accompanying a change of his abiding-place have always been held competent to explain the change as a part of the 'res gestæ'; but declarations in such cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person removing is

§ 1727. [1] Since by most Courts such declarations are dealt with as Verbal Acts, the precedents can more conveniently be collected under that head, *post*, § 1784.

competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be shown, if it is free from objection in other particulars. . . . Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show the intention [citing Com. *v.* Trefethen, *supra*]. . . . The danger that declarations may have been made for a purpose . . . has led to the exclusion of them . . . unless they are made under such circumstances as to give them some corroboration. In general, such corroboration is found in the fact that they accompany and explain acts which of themselves would be competent evidence on the issue involved."

No doubt, as pointed out in these passages, and as required by the general principle (*ante*, § 1714), the declaration must appear to have been made under circumstances of naturalness and without apparent motive to deceive; and for this reason they are occasionally rejected.[2]

§ 1728. **Statements of Intent, in Bankruptcy Cases.** Similarly, statements of intent, where the character of an alleged act of bankruptcy depends on the intent, are also admissible on the present principle; though the question whether the Verbal Act doctrine (*post*, § 1783) is the doctrine really applicable is not free from difficulty. The Courts have almost invariably treated this evidence from the latter point of view; and the authorities are there collected (*post*, § 1783), though occasionally such evidence seems to be accepted under the broad principle of the present Exception, as in the following passage:

1852, JOHNSON, C. J., in *Cornelius* v. *State*, 12 Ark. 806: "In the case of the bankrupt, the declaration which he makes, at the time of leaving his house, of his intention of so doing, is founded not upon his character for veracity, but on the presumption arising from experience that where a man does an act, his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention."

§ 1729. **Statements of Motive, Reason, or Intent.** The line between Motive and Intent is not easy to draw, and is in practice seldom carefully observed. Apart from the propriety of nomenclature, there are at any rate at least two distinct thoughts involved. When a person shoots a gun, for example, the hoped-for result may be to kill a bird or to hit a target or to empty the gun of an old charge; this result, conceived as anticipated by him to ensue from his act of pulling the trigger, may be termed Intent. But the act of shooting, and the intent, may have been induced by the craving for food for a meal or by the desire of winning a prize or by the fear that the old charge was useless; this conception by him of a specific circumstance as mak-

[2] 1853, Watson *v.* Simpson, 8 La. An. 337 (Merrick, C. J.: "It is evident that in most of his conversations, and whenever he had an opportunity to manufacture evidence, S. pretended to be a resident of New Orleans. . . . Where it appears that the declarations of a party are made with a reference to making testimony in his favor, they must be rejected") 1823, Cherry *v.* Slade, 2 Hawks 400, 409 (A's declarations of intent as to residence, excluded, on an issue as to the defendant's false swearing as to the residence, though *semble* otherwise admissible; Hall, J., diss.); 1895, Davis *v.* Adair, L. R. 1 Ire. 379, 396, 430, 444 (a peculiar case).

ing it desirable to do the act of shooting the gun may be termed Motive or Reason.

So far as the present Exception is concerned, nothing turns on this distinction between motive and intent. Each is a mental condition, and each is therefore provable by contemporaneous declarations. But it is necessary, because of the Verbal Act doctrine, to consider them separately.

(1) A statement of *intent*, so far as made by an accused person, is considered elsewhere (*post*, § 1732). A statement of intent, made by other persons, does not so frequently come into question, for the reason that the intent itself is less often a material and relevant fact to be proved. Moreover, whenever it is relevant and therefore provable, it is commonly so only when attending an act otherwise ambiguous and equivocal. For example, when money is handed over, the precise nature of the act, whether a loan or a payment, will depend much upon the intent; when land is occupied, the precise effect of the occupation, whether adverse or not, will depend much upon the intent. In such cases, declarations accompanying the act will be admissible as coloring and completing its significance, under the Verbal Act doctrine (*post*, § 1772), whether they do or do not include an assertion of intent; and as this larger doctrine suffices to admit declarations of intent accompanying the act, the applicability of the present Exception (though clear enough) is a merely academic question. Moreover, since the person's intent at the time of the equivocal act is alone material, his declarations of intent made at a former or a subsequent time are declarations of an immaterial fact. His subsequent declarations of a past intent are, furthermore, of course not admissible under the present Exception; and his prior declarations, being ordinarily construable as declarations of a design or plan (*ante*, § 1725) are sufficiently available in that aspect. There is therefore little field for invoking the present Exception for ordinary declarations of intent. Nevertheless there are many instances in which a prior or subsequent state of mind is relevant to show the state of mind at a specific time (*ante*, §§ 233, 241, 395); and wherever this state of mind is an intent, prior or subsequent declarations of an existing intent would properly be admissible. Apart from the case of a testator (*post*, § 1734), little use seems to have been made of this application of the principle.[1]

(2) A declaration of a present existing *motive* or *reason* for action is admissible, — assuming, of course, that the declarant's motive is relevant. So far as concerns *accused persons*, this use is later considered (*post*, § 1732). In other cases,[2] the typical instances in which motive becomes material are

§ 1729. [1] 1821, Redford *v.* Birley, 1 State Tr. N. S. 1071, 1238, 1244 (exciting a seditious mob; expressions of motive or intent by persons attending the meeting, admitted to show the purpose of its various members and its quality as a seditious meeting); 1918, State *v.* Cook, 81 W. Va. 686, 95 S. E. 792 (murder of a sheriff holding a colored prisoner; declaration of a member of the mob, admitted). This sort of evidence was also admitted in some of the other riot cases collected *ante*, § 1079, note 3, and *post*, § 1730, note 2.

[2] With the following cases belong some of those under § 1730, *post* (a wife's reason for leaving her husband), and § 1732, *post* (accused's motive):

actions for *loss of service* or of *custom*, in which it is necessary to show that the customer's or servant's abandonment of the plaintiff was motivated by

ENGLAND: 1829, Fellowes *v.* Williamson, Moo. & M. 307 (in an action upon a representation that D. was solvent, the plaintiff's declarations, at the time of sending, "that they had received a favorable account of him and would accordingly send them," was received as showing their reason for sending, the issue being whether they sent them in reliance on the representations); 1894, Skinner *v.* Shew, 2 Ch. 581, 593 (loss of a contract by defendant's illegal threats of litigation against the plaintiff's patented article; letter of a would-be customer, admitted to show his reason for not dealing with the plaintiff).

UNITED STATES: *Federal:* 1911, Lawlor *v.* Loewe, C. C. A., 187 Fed. 522 (action for damage done by a boycott by a labor union; testimony of the plaintiff's salesman that customers had reported to him threats by labor union representatives of trouble from the union if he handled the plaintiff's goods, held improper since "in some of the instances testified to" the present rule "should not be extended as far as it was");

Alabama: 1872, Mobile R. Co. *v.* Ashcroft, 48 Ala. 31 (statements of passengers, in jumping from a train, as to their reasons, admitted, the issue being the reasonableness of the plaintiff's jumping); 1921, United States Fidelity & G. Co. *v.* Millonas, 206 Ala. 147, 89 So. 732 (procuring breach of contract of employment; employer's statement of reason made at the time of discharge, admitted);

Connecticut: 1908, Barry *v.* McCollom, 81 Conn. 293, 70 Atl. 1035 (libel; defendant's declarations, showing a good motive, made a week or two before, admitted);

Georgia: 1895, Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294 (admitted, where motive was important in determining the validity of a gift of land);

Louisiana: 1899, Webb *v.* Drake, 52 La. An. 290, 26 So. 791 (reports of defendant's boycott of plaintiff, admitted as showing its effectiveness on the community);

Massachusetts: 1890, Elmer *v.* Fessenden, 151 Mass. 161, 24 N. E. 208 (action for loss of services of workmen caused to leave by the defendant's false statement that the plaintiff's goods on which they worked contained poison; Holmes, J.: "If, as may be assumed, the excluded testimony would have shown that the workmen, when they left, gave as their reason to the superintendent that the defendant had told them that the board of health reported arsenic in the silk, the evidence was admissible to show that their belief in the presence of poison was their reason in fact. We cannot follow the ruling at *nisi prius* in Tilk *v.* Parsons 2 C. & P. 201, that the testimony of the persons concerned is the only evidence to prove their motives. We rather agree with Mr. Starkie, that such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons"); 1900, Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619 (special damage in defamation; letters from third persons to plaintiff, refusing to deal with him because his name was on defendant's blacklist, admitted; unnecessarily treated as "an act of refusal"); 1905, Flynn *v.* Coolidge, 188 Mass. 214, 74 N. E. 342 (malicious prosecution, and damage by C.'s refusal to lease a building to the plaintiff; C.'s statement of his reason for refusing, excluded only because not made before action begun); 1906, Pierson *v.* Boston El. R. Co., 191 Mass. 223, 77 N. E. 769 (damage by noise; the statements of reasons given by the plaintiff's customers when leaving his restaurant, "We can't talk here and hear ourselves," admitted); 1908, Hubbard *v.* Allyn, 200 Mass. 166, 86 N. E. 356 (libel; customers' statements declining to buy because of the badness of the merchandise of the plaintiff as alleged by the defendant, admitted, on the issue of damage);

Michigan: 1882, Steketee *v.* Kimm, 48 Mich. 322, 324, 12 N. W. 177 (libel charging the sale of counterfeit oil; to show loss of business in consequence, statements by customers returning the oil and giving the defendant's publication as the reason were admitted);

New Hampshire: 1835, Hadley *v.* Carter, 8 N. H. 42 (declarations of a servant, at the time of leaving, as to his motives, admitted; good opinion by Upham, J.);

New York: 1885, Baker *v.* Baker, 16 Abb. N. C. 293, 302 (husband's declaration, at time of leaving, of the reason for leaving, admitted); 1896, Hine *v.* R., 149 N. Y. 154, 43 N. E. 414 (the smaller rental value of property as a result of the defendant's acts being in issue, the plaintiff's tenants' statements of the reasons for their demanding a reduction were admitted; put by the Court on the 'res gestæ' ground);

Oregon: 1917, Roberts *v.* Bodley, 84 Or. 637, 165 Pac. 1172 (sale of a horse, to be returned by the vendee "if unsatisfactory"; the vendee's expressions of content or not, admitted);

Vermont: 1908, State *v.* Ryder, 80 Vt. 422, 68 Atl. 652 (motive for destroying letters; statement made while burning them, admitted);

Virginia: 1886, Cluverius *v.* Com., 81 Va. 787, 801 (remarks of the deceased, about the time of leaving, stating her reason for leaving, admitted);

Wisconsin: 1893, Academy of M. Co. *v.* Davidson, 85 Wis. 129, 136, 55 N. W. 172 (issue as to the motive of a deceased tenant for leaving; his declarations when leaving,

the defendant's persuasion or threats; and actions in which the *reliance* of a person *on another's representations* becomes a part of the issue. The use of declarations of this sort is fully recognized in numerous precedents.

§ 1730. **Statements of Emotion (Bias, Fear, Malice, Affection, etc.); Wife's or Husband's Declarations.** — The existence of an emotion — *hatred, malice, affection, fear,* and the like — is usually evidenced by conduct or by utterances indirectly indicating the feeling that inspires them (*ante*, §§ 1715, 250, 394). But a declaration directly asserting the existence of the emotion is admissible, under the present Exception, like a statement of any other kind of mental condition.[1] The uses of such statements to *impeach a witness* (*ante*, § 950) and to prove an *accused person's malice* (*post*, § 1732) furnish the commonest instances of the application of the principle.

Statements of a present emotion of *fear, alarm, disgust, grief,* or the like, are also equally admissible under the present Exception,[2] although such utterances have usually an indirect and circumstantial force (*ante*, § 1715) rather than a direct and assertive one.

A special application is also found in actions for alienation of affections, criminal conversation, divorce, or wife-murder, where the *state of affections of the wife to the husband,* or of the husband to the wife, becomes material.

as to the motive, admitted); 1903, Charley *v.* Potthof, 118 Wis. 258, 95 N. W. 124 (theatrical contract; breach in not furnishing adequate services; the statements of persons in the audience, when leaving the theatre, giving their reasons for so doing, admitted to show their motive; compare Ellis *v.* Thompson, N. Y., *post*, § 1770).

Contra: 1825, Tilk *v.* Parsons, 2 C. & P. 202 (loss of custom as the result of a slander; declarations of the customers, giving their reason for ceasing to buy, excluded); 1846, Walker *v.* Meetze, 2 Rich. S. C. 570 (libel in letters to G., causing breach of promise of marriage by G.; G.'s statement in conversation that "she could not marry the plaintiff after receiving and reading the letters," excluded as hearsay).

For certain cases of utterances by *mobs*, perhaps decided on this principle, see *ante*, § 1079, note 3, and *post*, § 1730, note 2.

For a *debtor's* declarations, indicating his motive in an alleged *fraudulent conveyance*, see *ante*, §§ 1083, 1086.

Distinguish the question of *testifying on the stand* to one's own intent (*ante*, § 581).

§ 1730. [1] 1867, Wells, J., in Day *v.* Stickney, 14 All. Mass. 258 (admitting hostile expressions to impeach a witness' credit): "His prejudices can be known only by his expressions of them; and therefore such declarations are the legitimate evidence of their existence."

[2] ENGLAND: 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1165 ff. (statements of the deceased as to being melancholy, ill, and in love, admitted); 1821, Redford *v.* Birley, 1 State Tr. n. s. 1071, 1238, 1244 (seditious mob; expressions of alarm by persons in the neighborhood, admitted to show the feelings produced by the gathering); 1840, R. *v.* Vincent, 9 C. & P. 275 (complaints to policeby persons alarmed at violent Chartist meetings, admitted, the persons not being called; compare § 1790, *post*); *Canada:* 1907, Gilbert *v.* The King, 38 Can. Sup. 284 (by the deceased, on the approach of the defendant, "don't let him knife me," admitted); *United States:* 1859, Kearney *v.* Farrell, 28 Conn. 320 (nuisance; complaints by a deceased wife as to offensive smells, while suffering from them, received "as an expression of bodily or mental feeling"); 1886, State *v.* Baldwin, 36 Kan. 10, 12 Pac. 318 (letters of a deceased person showing cheerfulness, admitted); 1909, State *v.* Draughon, 151 N. C. 667, 65 S. E. 913 (father's expressions of gratitude, etc. to his son, admitted); 1909, Luckey *v.* Western U. Tel. Co., 151 N. C. 551, 66 S. E. 596 (non-delivery of a telegram announcing a mother's death; the mother's expressions showing affection for a son, admitted); 1920, Western Union Tel. Co. *v.* Kilgore, Tex. Civ. App. 220 S.W. 593 (expressions of grief at a relative's grave, admitted); 1882, People *v.* O'Laughlin, 3 Utah 133, 1 Pac. 653 (riot; testimony to expressions of "a general feeling of insecurity and alarm" and the riotous conduct, admitted).

Contra: 1896, Gloystine *v.* Com., — Ky. —, 33 S. W. 824 (statements about bad smells, excluded; but here the statements were probably assertions of external facts).

Here, the declarations of the person as to her or his own state of affections are admissible under the present principle. In most instances, such expressions are chiefly useful in an indirect or circumstantial way only (*ante*, §§ 394, 1715); in some instances, they merely state reasons for a departure from the home and thus belong in the preceding section. But in general no discrimination is made on these points; and it is said merely that declarations made at a time when there was no motive to deceive are admissible: [3]

[3] The following list includes also a few cases which reject the declarations for one or another reason:

ENGLAND: 1825, Walton *v.* Green, 1 C. & P. 621 (necessaries to a wife; defence, her adultery; wife's statements admitted as "forming part of the cause of her being so turned out"); 1832, Willis *v.* Bernard, 8 Bing. 376 (letters of a wife to her husband or others, admitted to show her feelings towards him); 1834, Jones *v.* Thompson, 6 C. & P. 415 (statement of a wife, in crim. con., as to a diary kept by her, that she kept it to show to her husband, admitted to evidence her feelings towards her husband); 1835, Wilton *v.* Webster, 7 C. & P. 198 (letters by a wife, offered to show her happiness with her husband, not admitted because written after attempted adultery).

UNITED STATES: *Federal:* 1901, Ash *v.* Prunier, 44 C. C. A. 675, 105 Fed. 722 (alienation of husband's affections; correspondence of husband and plaintiff before and after the time in issue admitted);
Alabama: 1895, Long *v.* Booe, 106 Ala. 570, 17 So. 716 (wife's letters, admitted);
California: 1915, Cripe *v.* Cripe, 170 Cal. 91, 148 Pac. 520 (father's alienation of husband-son's affections; the husband's statements to the father as to the wife's drinking-habits, admitted to show the husband's state of affections and also the father's motive); 1919, Bourne *v.* Bourne, 43 Cal. App. 516, 185 Pac. 489 (alienation of affections; husband's statements admitted to evidence "the state of the husband's feelings");
Colorado: 1894, Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614 (alienation of a husband's affections by his mother; the husband's declarations as to the defendant's conduct, admitted "to determine the cause or motive which prompted his separation from his wife");
Illinois: 1896, Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071 (issue as to a marriage of the deceased; letters written to the alleged wife, admitted as showing "how the deceased regarded" her);
Indiana: 1884, Higham *v.* Vanosdol, 101 Ind. 160, 163 (crim. con.; wife's declarations of the husband's ill-treatment, made on the day of elopement, excluded; being made after the influence of the defendant had arisen, the present rule was held not satisfied); 1893, Pettit *v.* State, 135 Ind. 393, 416, 34 N. E. 1118 (wife-murder; the wife's letters to the husband, exhibiting her affection, held admissible); 1898, Driver *v.* Driver, 153 Ind. 88, 52 N. E. 401 (divorce; letters of husband and wife received to show their condition of feelings); 1919, Kraeger *v.* Kraeger, — Ind. App. —, 125 N. E. 484 (alienation of husband's affections; husband's declarations, admitted);
Iowa: 1895, Bailey *v.* Bailey, 94 Ia. 528, 63 N. W. 341 (action against a father-in-law for alienation of affections; expressions of defendant and of his son, admitted to show the state of their feelings); 1896, Puth *v.* Zimbleman, 99 Ind. 641, 68 N. W. 895 (crim. con.; letters to the defendant after the alleged misconduct, admitted); 1899, State *v.* Butts, 107 Ia. 653, 78 N. W. 687 (letter of a co-respondent on a charge of adultery, showing his feelings towards the respondent, admitted); 1906, Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639 (alienation of a husband's affections by a father-in-law; the husband's statements to his wife, on taking leave, as to being influenced by his father, admitted; two judges dissent, citing no authority); 1916, Smith *v.* Rice, 178 Ia. 673, 160 N. W. 6 (here the special purpose was to show prior unhappy marital relations, in mitigation of damages);
Kansas: 1902, Roesner *v.* Darrah, 65 Kan. 599, 70 Pac. 597 (wife's declarations before guilty intimacy with defendant, admitted); 1904, Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492 (alienation of affections; husband's statements admitted to show the source of his change of mind);
Kentucky: 1914, Willey *v.* Howell, 159 Ky. 805, 169 S.W. 519 (alienation of affections; wife's letter complaining of cruel conduct and expressing an intention to leave him, held admissible);
Maryland: 1881, Robinson *v.* State, 57 Md. 14, 19 (abduction of wife and children of M.; the wife's declarations, while riding in the wagon driven by defendant, that she was leaving M. of her own choice, admitted to show that she was not under constraint);
Massachusetts: 1852, Jacobs *v.* Whitcomb, 10 Cush. 257 (admitting a wife's expressions of hostile feelings; "the usual expressions of such feelings are original evidence, and often the only proof of them which can be had"); 1857, Collins *v.* Stephenson, 8 Gray 440, *semble* (by a wife when leaving her husband, as to her motive, admissible);
Michigan: 1881, White *v.* Ross, 47 Mich. 172,

1838, Sir *F. Pollock*, arguing, in *Wright* v. *Tatham*, 5 Cl. & F. 683: "The letters of a wife written to her husband before the time of an alleged adultery are admitted, . . . [though] the wife herself is not examined. Why? Because credit is given to her for having acted with sincerity at the time; and her letters are receivable to show the state of her affections before her elopement, being written at a moment when she had no purpose to answer in writing them."

1839, ROGERS, J., in *Gilchrist* v. *Bale*, 8 Watts 356 (the wife's declarations as to bad treatment from her husband were offered to show that she had an inclination to leave him, and was not enticed by the defendant): "The motives . . . in most cases cannot be shown except by her declarations made at the time to her relations and friends."

1851, CATRON, J., in *Gaines* v. *Relf*, 12 How. 535: "The letter of D. . . . is competent to prove the state of feeling, affection, and sympathy of D. towards his wife when he wrote the letter. . . . There is no ground to suppose that the letter was written collusively. It appears to have been ingenuous and honestly intended."

In such an action, in particular for *alienation of affections*, the statements of the alienated spouse, exhibiting the mental condition of alienation and

10 N. W. 188 (alienation of wife's affections; wife's letters before and after marriage, excluded, where no misconduct of defendant had been otherwise shown; no precedent cited); 1883, Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485 (same; wife's letters admitted; the preceding case practically repudiated); 1887, Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501 (similar); 1894, Dalton *v.* Dregge, 99 Mich. 250, 252, 58 N. W. 57 (husband's remarks showing feelings, in crim. con., admitted); 1897, McKenzie *v.* Lautenschlager, 113 Mich. 171, 71 N. W. 489 (alienation of wife's affections; her letters and utterances, admitted);
Minnesota: 1894, Lockwood *v.* Lockwood, 67 Minn. 476, 70 N. W. 784 (action for loss of husband's affections; the husband's declaration that he had decided to separate from his wife, admitted);
Missouri: 1884, State *v.* Leabo, 84 Mo. 168, 171 (wife-murder; the wife's letter showing affection, admitted); 1900, State *v.* Callaway, 154 Mo. 91, 55 S. W. 444 (husband's and wife's letters to a third person, admitted); 1910, Fuller *v.* Robinson, 230 Mo. 22, 130 S. W. 343 (statements by the wife, admitted; *semble*, statements after her alleged misconduct would be inadmissible, if collusion with the husband were likely; so also the defendant's wife's conduct indicating coolness is admissible);
New York: 1909, Cochran *v.* Cochran, 196 N. Y. 86, 89 N. E. 470 (husband's declarations, excluded; E. T. Bartlett, J., diss.);
North Carolina: 1920, Cottle *v.* Johnson, 179 N. C. 426, 102 S. E. 769 (alienation of affections; conversations and letters between husband and wife, admitted);
North Dakota: 1911, Luick *v.* Arends, 21 N. D. 614, 132 N. W. 353 (alienation of wife's affections; her declarations of affection or the opposite, up to the time of the defendant's influence, admissible, but not to include statements of the conduct causing it);
Ohio: 1861, Preston *v.* Bowers, 13 Oh. St. 1, 11 (alienation of affection; the statements, "made recently prior to the alleged seduction," admitted "to show the state of her affections"; here made before the marriage);
Oregon: 1921, Noll *v.* Carlin, — Or. —, 199 Pac. 596 (husband's action for alienation of wife's affections against wife's parents; wife's letters admitted for defendant to show that her real motive was dislike of husband's parents' pro-German disloyal sentiments during the war); 1919, Schneider *v.* Tapfer, 92 Or. 520, 180 Pac. 107 (alienation of wife's affections);
Pennsylvania: 1900, Lyon *v.* Lyon, 197 Pa. 212, 47 Atl. 193 (alienation of affections; husband's statements after abandonment, excluded); 1913, Ickes *v.* Ickes, 237 Pa. 582, 85 Atl. 885 (alienation of affections; defendant's statement of his intention to leave and his motive therefor, made prior to leaving, admitted; but the Court seems incorrectly to place the ruling on the principle of § 1725, *ante*); 1921 Curtis *v.* Miller, 269 Pa. 509, 112 Atl. 747 (alienation of wife's affections; wife's letters to plaintiff, written before separation, admitted to show the "happy and affectionate relations existing between them");
Rhode Island: 1899, Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67 (alienation of wife's affections; wife's utterances, after leaving, admitted);
Texas: 1914, Brown *v.* State, 74 Tex. Cr. 356, 169 S. W. 437 (like Pettit *v.* State, Ind., but decided *contra;* Davidson, P. J. diss.);
South Dakota: 1922, Clendennen *v.* Bainbridge, — S. D. —, 187 N. W. 727 (alienation of affections);
Vermont: 1892, Rudd *v.* Rounds, 64 Vt. 432, 439, 25 Atl. 438 (crim. con.; wife's declarations while leaving, as to reasons for leaving the husband, admitted to show her feelings); 1894, Fratini *v.* Caslani, 66 Vt. 273, 29 Atl. 252 (crim. con. and alienation of affections; the wife's letters not admitted for

the motives therefor, sometimes mention *acts and utterances of the defendant* as the alienating influence, *e. g.* when the alienated wife says to her husband, referring to the defendant, "He offered to marry me if I could get a divorce from you, and so I am ready to leave you." Here the alleged utterances of the defendant need not be taken as facts, much less as true assertions (*post*, § 1768); but the wife's reference to them is plainly evidential of the relation of cause and effect *in her mind* between her present alienation of affections and the defendant's influence, *i. e.* her motive (*ante*, § 1729); therefore, supposing that the fact of the defendant's efforts and influence is otherwise evidenced, the wife's utterances of the above sort should be received to show their result on her state of mind.[4] In this aspect, the defendant's utterances and acts as recited by her are not hearsay, but fall under the principle of § 1768, *post*.

the plaintiff in rebuttal, because not shown to have been written before grounds to suspect collusion, etc., existed); 1898, Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035 (bastardy; defendant's expressions of feeling towards plaintiff, excluded, only because his feelings at the time in question were irrelevant);
Washington: 1898, Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46 (spouse's letters of affection, admitted); 1902, Stanley *v.* Stanley, 27 Wash. 570, 68 Pac. 187 (alienation of husband's affections; husband's declarations more than two years after separation, and six months after suit begun, excluded); 1921, Harringer *v.* Keenan, — Wash. —, 201 Pac. 306 (alienation of wife's affections; the wife's letters of affection to husband, written prior to separation, admitted on his behalf);
Wisconsin: 1896, Horner *v.* Yance, 93 Wis. 352, 67 N. W. 720 (crim. con.; wife's letters showing affection, admitted); 1909, White *v.* White, 140 Wis. 538, 122 N.W. 1051 (husband's declaration, in wife's action, admitted).

In this class of cases, as in others preceding, a Court occasionally rests the admission on the Verbal Act doctrine: 1853, Cattison *v.* Cattison, 22 Pa. 277 (divorce claimed for wilful desertion; declarations of the wife on the night of her flight, admitted); 1890, Glass *v.* Bennett 89 Tenn. 482, 14 S. W. 1085 (declarations of a wife's motive on leaving home, admitted).

In State *v.* Punshon, 124 Mo. 448, 27 S. W. 1101 (1894), such evidence was against all precedent rejected.

[4] *Accord: Fed.* 1918, McGowan *v.* Armour, 8th C. C. A., 248 Fed. 676 (alienation of husband's affections; the husband's narrative to wife of conversations with defendant, excluded on the facts); *Cal.* 1915, Cripe *v.* Cripe, 170 Cal. 91, 148 Pac. 520 (alienation of husband's affections; the husband's statements about the wife's conduct, admitted); 1920, Adkins *v.* Brett, 184 Cal. 252, 193 Pac. 251 (alienation of wife's affections; wife's statements as to her affections, including statements as to conduct with defendant, admitted, subject to proper instructions; approving Cripe *v.* Cripe, *supra*, note 3, and repudiating Barlow *v.* Barnes, 172 Cal. 98, 155 Pac. 457 and Humphrey *v.* Pope, *infra*); *Colo.* 1894, Williams *v.* Williams, 20 Colo. 51, 58, 37 Pac. 614; *Md.* 1908, Hillers *v.* Taylor, 108 Md. 148, 69 Atl. 715 (doctrine approved; but held not to admit an utterance which merely recited conduct of the defendant, and thus had no significance under the present doctrine); 1911, Hillers *v.* Taylor, 116 Md. 165, 81 Atl. 286 (husband's conversations, unspecified, here held admissible, following the rule of the prior decision); *Mich.* 1887, Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501 (cited *supra*, n. 2).

Contra: 1905, Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223; 1920, Jacobs *v.* Jacobs, 95 Conn. 57, 110 Atl. 455 (divorce for cruelty; the wife's complaint to A., testified to by A., that the husband choked her, excluded as immaterial); 1889, Huling *v.* Huling, 32 Ill. App. 519, 521; 1884, Higham *v.* Vanosdol, 101 Ind. 160, 164 (cited *supra*, n. 2); 1908, Leucht *v.* Leucht, 129 Ky. 700, 112 S. W. 845 (the opinion apparently does not perceive the distinction); 1861, Preston *v.* Bowers, 13 Oh. St. 1, 11 (cited *supra*, n. 2); Westlake *v.* Westlake, 34 Oh. St. 621, 634; 1914, Brison *v.* McKellop, 41 Okl. 374, 138 Pac. 154 (alienation of husband's affections; the husband's statements to the wife as to what the defendant his mother had said to him, excluded); 1921, Pugsley *v.* Smyth, 98 Or. 448, 194 Pac. 686 (alienation of affections; wife's statements merely as to facts of co-respondent's conduct, here excluded); 1919, Gilmore *v.* Gilmore, 42 S. Dak. 236, 173 N. W. 865 (alienation of affections of husband by his parents; husband's statement to the wife, of his reason for writing her a letter, viz. that his parents had said that he was not the father of their infant child, excluded, because made prior to his abandonment of her; erroneous; Smith, C. J., and McCoy, J., diss.).

§ 1731. **Statements of Opinion or Belief.** Utterances of opinion or belief are usually circumstantial in their significance (*ante*, § 266) rather than direct assertions. But so far as the existence of an opinion or belief in a specific person is material, the person's contemporaneous assertions of its existence, made without any apparent motive to deceive, are admissible. This was always recognized, for example, as a proper mode of proving atheism to disqualify a witness;[1] other instances are naturally rare.[2]

C. Statements by an Accused

§ 1732. **Sundry Statements by an Accused Person (Purpose, Motive, Good-Will, Fear, before or during or after the Deed; Political Opinions).** Statements by an accused person may involve instances of almost every one of the preceding sorts, but it is convenient to consider them in one place, in order that the necessary discriminations may be made.

In the first place, any and every statement by an accused person, so far as not excluded by the doctrine of confessions (*ante*, § 815), or by the privilege against self-crimination (*post*, § 2250), is usable *against him* as an admission (*ante*, § 1048). Thus, it is unnecessary for the prosecution to establish the propriety of such statements under the present Exception, because they would be in any case receivable as admissions. For this reason, since a person's own statements are not receivable *in his favor* as admissions, there has been a strong judicial tendency to ignore the bearings of the present Exception for statements offered in favor of the accused. It is therefore proper to inquire how far the present principles are after all available for such a purpose.

(1) Statements of *design or plan*, as already noticed (*ante*, § 1725), are in general admissible, so far as the design or plan is relevant to show the doing of the act designed. Accordingly, it has never been doubted that the *threats* of an *accused person* are admissible to show his doing of the deed threatened,[1] so also the threats of the *deceased*, on a charge of homicide, are by most Courts admitted to show the deceased to have been the aggressor.[2] Upon the same

§ 1731. [1] *Post*, § 1820.

Statements of *political opinion* have also been admitted as circumstantial evidence (*ante*, § 195 and § 369); for the *accused's* opinions, see *post*, § 1732.

[2] 1702, Hathaway's Trial, 14 How. St. Tr. 653 (cheating by pretending to be so bewitched by Sarah M. that he could not eat; to show that the community was imposed on by the fraud, evidence was offered of the abuse and imprecations uttered by sundry persons against Dr. M., who had procured the liberation of the supposed witch, and had held to expose the fraud; objected to as hearsay; L. C. J. Holt: "This evidence is proper; he is indicted for a cheat, for endeavoring to beget an opinion in people by his fraudulent practices that he is bewitched; . . . now is not this an evidence that his pretending himself to be bewitched begot that opinion in the people?"); 1848, McCracken *v.* West, 17 Oh. 16, 24 (declaration by a defendant, sued on a representation as to M.'s credit, as to what he thought M. was worth, and made prior to the representation, admitted as evidence of his belief).

§ 1732. [1] 1848, New Gloucester *v.* Bridgham, 28 Me. 68 ("declarations of defendants, tending to show their having formed determinations to commit crimes, are always admissible against them when accused of committing the same"; here said of the illegal sale of liquor). The cases are collected *ante*, § 105

[2] The cases are collected *ante*, §§ 110, 111.

principle, the expressions of plan, by the accused, *not to do* the thing charged, or to do a different thing, are equally admissible.[3]

(2) Statements *before the act*, asserting *malice* or *hatred*, are always received *against* an accused;[4] except so far as the time of feeling is so remote as to make it irrelevant (*ante*, § 395). Is there any reason why prior statements *in favor* of the accused — for example, of *good feeling* towards the injured party, or of *fear* of him as an aggressor — should not be equally admissible? Conduct offered as circumstantially evidential does not seem to be objected to.[5] But statements asserting directly the existence of such feelings are by some Courts treated as inadmissible, so far as they do not accompany the very act charged.[6]

[3] ENGLAND: 1699, Spencer Cowper's Trial 13 How. St. Tr. 1170 (murder at night; to prove an alibi at a certain lodging-house, the fact was admitted that the defendant had come to town that day and had gone to the house and engaged lodgings, promising to come there for the night).

CANADA: 1876, R. *v.* Chasson, 16 N. Br. 546, 582 (murder; purpose of defendant and his companions as expressed in going to a house and entering, allowed).

UNITED STATES: *Federal:* 1827, U. S. *v.* Craig, 4 Wash. C. C. 729, 732 (the defendant was arrested in a compromising position; declarations made beforehand that he was going to the place to get bail for his brother-in-law, received); *Alabama:* 1921, Crenshaw *v.* State, 205 Ala. 256, 87 So. 328 (murder; in explanation of defendant's whereabouts, his prior announcement of his intention to go to the place, as referable to "an innocent plan rather than to a consciousness of guilt," admitted); *Indiana:* 1879, Grimes *v.* State, 68 Ind. 193 (larceny; the defendant borrowed a gun, declaring that he was going to B. to shoot; his intent being material, a plan with D. to go to B., made before taking the gun, was admitted to show that he actually intended to go to B.); *Tennessee:* 1867, Garber *v.* State, 4 Coldw. 161 (defendant's declarations, when starting to find deceased, of intent as an army officer to arrest him as a deserter, admitted); *Texas:* 1914, Brown *v.* State, 74 Tex. Cr. 356, 169 S. W. 437 (wife-murder; that the defendant had a short time before saved his wife from drowning, admitted, but not the defendant's statement to friends recounting the act; this distinction is unsound; the man's recital of the act must have had some apparent revelation of his sentiments and intentions toward the object of his act; as negativing either hostile intent or hostile emotion, the statement was admissible).

Contra, but wholly unsound: 1855, R. *v.* Petcherini, 7 Cox Cr. 82, Ire. (charge of blasphemously burning the Holy Scriptures; the defendant denied having knowingly done so; his declarations of intention some days before the act, as to the kind of books he intended to destroy, were rejected by Crampton, J., and Greene, B.); 1843, Com. *v.* Kent, 6 Metc. Mass. 221 (counterfeiting dies; the defendant's declaration, at the time of ordering them, as to his purpose in wanting them, excluded; no reason given); 1905, State *v.* Dean, 72 S. C. 74, 51 S. E. 524 (murder; the accused's prior statements of innocent purpose in going to the place, excluded).

[4] This is not questioned; illustrations will be found in the citations *ante*, §§ 105 ff., 394; 1908, Hill *v.* State, 156 Ala. 3, 46 So. 864.

[5] *Ante*, § 394.

[6] Cases on both sides are as follows: *Alabama:* 1872, Birdsong *v.* State, 47 Ala. 68, 71, 77 (defendant's statements, before the killing, of a desire to avoid the deceased, excluded); 1909, Maddox *v.* State, 159 Ala. 53, 48 So. 689 (Mayfield, J., "The writer of this opinion thinks that this Court and some trial Courts have gone too far, in certain of the cases reported, in admitting such evidence against the accused"; here admitting declarations of the accused made at and about the time of leaving home, but excluding others made later; the learned Court, instead of excluding more evidence *against* accused persons, should admit more evidence *for* them; the logic-chopping in such cases as the present seems a pitiable method of getting at the truth about a murder, — pitiable, that is, when one reflects that it is the method used by able men administering a great legal system, and fancying themselves to be doing its proper service; *Florida:* 1903, Fields *v.* State, 46 Fla. 84, 35 So. 185 (assault with intent to kill; defendant's prior application to an officer for protection, excluded); 1910, White *v.* State, 59 Fla. 53, 52 So. 805 (certain prior conversations, held admissible); *Georgia:* 1848, Monroe *v.* State, 5 Ga. 85 132 ("testimony which went to establish by the prisoner's own acts and declarations his knowledge of the threats and violent conduct of the deceased and his constant alarm and apprehension, by reason thereof, of death or

It has been argued that the party must not be allowed to "make evidence for himself." But this objection applies equally to many classes of statements under the present Exception, and is yet not thought of as fatal. Moreover, the notion of "making," that is, "manufacturing" evidence, assumes that the statements are false, which is to beg the whole question.

Then it is further suggested that at any rate the accused, if guilty, *may* have falsely uttered these sentiments in order to furnish in advance evidence to exonerate him from a contemplated crime. But here the singular fallacy is committed of taking the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty; in other words, the fundamental idea of the Presumption of Innocence is repudiated. We elaborate this presumption in painful and quibbling detail; we expend upon it pages of judicial rhetoric; we further maintain, with sentimental excess, the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the principles of common sense to protect an accused person against an assumption of guilt until the proof is irresistible; and yet, at the present point, we throw these fixed principles to the winds and make this presumption of guilt in the most violent form. Because (we say) this accused person *might* be guilty and therefore *might* have contrived these false utterances, therefore we shall exclude them, although without this assumption they indicate feelings wholly inconsistent with guilt, and although, if he is innocent, their exclusion is a cruel deprivation of a most natural and effective sort of evidence. To hold that every expression of hatred, malice, and bravado is to be received, while no expression of fear, good-will, friendship,

some great bodily hurt at the hands of M."; its admissibility held to depend on whether it accompanied an act as a "part of the 'res gestæ'"); 1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303 (statements that he was afraid to go where the deceased was, excluded); *Louisiana:* 1910, State *v.* Kinchen, 126 La. 39, 52 So. 185 (here the Court falls back in defence, as many others have done, on the bugbear phrase, invented apparently by Mr. Wharton, "self-serving," a term which merely perpetuates the long-abandoned doctrine of interest, *i. e.* every person when speaking on a matter in which he is interested is presumably false in every detail; this worn-out notion should be totally discarded); *Mississippi:* 1859, Newcomb *v.* State, 37 Miss. 383, 398 (defendant's statement, shortly before the homicide, that he "had no harm against [deceased], and would not hurt a hair of his head," excluded; because to admit it would be "to allow a party to make evidence for himself"); *Missouri:* 1880, State *v.* Van Zant, 71 Mo. 541 (assault; defendant's statements prior to and at the time of the affray, as to his physical condition excluded); 1905, State *v.* Atchley, 186 Mo. 174, 84 S. W. 984 (murder; defendant's application to have the deceased put under a peace-bond, excluded); *Pennsylvania:* 1918, Com. *v.* Principatti, 260 Pa. 587, 104 Atl. 53 ("a black hand" agent killed by accused; the accused's prior application to the police for protection, admitted, as evidencing his fear); *Tennessee:* 1901, Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713 (defendant's prior statements that the deceased had threatened him, excluded); *Texas:* 1898, Red *v.* State, 39 Tex. Cr. 414, 46 S. W. 408 (that he wished to get away from the vicinity of the deceased, excluded); 1900, Nelson *v.* State, — Tex. Cr. —, 58 S. W. 107 (defendant's application to city marshal for protection, etc., admitted); 1903, Poole *v.* State, 45 Tex. Cr. 348, 76 S. W. 565 (accused's statements, before the homicide, that he did not wish to have trouble, admitted); 1921, Powers *v.* State, 88 Tex. Cr. 457, 227 S. W. 671 (murder; defendant's prior declarations, expressing fear of "trouble," admitted); 1921, Watt *v.* State, — Tex. Cr. —, 235 S. W. 888 (murder; defendant's prior statements to the deceased protesting against deceased's aggressions, etc., excluded; unsound); *Vermont:* 1904, State *v.* Raymo, 76 Vt. 430, 57 Atl. 993 (assault on B.; plea, self-defence; defendant's declarations of fear of B., prior to the assault, excluded).

or the like, can be considered, is to exhibit ourselves the victims of a narrow whimsicality, which might be expected in the tribunal of a Jeffreys, going down from London to Taunton with his list of intended victims already in his pocket, or on a bench "condemning to order," as Zola said of Dreyfus' military judges. But it was not to have been anticipated in a legal system which makes so showy a parade of the presumption of innocence and the rights of the accused. — This question-begging fallacy about "making evidence for himself" runs through much of the judicial treatment. There is no reason why a declaration of an existing state of mind, if it would be admissible against the accused, should not also be admissible in his favor, except so far as the circumstances indicate plainly a motive to deceive.

(3) Statements of *intent* or *motive*, at the *time of the act charged*, are of course admissible under the present Exception. Whether in strictness the principle properly involved is the present one, or that of the Verbal Act doctrine (*post*, § 1772), is perhaps open to question. Practically there can be little difference in the result; for, under either principle, the statements must relate to the present state of mind at the time of the act. Most Courts treat the question in terms of the Verbal Act doctrine.[7] The statements, as already indicated, ought to be admissible as well in favor of the accused as against him.

(4) Statements *after the act*, stating the *past intent or motive* at the time of the act, are of course inadmissible under the present Exception; [8] though

[7] Compare with these the cases cited *ante*, § 396 (hostility evidenced by conduct);

ENGLAND: R. *v.* Petcherini, 7 Cox Cr. 81 (declarations while throwing books into a fire, admissible to prove the intention, on a charge of blasphemously burning the Holy Scripture).

UNITED STATES: *Federal:* 1909, Huntington *v.* U. S., 8th C. C. A., 175 Fed. 950, 956 (fraudulent entries under the homestead laws, by false representations to entrymen; true representations to other entrymen during the same period, excluded; Philips, J., diss., citing the above text); 1913, Gould *v.* U. S., 8th C. C. C., 209 Fed. 730 (fraudulent use of mails for irrigation lands investment; letter of one defendant to another held admissible to show good faith); *Arkansas:* 1852, Cornelius *v.* State, 12 Ark. 805 (defendant's statements, at the time of killing a cow, as to his object in doing so, admitted; good opinion by Johnson, C. J., quoted *ante*, § 1714); *Indiana:* 1871, Hamilton *v.* State, 36 Ind. 280, 282 (robbery; defendant's declaration, while beating the person, that he was revenging himself for an assault, admitted); *Maine:* 1885, State *v.* Walker, 77 Me. 488, 490 (killing of one of a party attacking the defendant's house; defendant's statements at the time of the shooting, admitted to show "in what condition of mind the respondent was at the time"); *Massachusetts:* 1881, Com. *v.* Abbott, 130 Mass. 472 ("the intent or disposition, when it constitutes an element of crime, can only be ascertained, as all moral qualities are, from the acts and declarations of the party"); *North Carolina:* 1843, State *v.* Huntly, 3 Ired. N. C. 418, 422 (charge of going about armed to the terror of the people; declarations of defendant at the time, admitted as "characterizing the very acts charged"); 1905, Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. 777 (malicious prosecution; defendant's statements at the time of suing out the warrant, admitted in his favor); *West Virginia:* 1875, State *v.* Abbott, 8 W. Va. 741, 751, 755 (defendant's declarations at the time of shooting, stating his reason, admitted for him; "the jury are to consider them in connection with all the other evidence in the cause; the jury must judge from all the facts and circumstances shown in evidence whether the mature purpose or intention of the accused as declared by him at the time were feigned or were a mere pretence or pretext assumed to cover up his real purpose, object, or intention in shooting").

In cases involving the doings of a *mob* or *riotous assemblage*, several principles have a bearing; these are explained, with references to the various places of treatment, *post*, § 1790; some of the cases have been placed *ante*, §§ 1729, 1730.

[8] 1880, State *v.* Howard, 82 N. C. 627 (murder at night; the defendant had gone on the same morning to the house of the deceased

usable against the accused as admissions. But subsequent statements predicating *then existing* state of mind are properly admissible under the present Exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions.[9] But they should be equally admissible in his favor.[10] In both cases the object is to ascertain his subsequent state of mind, and thence to infer (*ante*, § 395) his state of mind at the time of the act. It is true that these declarations may not be thought to fulfil the requisite of the present Exception (*ante*, § 1714) that there should be no apparent motive to deceive; but this argument, as before, seems to involve the assumption of guilt.

(5) Statements of *political opinion* form a class difficult to place. In one aspect they are statements of opinion, admissible under the general principle (*ante*, § 1731). In another aspect, as expressions of a feeling or sentiment, — of antagonism, hostility, loyalty, disaffection, or the like, — they are equally admissible under that principle (*ante*, § 1730) in favor of as well as against the accused. In still another aspect, when offered for the accused, they are mere instances of conduct as exhibiting a good loyal character or intent, and are thus sometimes inadmissible (*ante*, §§ 195, 367). Whatever the more correct theory, they were at any rate long admitted without question in favor of the accused on trials for *sedition* and *treason*.[11] About the end of the 1700s

and then left, going to S.'s house; his statement, while at S.'s house, of his reason for going to the house of the deceased, rejected); 1880, State *v.* Vann, 82 N. C. 631, 633 (Dillard, J.: "We understand the rule to be that a party charged with a crime can never put in evidence in his own behalf any declarations of his after its commission, . . . unless as a part of the 'res gestæ' to some act which is admitted in evidence"); 1900, State *v.* Davis, 104 Tenn. 501, 58 S. W. 122 (that "he didn't go to kill him," excluded).

[9] 1869, R. *v.* Dixon, 11 Cox Cr. 341 (the accused, as he shot, said, "Take that!" and immediately afterwards, "I know what I have done and am not sorry for it"; admitted to show motive); 1895, State *v.* Brown, 28 Or. 147, 41 Pac. 1042 (the defendant, just after the killing, ran off, saying, "I am the toughest son of a — that ever struck this town").

Contra: 1921, Sherman *v.* State, — Okl. Cr. —, 202 Pac. 521 (murder; plea, self defence; defendant's statement, made 5 to 15 minutes after the shooting, when arrested, excluded).

[10] *Accord:* 1907, State *v.* Rutledge, 135 Ia. 581, 113 N. W. 461; 1896, Com. *v.* Crowley, 165 Mass. 569, 43 N. E. 509 (exclamations by a defendant after an assault, as showing his apprehension of its repetition, admitted).

Contra: 1907, Day *v.* State, 54 Fla. 25, 44 So. 715 (murder; statement when handing over the knife upon arrest, excluded); 1908, Lyles *v.* State, 130 Ga. 294, 60 S. E. 578 (wife-murder; immediately upon the sound of the shots, witnesses arrived, and the defendant said: "Gentlemen, come in here;. my God! I have shot my wife!" excluded; a flagrant instance of the dogged and needless cruelty to which our technical methods lead); 1922, State *v.* Brooks, — Ia. —, 186 N. W. 46 (homicide; accused's statements on coming home explaining how the affray began, etc., excluded; another ruling harshly unjust to innocent men); 1920, Richardson *v.* State, 123 Miss. 232, 85 So. 186 (murder; defendant's utterance, just afterwards, "S. tried to kill me, and I shot him," excluded; it seems incredible that a court of a nation regarding itself as modern and rational can consent to enforce such a rule as a part of a supposed rational system of proof; the blind bigotry of the Middle Ages, in its religious persecutions, otherwise incomprehensible to us, becomes understandable when we perceive kindly, accomplished, highly trained gentlemen applying without a tremor such a piece of cruel stifling technicality as this); 1900, State *v.* Moore, 156 Mo. 204, 56 S. W. 883 (explanations, at the time of arrest, of his reasons for having shot, excluded); 1849, State *v.* Hildreth, 9 Ired. N. C. 440, 446 (defendant's statement after a homicide to his accomplice, "You ought not to have done so," excluded).

Compare the cases cited *post*, § 1749.

[11] Compare, the cases cited *ante*, § 195, note 2, § 369, and *post*, § 2119; in the following cases the evidence was admitted, unless

the matter came into frequent controversy, and some of Erskine's greatest arguments dealt with the admissibility of this class of evidence. The notable trials of Thomas Hardy and of Horne Tooke left it settled that such evidence was available for the accused; and, though the limits of its use are not clear, the theory seems to be in effect the first above noted.

(6) Other principles applicable are as follows: Where a *confessory statement* has been received, the *whole* said at the time in exculpation is also admissible, under the rule of Completeness (*post*, § 2115). But, apart from this principle, it seems highly desirable that any statement *protesting innocence*,

otherwise noted; the quotations are merely illustrations from a larger mass of instances:

ENGLAND: 1683, Lord Russell's Trial, 9 How. St. Tr. 577, 622 ("I have heard him profess solemnly, he thought it would ruin the best cause in the world to take any of these irregular ways for the preserving of it"); 1684, Rosewell's Trial, 10 How. St. Tr. 214 ("he kept that day, and the 30th of January, as a day of fasting and prayer, and he preached from that text on the 1st Timothy, 2, 1, 'Pray for kings and all in authority'"); 1696, Freind's Trial, 13 How. St. Tr. 39; 1396, Cook's Trial, 13 How. St. Tr. 372, 391 ("I have heard him very much wish prosperity and success to our fleet"); 1710, Dammaree's Trial, 15 How. St. Tr. 582 ("At any time when there have been public rejoicings for any victories, how has he behaved himself?"); 1717, Francis Francia's Trial, 15 How. St. Tr. 975 ("It was a great surprise to me when I heard that he was taken up, for he used often to drink a health to king George"); 1780, Maskall's Trial, 21 How. St. Tr. 677; 1781, Lord Gordon's Trial, ib. 542, 564; 1794, Walker's Trial, 23 How. St. Tr. 1133 (Mr. Erskine, for the defence: "When a man is indicted for exciting sedition and rebellion, is it not evidence, to show that he held a language directly repugnant to any such idea? If he had said, 'God bless the king!', would not that be evidence?" Mr. J. Heath: "[Yes,] if it was at that meeting"; Mr. Law, for the prosecution: "If it goes to the whole tenor of his conduct; but a man shall not be justified by saying 'God bless the king!' in the street, when he has been damning him in his house"; Mr. J. Heath: "You should have examined to that in chief"); 1794, Thomas Hardy's Trial, 24 How. St. Tr. 1066–1094 (Eyre, L. C. J.: "If the question be, What was the political speculative opinion which this man entertained touching a reform of parliament. I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place. . . . But if the declaration was meant to apply to a disavowal of the particular charge made against this man, that declaration could not be received, — as, for instance, if he had said to some friend of his, 'When this convention was planned I did not mean to use this convention to destroy the king and his government'"); 1794, Horne Tooke's Trial, 25 How. St. Tr. 344–361 (the arguments of Mr. Erskine and Mr. Scott (Lord Eldon), and the opinion of L. C. J. Eyre deal at length with this class of evidence; and the "prior sentiments and opinions of a man, very publicly declared," are held admissible to rebut the evidence or seditious intention).

(*Contra:* 1809, Le Blanc, J. [without argument] in Joseph Hanson's Trial, 31 id. 43, 81.)

UNITED STATES: The settled English practice seems to have escaped the attention of American Court when the question was presented at the time of the World War: 1918, U. S. *v.* Krafft, 3d C. C. A., 249 Fed. 919 (charge of attempting to cause insubordination in military forces under U. S. St. June 15, 1917, c. 30, tit. 1, § 3; defendant's offer to show utterances at a prior time "in favor of the war with Germany," held inadmissible because irrelevant); 1919, State *v.* Kahn, 56 Mont. 108, 182 Pac. 107 (charge of sedition, under St. 1918, Ex. Sess., c. 11; testimony to defendant's expressions of loyal sentiments, excluded as hearsay; no precedent cited); 1919, State *v.* Wyman, — Or. —, 186 Pac. 1 (seditious utterances under St. 1918, c. 11, Extra Sess.; statements at other times expressing loyalty, excluded). The foregoing rulings are fundamentally unsound.

Point not involved: 1919, Wells *v.* U. S., 9th C. C. A., 257 Fed. 605 (charge under U. S. Criminal Code, Mar. 5, 1909, § 6, of conspiracy to prevent by force the execution of U. S. Joint Resolution, April 6, 1917, declaring war on Germany and directing the use of military forces, and also of other laws, by utterances in April and May, 1917, urging resistance by force to military conscription; defendant contended that his intent was to create a public opinion against the passage of the Selective Service Act of May 18, 1917, then pending, and not to advocate resistance by force; certain other utterances, not by the defendant, tending to influence public opinion but not urging forcible resistance, were excluded as irrelevant; the present principle was not involved nor discussed).

made upon arrest, should be receivable, upon the principle of corroborating a witness (*ante*, § 1144, where the cases are collected), as also *conduct* indicating a consciousness of innocence (*ante*, § 293). Statements *after the act* may also be receivable, for or against the accused, as *spontaneous exclamations* ('res gestæ'), under another principle (*post*, § 1749, where the cases are collected). Statements made during *possession of stolen goods*, naming the source of title — by purchase, finding, or the like — or claiming ownership, are receivable on the verbal-act principle (*post*, § 1781, where the cases are collected).

D. Statements by a Testator, in Will Cases

§ 1734. **Different Classes discriminated.** Statements by a testator involve principles no different from those already considered; but the superficial circumstance of unity — namely, their utterance by a testator — and the necessity of carefully discriminating the widely different principles applicable to superficially similar statements, makes it desirable to consider the various classes together.

The principles of Relevancy of Circumstantial Evidence affecting a testator's mental condition have already been examined (*ante*, §§ 112, 228, 233, 271); they involve chiefly the process of inference from a Mental Condition at one time to a Mental Condition at another time, and of inference from Conduct to Mental Condition. Keeping these in mind, it remains here to consider how far the testator's statements are admissible under the present Exception as assertions of a state of mind, and how far they are excluded because mere hearsay assertions of other kinds of facts.

For the purpose of distinguishing the principles involved, utterances of a testator may be classified as follows:

(1) That he does or does not *intend to make a will* of a particular tenor;

(2) That he *has* or has not *made a will* of a *particular tenor;*

(3) That he *has* or has not *made a will,* or that a particular will is or is not *in existence,* or is or is not genuine;

(4) That a particular will has or has not been *destroyed* or otherwise *revoked;*

(5) That a particular will was procured by *fraud* or *undue influence;*

(6) That certain persons have been or are the object of his *affection* or *dislike;* and

(7) Utterances indicating *insanity,* mental feebleness, or the like.

In examining the propriety of using any of these, it is essential to keep separately in mind (*a*) what is the fact which the utterance is offered to evidence, (*b*) whether this fact is relevant, and in what way, and (*c*) supposing it to be relevant, whether the utterance is admissible to evidence it.

§ 1735. **Ante-Testamentary Statements of Design, Plan, Intention.** A design or plan to do or not to do a specific act is always relevant to indicate

that the act named was or was not subsequently done (*ante*, § 102). Accordingly, if the issue is whether a will was executed, or a will of a particular tenor, or whether at the time of execution it contained an alteration, the preëxisting testamentary design of the alleged testator is always relevant (*ante*, § 112). To evidence that design or plan, the person's *statements of his existing design or plan* are admissible, under the general principle of the present Exception (*ante*, § 1725).[1] These statements may be found in oral utterances, in letters, in the draft of a will or instructions to an attorney, or in any other form. The admissibility of such evidence, on the analysis just outlined, is entirely settled.[2]

§ 1736. **Post-Testamentary Statements as to Execution, Contents, or Revocation.** *First Theory.* Post-testamentary statements of the second, third, and fourth sorts above enumerated, *i. e.* statements affirming or denying the fact of execution, contents, or revocation of a will, are, in their first and simple aspect, to be taken as mere *assertions of an external fact*, offered as evidence of the truth of the assertion. They do not come within the present Exception, nor within any other of the established ones.[1] They are therefore ordinary hearsay assertions, and are inadmissible. This is the view taken by a number of Courts, represented in the following passages:[2]

§ **1735.** [1] 1876, Sugden *v.* St. Leonards, L. R. 1 P. D. 154 (Mellish, L. J.: "The declarations which are made before the will are not, I apprehend, to be taken as [direct] evidence of the will which is subsequently made; they obviously do not prove it; and [but?] wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were").

[2] The cases are collected *ante*, § 112 (intention, as evidence of the doing of an act).

§ **1736.** [1] That they are not to be taken as assertions of a fact *against interest* is noted *ante*, § 1461.

[2] In the following cases this is the attitude taken:

ENGLAND: 1861, Staines *v.* Stewart, 2 Sw. & Tr. 320, 329 (declaration that he had destroyed his will, excluded); 1876, Mellish, J. in Sugden *v.* St. Leonards, quoted *supra*.

UNITED STATES: *Federal:* 1901, Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. 474 (burnt document, sent anonymously to the probate office, after alleged testator's death; his declarations indicating a state of mind as to revocation, excluded; post-testamentary declarations of an unspecified kind, excluded, following Boylan *v.* Meeker; confused opinion; Harlan, White, and McKenna, JJ., diss.; Brown, J., acc. as to the result of the case only; in view of the authority of this Court, and the frequent citation of this decision, it should be noted that the opinion is only a quicksand for those who seek guidance on this subject);
Alabama: 1895, Henry *v.* Hall, 106 Ala. 84, 17 So. 187 (declarations as to a will's non-existence, excluded);
Arkansas: 1895, Leslie *v.* McMurty, 60 Ark. 301, 30 S. W. 33 (declarations that he had made no will, admissible on an issue of forgery);
Connecticut: 1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289 (certain declarations admitted, but only because of lack of proper objection);
Iowa: 1906, Dunahugh's Will, 130 Ia. 692, 107 N. W. 925 (whether a revoking will had been made; the testatrix' statements, just before death, that she had made one, excluded; the opinion relies upon a passage in an encyclopedia "citing the following cases" which include Sugden *v.* St. Leonards, Eng., Lane *v.* Hill, N. H., and Tynan *v.* Paschal, Tex., *infra*, n. 3; the learned judge evidently was not aware that the cases cited decide precisely the opposite); 1907, Smith *v.* Ryan, 136 Ia. 335, 112 N. W. 8 (subsequent declarations, not admitted to show revocation); 1912, Nixon *v.* Snellbaker, 155 Ia. 390, 136 N. W. 223;
Kentucky: 1879, Mercer *v.* Mackin, 14 Bush 441 (declarations that he had made a will, no will being found, were rejected as hearsay; though the Court on the evidence confessed that "there is hardly room to doubt" that he made the will; Sugden *v.* St. Leonards is relied upon, but is entirely misunderstood);
Maryland: 1800, Collins *v.* Elliott, 1 H. & J. 1 ("that he had made a will," excluded); 1921, Courtenay *v.* Courtenay, — Md. —,

1851, CAMPBELL, L. C. J., in *Doe* v. *Palmer*, 16 Q. B. 747: "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires."

1864, WILDE, J., in *Quick* v. *Quick*, 3 Sw. & Tr. 442 (rejecting subsequent declarations to prove contents of a will): "It is familiar enough practice to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intention where his competency is in dispute or where there is any imputation of fraud in the making of his will; for in such cases the state of his mind and affections is in itself a material fact, of which such statements are the fair exponents. But where those declarations are vouched to prove . . . the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they become mere hearsay."

1876, MELLISH, L. J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154, 249 (a minority opinion on this point): "A declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions."

Second Theory. But a few Courts (increasing perhaps in numbers), while facing the truth that such utterances are used distinctly as hearsay assertions, have frankly invoked a *special exception* to the Hearsay rule in order to

113 Atl. 717 (bequest to a child and children of a deceased child; testatrix' post-testamentary letter, not admitted to show intent);

Massachusetts: 1910, Giles *v.* Giles, 204 Mass. 383, 90 N. E. 595 (testator's declarations not admitted to show that a revocatory writing, executed as required by law, had been made; the Court fails to distinguish between prior declarations of intention and subsequent assertions);

Mississippi: 1909, Miller *v.* Miller, 96 Miss. 526, 51 So. 210 (testator's statements that he had not made and would not make a will, excluded on an issue of forgery); 1920, Moore *v.* Parks, 122 Miss. 301, 84 So. 230 (declarations of the contents of a lost will, excluded; Miller *v.* Miller followed);

Missouri: 1898, Wells *v.* Wells, 144 Mo. 198, 45 S. W. 1095 (declarations that he never made a will, not admissible to disprove the making);

Montana: 1904, Colbert's Estate, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248 (whether a lost will had been revoked; the testator's statements that he was satisfied with it, excluded; following Throckmorton *v.* Holt, U. S.);

New Hampshire: 1903, Stevens *v.* Stevens, 72 N. H. 360, 56 Atl. 916 (will found, but alleged to have been revoked; declarations of the testator that he had revoked it, excluded; yet the opinion purports to approve Lane *v.* Hill, N. H., *infra*, n. 3, and perhaps would have admitted the evidence as corroborative);

New Jersey: 1860, Boylan *v.* Meeker, 28 N. J. L. 276 (declarations as to the non-existence of a will, excluded; see quotation *post*); 1892, Gordon's Will, 50 N. J. Eq. 397, 424, 26 Atl. 268 (Boylan *v.* Meeker approved);

New York: 1825, Dan *v.* Brown, 4 Cow. 490 (declarations as to the existence of a will and where to find it, excluded); 1826, Jackson *v.* Betts, 6 Cow. 382; 1844, Grant *v.* Grant, 1 Sand. Ch. 235, 237 (declarations as to execution, excluded following Dan *v.* Brown); 1901, Kennedy's Will, 167 N. Y. 163, 60 N. E. 442 (issue as to the revocation of a lost will; declarations not admitted to show its existence at the time of testatrix' death);

Tennessee: 1901, Earp *v.* Edgington, 107 Tenn. 23, 64 S. W. 40 (declarations, not clearly specified, as to the making of a will, excluded; following Throckmorton *v.* Holt, U. S.; the opinion does not make the proper distinctions);

Texas: 1885, Kennedy *v.* Upshaw, 64 Tex. 411, 417 (forgery of a codicil; testator's declarations that he had made no change in his will, excluded);

Virginia: 1922, Dearing *v.* Dearing, — Va. —, 111 S. E. 286 (forgery; certain declarations excluded);

Wisconsin: 1920, Johnson's Estate, 170 Wis. 436, 175 N. W. 917 (deceased's declarations "that he had made a will" alleged to be lost, admissible);

admit them. It is not clear to what extent this Exception would be carried; apparently its recognition would depend upon the circumstances of trustworthiness appearing in each case. The bulwark of this doctrine is the opinion of the Master of the Rolls, Sir George Jessel, one of the greatest English judges of the 1800s in the qualities of directness and penetration of thought. In the following passages this doctrine is expounded:[3]

[3] This view is represented in the following cases; but it should be said that some of the American Courts merely admit the statements in supposed accord with Sugden *v.* St. Leonards not noting plainly which of its theories are followed; compare the comments on that case *infra:*

ENGLAND: 1873, Sykes' Goods, L. R. 3 P. & D. 27 (declaration of contents of will as altered, made before a codicil confirming the will, admitted); 1876, Cockburn, C. J., and Jessel, M. R., in Sugden *v.* St. Leonards, L. R. 1 P. D. 154, 163, 172 (lost will; certain unspecified declarations about the will, held admissible to prove its contents; "he was in the constant habit of talking to every one with whom he came into contact . . . of the testamentary provisions he had made"). It will be noticed that Mr. Justice Hannen, in Keen *v.* Keen, and in Sugden *v.* St. Leonards in the court below (quoted *supra*), came to the same result as Chief Justice Cockburn and the Master of the Rolls in the latter case on appeal, but this result was reached on very different principles. For this reason, in the cases purporting to follow the ruling in Sugden *v.* St. Leonards, it is by no means certain which of the two principles of decision has been adopted, or whether it has been always clearly understood that a distinct choice of principles is open. Perhaps it may be assumed that the view of the majority on appeal — the second theory *supra* — is the one intended to be accepted. But this difference of principle in the opinions in Sugden *v.* St. Leonards, together with the strong dissenting opinion of Lord Justice Mellish, have deprived the case of the authority that it might otherwise have had. It is not to be taken as representing the final settlement of the law in England, as subsequent opinions have pointed out: 1890, Harris *v.* Knight L. R. 15 P. & D. 174 (declarations that a will had been made, admitted); 1890, Re Ball, 25 L. R. Ire. 557 (admitting declarations of contents, made after execution, on the general ground that there is no difference between declarations before and declarations after; purporting to follow Sugden *v.* St. Leonards); 1891, Flood *v.* Russell, 29 L. R. Ire. 97 (purporting to follow Sugden *v.* St. Leonards; admitting declarations as to execution); 1886, Woodward *v.* Goulstone, L. R. 11 App. Cas. 469 (Herschell, L. C.: "I do not desire to be understood as dissenting from the judgment of the majority of the Court of Appeal in Sugden *v.* St. Leonards, upon this point. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision"; similar statements were made by Lords Blackburn and Fitzgerald); 1897, Atkinson *v.* Morris, Prob. C. A. 40 (a will imperfectly cancelled was found; the defendants, to prove that the will had been executed in duplicate, and that the non-appearance of the duplicate raised a presumption of destruction, thus legally effecting a revocation, offered the testatrix's declarations that she had executed the will in duplicate; excluded, since, even assuming Sugden *v.* St. Leonards to be fully accepted, it did not authorize the use of declarations as sufficient proof that a will had been duly executed).

CANADA: 1903, Stewart *v.* Walker, 6 Ont. L. R. 495, 503 ("while the decision in Sugden *v.* Lord St. Leonards stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents").

UNITED STATES: *Alabama:* 1878, Conoly *v.* Gayle, 61 Ala. 116, 124, *semble* (execution and loss having been evidenced, the testatrix's letter, speaking of having made her will, etc., was admitted);
Georgia: 1861, Patterson *v.* Hickey, 32 Ga. 159 (subsequent declarations of a testator indicating the non-existence of a will, admitted, apparently as an exception to the Hearsay rule);
Illinois: 1914, Burton *v.* Wylde, 261 Ill. 397, 103 N. E. 976 (revocation by cutting out the signature, etc.; testatrix' declarations that she had destroyed her will, admitted; sensible opinion, ignoring all the vain theoretical distinctions, and admitting virtually all post-testamentary utterances);
Indiana: 1895, McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 345 (statements describing a will's contents, admitted to show contents and non-revocation); 1906, Inlow *v.* Hughes, 38 Ind. 375, 76 N. E. 763 (post-testamentary declarations as to the tenor of a lost will, held admissible only "by way of corroboration" of the testimony of two witnesses required by Rev. St. 1901, § 2779, quoted *post*, § 2052);
Iowa: 1898, Scott *v.* Hawk, 105 Ia. 467, 75 N. W. 368 (that "the deceased, upon examina-

1876, JESSEL, M. R., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154, 231: "[The reasons for the exceptions to the Hearsay rule] all exist in the case of a testator declaring the contents of his will. . . . Having regard to the reasons and principles which have induced the Courts of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong, . . . it is the case of a lost will. The Court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration."

1876, COCKBURN, C. J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154, 225: "Declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands preëminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will.

tion of the instrument and the signatures thereto, declared it his will, is convincing evidence");
Kansas: 1900, Schnee *v.* Schnee, 61 Kan. 643, 60 Pac. 738 (declarations as to contents of a lost will, admissible);
Kentucky: 1900, Muller *v.* Muller, 108 Ky. 511, 56 S. W. 802 (declarations admissible to show contents; no authority cited); 1922, Atherton *v.* Gaslin, — Ky. —, 239 S. W. 771 (forgery of a will; "long before Sugden *v.* St. Leonards was decided, we had adopted the rule that post-testamentary declarations of the testator as to the contents of a lost will are admissible in corroboration of other evidence"; and the same rule was here applied; prior cases reviewed, in a careful opinion by Clay, J.);
Michigan: 1893, Lambie's Estate, 97 Mich. 49, 57, 56 N. W. 223 (after evidence of a revoking will, testatrix's declarations that she had changed her will, received in corroboration);
Missouri: 1905, Mann *v.* Balfour, 187 Mo. 290, 86 S. W. 103 (after evidence of execution and loss, the testator's declarations as to contents, etc., are admissible in corroboration);
New Hampshire: 1895, Lane *v.* Hill, 68 N. H. 275, 44 Atl. 393 (testator's declarations as to the contents of a lost will, admitted, expressly on the principle of Jessel, M. R., in Sugden *v.* St. Leonards, as a special exception to the Hearsay rule; declarations as to its execution, also admissible, but only in corroboration of "direct evidence");
New Jersey: 1904, Davenport *v.* Davenport, 67 N. J. Eq. 320, 58 Atl. 535 (lost will; the testator's declarations of contents "a few days after the alleged will was executed," admitted; purporting to follow Rusling *v.* Rusling, N. J., *post*, § 1738, which deals with a different question, and ignoring Boylan *v.* Meeker and Gordon's Will, N. J., *supra*, n. 2);
North Carolina: 1906, Shelton's Will, 143 N. C. 218, 55 S. E. 705 (exception recognized, following Jessel, M. R., in Sugden *v.* St. Leonard's, and Reel *v.* Reel, N. C., cited *post*, § 1738, n. 2; here a will bore a revocatory writing, legally sufficient, and the testator's subsequent declarations were admitted on the issue of its genuineness);
Oregon: 1907, Miller's Will, 49 Or. 452, 90 Pac. 1002 (lost will; testatrix' declarations, up to a short time before her death, that it was still on deposit in the bank and unrevoked, held admissible; following Cockburn, C. J.'s, view in Sugden *v.* St. Leonards; able opinion by King, C.);
South Dakota: 1920, State *v.* Nieuwenhuis, 43 S. D. 198, 178 N. W. 976 (forgery of a will; testator's statements at a date subsequent that he had made such a will, admitted; Whiting, J., diss.);
Tennessee: 1858, Smiley *v.* Gambill, 2 Head 165 (subsequent declarations of the destruction of a will, admitted); 1877, Beadles *v.* Alexander, 9 Baxt. 604, 606 (declarations by the testator that he had signed the will in the witnesses' presence, admissible in corroboration as "the declaration of the only party having a vested interest to declare the whole truth"; approving Reel *v.* Reel, quoted *post*, § 1738);
Texas: 1863, Tynan *v.* Paschal, 27 Tex. 300 (assertions received to show the execution of the will and to rebut the inference of revocation); 1903, McElroy *v.* Phink, — Tex. —, 76 S. W. 753 (lost will; deceased's statements that she had destroyed it, for certain reasons, held admissible, being "treated as an exception" confined to the case of a lost will last in the custody of some person other than the testator; careful opinion by Gaines, C. J.).

Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree. . . . I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly?"

1895, JORDAN, J., in *McDonald* v. *McDonald*, 142 Ind. 55, 41 N. E. 345: "Such statements of the testator should be received as evidence with great caution, for the reason that they are sometimes made by him for the express purpose of misleading or satisfying curious friends or expectant relatives. But the declarations in the case at bar are not open to this objection. They are voluntarily made to a confidential friend, — one who apparently had no interest in the estate of the testator — and not in response to any inquiry by him made. Considering the circumstances under which they were made by the testator, — at a time when sick, but in the full control of his mental faculties, and when he seemingly recognized that his death was a near probability, — they appear to us to bear upon their face the very impress of sincerity."

Third Theory. There is, however, still a third view, agreeing with the second in so far as it admits the declarations, but reaching the result by another mode and without invoking a special exception to the Hearsay rule. The testator's declarations may be conceived as either directly *asserting his belief* (*i. e.* that he had or had not executed or revoked a will of certain contents), or as indirectly and circumstantially indicating such a belief; in the former view, they are admissible to evidence his state of mind, under the present Exception (*ante*, § 1731); in the latter view, they are admissible as circumstantial evidence to indicate his state of mind (*ante*, § 271). Having thus evidenced his belief or consciousness, we may infer from it (backwards in time) the doing of the act which produced that belief or consciousness (*ante*, § 176). In other words, by a double process of inference, from utterance to belief, and from belief to a preceding act, we argue that the testator did or did not execute or revoke. The propriety of the second inference is a question of Relevancy, and has been already examined (*ante*, §§ 176, 271); the propriety of the first inference is judicially expounded in the following passages:[4]

[4] The following cases seem to go upon this theory:

ENGLAND: 1854, Patten *v.* Paulton, 4 Jur. N. S. 341 (subsequent declarations of a testator admitted, asserting the existence of a will, the issue being whether, though it was lost, it had been revoked); 1864, Whiteley *v.* King, 10 Jur. N. S. 1079 (same); 1873, Keen *v.* Keen, L. R. 3 P. & D. 107 (quoted *supra*); 1874, R. *v.* Castro (Tichborne Case), Charge of C. J. Cockburn, I, 614 ("It certainly does seem strange that the man who had signed his will in London in June should imagine he had signed it in the ensuing month of November"); 1876, Hannen, J., in Sugden *v.* St. Leonards, quoted *supra;* 1880, Gould *v.* Lakes, L. R. 6 P. D. 1 (per Hannen, J., that "the state of the testatrix's mind and intentions" after the will, as shown by her declarations, was evidence to show "what were the constituent parts of the will"; purporting to follow Sugden *v.* St. Leonards).

CANADA: 1882, Pike's Will, 4 Morris Newf. 445 (approving Sugden *v.* St. Leonards, and admitting similar evidence on the theory of Hannen, J.).

UNITED STATES: *Federal:* the following case perhaps belongs here: 1897, Bergere *v.* U. S. 168 U. S. 66, 18 Sup. 4 (a will showing that the testator was dealing with all his assets; the omission of a tract of half a million acres, held to be evidence that he did not suppose that he owned the land, and therefore that there was a defect of title);

1873, HANNEN, J., in *Keen* v. *Keen*, L. R. 3 P. & D. 107 (admitting subsequent declarations asserting and denying the existence of a will which was lost, the issue being as to whether it had been revoked): "A statement by the testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is evidence of intention, from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion."

1876, HANNEN, J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 203: "Believing, as I do, the testator made these statements [alluding to the existence of the will] showing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not in fact revoked it at any time when he had the opportunity of getting access to it. . . . I come to the conclusion that his declarations down to the latest period of his life show that he died under the belief that that will was still in existence, and rebut the presumption that he had revoked it."

Alabama: 1847, McBeth *v.* McBeth, 11 Ala. 602;

Arkansas: 1913, Longer *v.* Beakley, 106 Ark. 213, 153 S. W. 811 (whether an insurance-policy request for change of beneficiary had been authorized: the insured's subsequent reference to the original persons as beneficiaries, and his affection for them, admitted; McCulloch, C. J., diss.; the dissenting opinion correctly points out that the issue is analogous to that of execution of a will, and that the majority opinion seems to go upon the principle of capacity; nevertheless, the result of the decision is sound);

Columbia (Dist.): 1898, Throckmorton *v.* Holt, 12 D. C. App. 552, 574, 581 (on an issue of forgery of a will, "the feelings of the testator towards all the parties and his relations with them and apparent intentions as disclosed by his conduct and declarations," admissible, as "suppletory proof," "tending to show the state of mind of the testator"; good opinion by Shepard, J.);

Connecticut: 1873, Johnson's Will, 40 Conn. 587 (a will having disappeared and the testator becoming insane, later declarations indicating his belief that the will still existed were admitted, and the Court thence argued back to the conclusion that he did not destroy the will 'animo revocandi');

Georgia: 1884, Burge *v.* Hamilton, 72 Ga. 568, 619, *semble* (statement of the testator to the scrivener of a codicil, admitted "to show that ten pages fastened together are the will and the whole will of the testator");

Illinois: 1886, Re Page, 118 Ill. 581, 8 N. E. 852 (the issue being the revocation of a lost will, subsequent declarations recognizing the existence of the will were admitted, as pointing to a non-revocation; Scholfield, J.: "Why should he have spoken falsely in this respect, and this, too, in the face of impending death realized by him? Not the shadow of an excuse is shown");

Kentucky: 1844, Steele *v.* Price, 5 B. Monr. 63 (admitting the testator's declarations showing a subsequent disinclination to revoke a will that has been lost);

Maryland: 1883, Hoppe *v.* Byers, 60 Md. 393 (subsequent belief of a testator that he had made a will of the tenor of a document offered, held admissible to show the genuineness of the document, other evidence of genuineness being also offered; following Sugden *v.* St. Leonards and Gould *v.* Lakes);

Ohio: 1890, Behrens *v.* Behrens, 47 Oh. St. 332, 25 N. E. 209 (purporting to follow Keen *v.* Keen, yet apparently using the declarations — that a will had been destroyed — directly as hearsay assertions of the past act);

Pennsylvania: 1878, Foster's Appeal, 87 Pa. 75 (the testator's reliance upon the existence of a will, used to infer back to the non-revocation of a lost will); 1905, Lappe *v.* Gfeller, 211 Pa. 462, 60 Atl. 1049 (destroyed will, said to have been forged; declarations of the deceased, for some months prior to his death, "inconsistent with the existence and validity of the alleged will," admitted, "as throwing some light on the question of fraud and forgery");

Tennessee: 1858, Smiley *v.* Gambill, 2 Head 165 (subsequent belief of a testatrix, as shown by acts, that she had destroyed a will, admitted to show the fact of destruction and the intent);

Virginia: 1913, Jackson *v.* Hewlett, 114 Va. 573, 77 S. E. 518 (facts similar to Sugden *v.* St. Leonards; declarations admitted to rebut intention to revoke);

Wisconsin: 1896, Valentine's Will, 93 Wis. 45, 67 N. W. 12 (a will shown to have been executed, but now not found; to show whether the will had been destroyed and revoked by the testatrix, declarations of hers, as to such destruction and also as to her still possessing the will, were received, not as "evidence of the fact so declared," but as showing "that she died in the belief that she left no will, and thus support the presumption of revocation"; purporting to follow Sugden *v.* St. Leonards); 1897, Steinke's Will, 95 Wis. 121, 70 N. W. 61 (like Sugden *v.* St. Leonards; declarations that "H. has the will," admitted, as indicating "that she died in the belief that the will was still in existence").

So far as this result rests on the propriety of the second inference above named — *i. e.* from the person's belief or consciousness to his preceding act inducing that consciousness (*ante*, § 176), it seems unassailable; if a person in fact has a fixed belief that he has made or revoked a will of a certain tenor, either he has done so, or he is insane or feeble-minded, in all probability; the evidence is at least strong. But it is the first inference that is weak. Are his utterances trustworthy? Do not testators constantly make such statements deliberately in order to deceive designing or annoying relatives? Perhaps here the matter should be left to depend on the circumstances of each case. The possibilities of error in this part of the process of inference have been pointed out in the following passage:

1860, WHELPLEY, J., in *Boylan* v. *Meeker*, 28 N. J. L. 276: "The plaintiffs relied on the declarations and conduct of Meeker, both before and after the day of execution, to show that while living he never knew of the existence of such a will and that therefore he had never knowingly executed the paper. . . . The admissibility of this evidence on the issue of fraud and forgery has been argued on two grounds, first, that they were exterior manifestations of an inward condition of mind, that is to say, ignorance of the existence of the will. It is argued . . . that sanity and ignorance are both states of mind, that exterior manifestations must be relied upon to prove both. If this were so, there might be some force in the argument. But . . . the exterior manifestations of insanity are involuntary, those of knowledge purely voluntary. . . . The devisor may to secure his own peace and comfort during life . . . conceal the nature of his testamentary dispositions and make statements calculated and intended to deceive those with whom he is conversing. He has neither the sanctity of an oath nor the strong bond of self-interest to secure his adherence to the truth."

§ 1737. **Statements Indicating Intent to Revoke.** (1) In the precedents of the foregoing section, where a will cannot be found, and an issue arises as to its revocation, the object of using the testator's declarations was to show the *very act of revocation* (or the opposite); that is, to use the declarations either as assertions of the past act, or as evidence of a belief from which in turn the past act could be inferred.

(2) But the case may arise where the *act of destruction* or *cancellation* by the testator is *conceded*, and the inquiry is merely as to the *accompanying intent*, whether it was revocatory or not:

(*a*) Declarations of intent *at the time of the act* are of course admissible, not only under the present Exception, but also (as usually treated) under the Verbal Act doctrine (*post*, § 1782).[1]

(*b*) But since the question is here merely one of the existence of a state of mind, may we not infer the testator's then state of mind from his *state of mind* at a *prior or subsequent time* not too remote? The principle of Relevancy already examined (*ante*, §§ 241, 242) certainly justifies this; hence, as evidence of this prior or subsequent state of mind, utterances at the prior or subsequent time are admissible. The propriety of this is generally conceded

§ 1737. [1] The cases are there collected. Compare also the case cited *post*, § 1777 (declarations of a testator accompanying a delivery of money or chattels).

(where the point has been explicitly raised); but some rulings distinctly reach the result by the above analysis;[2] while others ignore the double process of inference, and admit the utterances either without specific reasons, or (incorrectly) as a result of the Verbal Act doctrine, or by way of a special Hearsay exception.[3] It will be noticed that Courts refusing to accept the theory of Mr. Justice Hannen (*ante*, § 1736), may nevertheless accept the present doctrine where the act of destruction is conceded; because there, when post-testamentary utterances were employed, an inference was required from the subsequent state of mind to the prior act, while here the inference is merely from the subsequent to the prior state of mind.

§ 1738. **Statements as to Undue Influence or Fraud.** Utterances of the fifth and sixth classes already enumerated (*ante*, § 1734) may be regarded

[2] As in Massachusetts.

[3] Compare the cases cited *ante*, § 112, and *post*, § 1782: *Alabama:* 1848, Weeks *v.* McBeth, 14 Ala. 474 (a will being not found, the testator's declarations of having burned it were admitted, on the verbal-act theory); 1914, Allen *v.* Scruggs, 190 Ala. 654, 67 So. 301 (Weeks *v.* McBeth, approved); *California:* 1921, Sweetman's Est., Griffiths *v.* Johnson, 185 Cal. 27, 195 Pac. 918 (revocation of a lost will; testatrix' declarations 3 days before death, that the will was in existence, admitted, without dispute); *Georgia:* 1861, Patterson *v.* Hickey, 32 Ga. 159 (a will having been torn, subsequent language of the testator indicating indirectly the nonexistence of a will at the time was held admissible to show the intent with which the will was torn); *Illinois:* 1921, Holler *v.* Holler, 298 Ill. 418, 131 N. E. 663 (post testamentary declarations, admissible to show that a lost will had been destroyed by testator); *Maine:* 1867, Collagan *v.* Burns, 57 Me. 458 (a will was found torn, and the testator's declarations while re-pasting it were admitted to show his belief and intention at the time as to revocation; four judges dissented on the ground that the declarations were purely hearsay narrative of past facts); *Massachusetts:* 1875, Whitney *v.* Wheeler, 116 Mass. 492 (the controversy was whether a gift had been made 'causa mortis'; "when there is any ground for doubt as to the intent with which a delivery of property was made, . . . evidence tending to show a continuous and apparently fixed state of mind and purpose, inconsistent with such alleged gift, existing previously thereto, may have a legitimate bearing upon the case"); 1883, Whitwell *v.* Winslow, 132 Mass. 307; 1883, Pickens *v.* Davis, 133 Mass. 257 ("The state of mind of a testatrix before and after cancellation of a will being relevant in inferring the intent at the time of cancellation, the testator's declarations before and after revocation are evidence of his state of mind at those times"); 1883, Lane *v.* Moore, 151 Mass. 90, 23 N. E. 828 (following Pickens *v.* Davis); 1901, Stewart *v.* Stewart, 177 Mass. 493, 59 N. E. 116 (whether an instrument was intended as a codicil or a power of attorney; decedent's declarations and conduct after as well as before execution, admitted); 1913, Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487 (statements to counsel in regard to a will, indicative of intent to revoke, held admissible; following Pickens *v.* Davis); *Michigan:* 1860, Lawyer *v.* Smith, 8 Mich. 860 (a will having been torn up, declarations of the testatrix, made subsequently, that she had destroyed her will, were admitted on the question whether the tearing was "done by the testatrix or some other person, and if by her, whether accidentally or intentionally and for the purpose of revoking her will"); *Mississippi:* 1882, Tucker *v.* Whitehead, 59 Miss. 594 (the destruction being presumably by the testator, declarations up to the time of death were admitted to show his state of mind); *New York:* 1830, Betts *v.* Jackson, 6 Wend. 175 (Walworth, C.: "Where the question is as to the intent present in an equivocal act possibly a revocation, the possible motives for revocation may be offered in evidence").

Contra: 1901, Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. 474 (cited *ante*, § 1736, note 2).

A declaration concerning revocation may be in truth an *attempt at a present verbal revocation.* In this view it is usually, under the substantive law of wills, ineffective and therefore immaterial to be proved; a few early cases to this effect, not dealing with the present evidential question, have sometimes been misunderstood: 1776, Bibb *v.* Thomas, 2 Wm. Bl. 1043 (no rulings on evidence; the effect of an attempted and partial destruction considered; declarations at the time and subsequently admitted without question); 1820, Doe *v.* Perkes, 3 B. & Ald. 489 (similar to Bibb *v.* Thomas); 1829, Provis *v.* Read, 5 Bing. 435 (declarations of the testator that his will was not valid, rejected); 1866, Dickie *v.* Carter, 42 Ill. 389 (similar).

in several aspects. The chief distinction is between their use as direct *assertion of the external fact of fraud* or undue influence — for here they are met immediately by the Hearsay rule — and their use as indicating (directly or indirectly) a *condition of mind* relevant to the issue — for here they are admissible either as circumstantial evidence or as statements of a mental condition under the present Exception.

(1) The testator's *assertion that a person*, named or unnamed, has procured him by *fraud* or by *pressure* to execute a will or to insert a provision, is plainly obnoxious to the Hearsay rule, if offered as evidence that the fact asserted did occur:

1868, COLT, J., in *Shailer* v. *Bumstead*, 99 Mass. 122: "When used for such purpose, they are mere hearsay, which by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve"; they are thus inadmissible so far as they form "a declaration or narrative to show the fact of fraud or undue influence at a previous period."

For this reason such declarations of a testator are by most Courts regarded as inadmissible.[1]

§ 1738. [1] *California:* 1896, Calkins' Estate v. Calkins, 112 Cal. 296, 44 Pac. 577; 1897, Kaufman's Estate, 117 Cal. 288, 49 Pac. 192; 1903, Donovan's Estate, 140 Cal. 390, 73 Pac. 1081; 1913, Gleason's Estate, Corbin v. Gleason, 164 Cal. 756, 130 Pac. 872 (Calkin's Estate followed); 1913, Jones' Estate, Baker v. Jones, 166 Cal. 108, 135 Pac. 288 ("I was talked into making the will," etc., excluded); *Columbia (Dist.)*: 1897, Towson v. Moore, 11 D. C. App. 377, 385 (declarations held not admissible "to show such undue influence; although they may be admitted to show mental condition"); 1898, Manogue v. Herrell, 13 id. 455, 458 (testator's declarations, excluded, because here there was no other evidence of undue influence); 1903, Utermehle v. Norment, 22 D. C. App. 31 (testator's declarations of intent to leave a share to the caveatee, excluded on the facts; principle obscure); *Connecticut:* 1830, Comstock v. Hadlyme, 8 Conn. 263; 1901, Vivian's Appeal, 74 Conn. 257, 261, 50 Atl. 797 (Comstock v. Hadlyme followed; good opinion, by Baldwin, J.); *Georgia:* 1894, Mallery v. Young, 94 Ga. 804, 22 S. E. 142; 1900, Underwood v. Thurman, 111 Ga. 325, 36 S. E. 788; *Idaho:* 1897, Gwin v. Gwin, 5 Ida. 271, 48 Pac. 295; *Illinois:* 1878, Reynolds v. Adams, 90 Ill. 147; 1912, Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; *Indiana:* 1858, Runkle v. Gates, 11 Ind. 94 (here, declarations six or eight days after execution were held to be not "so near as to be part of the 'res gestæ'"); 1871, Hayes v. West, 35 Ind. 21, 24 (if "not made contemporaneously with the execution," inadmissible); 1879, Todd v. Fenton, 66 Ind. 25, 31 (similar to Hayes v. West); 1883, Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433, 438 (similar); 1918, Ramseyer v. Dennis, 187 Ind. 420, 119 N. E. 716 (testator's mental incapacity; testator's utterances as to his stepson being a snake in the grass, etc., received, on the principle of § 233, *ante*; distinguishing Runkle v. Gates, *supra*, and the present principle); *Kentucky:* 1896, Kirkpatrick v. Jenkins, — Ky. —, 33 S. W. 830, *semble;* 1857, Gibson v. Gibson, 24 Mo. 236 (that he was drunk at the time of execution); 1885, Bush v. Bush, 87 Ky. 480, 485; 1896, Doherty v. Gilmore, 136 Ky. 414, 37 S. W. 1127; 1900, Schierbaum v. Schemme, 157 Ky. 1, 57 S. W. 526 (statements that he had "mistreated" a daughter in his will, implying that a son had practised imposition on him, excluded); *Missouri:* 1909, Jones v. Thomas, 218 Mo. 508, 117 S. W. 1177; *Nebraska:* 1901, Davidson v. Davidson, — Nebr. —, 96 N. W. 409 (statements that "it was a will on paper but it was not his intention; it was not his heart's desire," excluded); *New Jersey:* 1874, Lynch v. Coements, 24 N. J. Eq. 431, 437; 1882, Kitchell v. Beach, 35 N. J. Eq. 446, 454; 1883, Rusling v. Rusling, 36 N. J. Eq. 603, 607 (statements, before and after execution, of the legatees' conduct to the testator, not admitted "as evidence of the facts" they were offered to prove; quoted *supra;* Boylan v. Meeker, N. J., *ante*, § 1736, approved); 1885, Pemberton's Case, 40 N. J. Eq. 520, 528, 4 Atl. 770; 1889, Middleditch v. Williams, 45 N. J. Eq. 726, 736, 17 Atl. 826; *New York:* 1806, Jackson v. Kniffen, 2 Johns. 33 (dec-

Yet it has been argued that where the declarations appear in fact to have been made under circumstances of trustworthiness, they should be considered; a special Exception, in effect, being established for them, analogous to that which has been recognized (*ante*, § 1736), by certain opinions in Sugden *v.* St. Leonards, for declarations as to the fact of execution, revocation, or contents.[2] The propriety of such an exception has been defended in the following opinion:

1821, HENDERSON, J., in *Reel* v. *Reel*, 1 Hawks 268 (the claim being that a will had been secured by fraud from the testator when drunk, subsequent declarations by the testator as to the contents of the will, showing them to be different from its actual contents, were admitted): "To our minds, to reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity. . . . The tribunal which is to try the fact is to decide whether the declarations contain the truth. or are deceptive in order to delude expectants and procure peace."

(2) But these utterances may be nevertheless availed of as evidence of the testator's *mental condition* (*ante*, § 1714), if the latter fact is relevant. Though the issue is as to his mental condition with regard to deception or duress at the time of execution, yet his mental state both before and afterwards is admissible as evidence of his state at that time (on the principles of §§ 230, 242, 394, 395, *ante*). Thus the question is reduced to a simple one, namely, What particular mental conditions of the testator, thus evidenced, are material as being involved in the broader issue of deception or undue influence? There are here recognized by the Courts two distinct sorts of mental condition:

(*a*) The existence of undue influence or deception involves incidentally a consideration of the testator's *incapacity to resist pressure* and his *susceptibility to deceit*, whether in general or by a particular person. This requires

larations of a testator that a will had been extorted from him by compulsion were rejected, as being hearsay and not exempt from the rule); 1854, Waterman *v.* Whitney, 11 N. Y. 157; 1877, Cudeny *v.* Cudeny, 68 N. Y. 148, 150; 1882, Marx *v.* McGlynn, 88 N. Y. 374; *Pennsylvania:* 1827, Moritz *v.* Brough, 16 S. & R. 403; 1856, Hoshauer *v.* Hoshauer, 26 Pa. 404; *South Carolina:* 1897, Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16; *Texas:* 1885, Kennedy *v.* Upshaw, 64 Tex. 417; *Vermont:* 1853, Robinson *v.* Hutchinson, 26 Vt. 47; 1885, Crocker *v.* Chase's Estate, 57 Vt. 413; *Wisconsin:* 1901, Loennecker's Will, 112 Wis. 461, 88 N. W. 215 (declarations that she has been ill-treated and had made the will from fear, excluded); 1906, Mueller *v.* Pew, 127 Wis. 288, 105 N. W. 840 (Loennecker's Will approved).

The same rule would be applicable to a *deed* on an issue of undue influence: 1866, Dickie *v.* Carter, 42 Ill. 376, 389; 1886, Massey *v.* Huntington, 118 Ill. 80, 88, 7 N. E. 269; 1889, Guild *v.* Hull, 127 Ill. 523, 532, 20 N. E. 665; 1893, Francis *v.* Wilkinson, 147 Ill. 370, 384, 35 N. E. 150.

[2] *Accord: N. C.* 1821, Reel *v.* Reel, 1 Hawks 268 (quoted *supra*); 1832, Howell *v.* Barden, 3 Dev. 442 (declarations by a testator, that a will had been obtained by fraud and undue influence, admitted; treated as assertions, and in effect held to be exceptions to the hearsay rule; approving Reel *v.* Reel); 1907, Shelton's Will, 143 N. C. 218, 55 S. E. 705 (approving Reel *v.* Reel); 1906, Linebarger *v.* Linebarger, 143 N. C. 229, 55 S. E. 709 (an opinion filed on the same day as the preceding but by a different judge, refers to the rule of Reel *v.* Reel as a "much vexed question"); 1912, Fowler's Will, 159 N. C. 203, 74 S. E. 117 (approving Howell *v.* Barden); *Tenn.* 1877, Beadles *v.* Alexander, 9 Baxt. 604 (following Reel *v.* Reel); 1878, Linch *v.* Linch, 1 Lea 529.

a consideration of many circumstances, including his state of affections or dislike for particular persons, benefited or not benefited by the will; of his inclinations to obey or to resist these persons; and, in general, of his mental and emotional condition with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue. This use of such data is universally conceded to be proper:[3]

[3] The cases in note 1, *supra*, also refer usually to the propriety of this use:

ENGLAND: 1864, Quick *v.* Quick, 3 Sw. & Tr. 442 (Sir J. P. Wilde: "It is a familiar enough practice to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intention, where his competency is in dispute, or where there is any imputation of fraud in the making of his will; for in such cases the state of his mind and affections is in itself a material fact, of which such statements are the fair exponents").

CANADA: 1908, Rose *v.* Bouck, 2 Alta. 263 (subsequent statements of the testator considered; distinguishing the improper use as confirming a will admittedly void for undue influence, etc.).

UNITED STATES: *Alabama:* 1891, Knox *v.* Knox, 95 Ala. 495, 503, 11 So. 125 ("all the facts and circumstances which tend to elucidate its [the testator's mental] condition, or to show the freedom of the will, or that it was unduly coerced and influenced at the particular time, although such facts and circumstances may have existed or occurred previous to the time of the execution of the will, are admissible"); 1898, Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459 ("Put them out of the house," and other expressions, admitted);

California: 1896, Calkins' Estate, 112 Cal. 296, 44 Pac. 577; 1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252; 1910, Snowball's Estate, 157 Cal. 301, 107 Pac. 590 (following Arnold's Estate); 1912, Piercy *v.* Piercy, 18 Cal. App. 751, 124 Pac. 561; 1920, Re Carson's Est., Walker *v.* Carson, 184 Cal. 437, 194 Pac. 5 (undue influence in a bequest by wife to husband; her expressions revealing her belief in the legality of her marriage, admitted); 1921, Anderson's Estate, 185 Cal. 700, 198 Pac. 407 (undue influence; testatrix's declarations as to changing her mind, and as to making the will at an aunt's request, held inadmissible; declarations as to fear of the aunt's cruelty, admissible);

Columbia (Dist.): 1907, Kultz *v.* Jaeger, 29 D. C. 300 (undue influence by husband over wife; wife's statements as to relations with husband exhibiting fear of husband, excluded; following Throckmorton *v.* Holt, *infra*, n. 4);

Georgia: 1874, Dennis *v.* Weekes, 51 Ga. 24, 32 (admitting the following: "I have done something I ought not to have done; I have made my will and did not make it as I wanted; I know I did wrong, but I could not help it; Lord God Almighty, who ever heard of such a will?"; on the ground that "they tended to show that he was in a condition to be easily influenced"); 1896, Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590 (declarations "tending to show" that the testator was "satisfied with" the will, admissible; but not "declarations to the contrary"); 1905, Credille *v.* Credille, 123 Ga. 673, 51 S. E. 628 (declarations, the day after signing, that he had never made a will, and that if he had signed a certain will, he did not know what he was doing, admitted, with the above discriminations);

Illinois: 1895, Hill *v.* Bahrns, 158 Ill. 314, 318 41 N. E. 912; 1903, Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; 1911, Wilkinson *v.* Service, 249 Ill. 146, 94 N. E. 50, *semble*; 1913, Kellan *v.* Kellan, 258 Ill. 256, 101 N. E. 614 (undue influence, exercised by L. K., a legatee; a postcard, written by L. K. to his sister, and reading, "Had aunt fix things somewhat Monday; cut Ed and Ellen off for one dollar, but they don't know it," was excluded; this shows how the rule suppresses good evidence); 1920, Blackhurst *v.* James, 293 Ill. 11, 127 N. E. 226 (proceedings for appointment of a conservator, admitted on the issue of undue influence, to explain the testator's discrimination in his bequests);

Iowa: 1869, Bates *v.* Bates, 27 Ia. 113; 1882, Re Hollingsworth's Will, 58 Ia. 527, 12 N. W. 590; 1883, Stephenson *v.* Stephenson, 62 Ia. 165, 17 N. W. 456; 1885, Parsons *v.* Parsons, 66 Ia. 757, 21 N. W. 570, 24 N. W. 564; 1887, Muir *v.* Miller, 72 Ia. 590, 34 N. W. 429; 1895, Goldthorp's Estate, 94 Ia. 336, 62 N. W. 845; 1905, Townsend's Estate, 128 Ia. 621, 105 N. W. 110 (that "the boys would not hear to his giving E. anything," held, "if competent of slight value"; the opinion might have made a more explicit ruling); 1904, Wiltsey's Will, 122 Ia. 422, 98 N. W. 294 (Muir *v.* Miller followed); 1907, Vannest *v.* Murphy, 135 Ia. 123, 112 N. W. 236; 1907, Kah's Estate, 136 Ia. 116, 113 N. W. 563; 1916, Crissick's

Will, 174 Ia. 397, 156 N. W. 415 (ruling obscure);
Kentucky: 1896, Kirkpatrick *v.* Jenkins, — Ky. —, 33 S. W. 830 (when accompanied by independent evidence); 1903, Wall *v.* Dimitt, 114 Ky. 923, 72 S. W. 300; 1904, Powers' Ex'r *v.* Powers, — Ky. —, 78 S. W. 152 (Wall *v.* Dimitt followed); 1910, Gillispie's Ex'r *v.* Gillispie, — Ky. —, 128 S. W. 1064;
Massachusetts: 1820, Somes *v.* Skinner, 16 Mass. 348, 360 (deed said to have been obtained by undue influence; transactions of the grantor with the grantee, before and after the time, admitted to show the existence of that influence and its probable continuance); 1885, Batchelder *v.* Batchelder, 139 Mass. 1, 29 N. E. 61 (undue influence by the testator's wife; their relations many years before, excluded in the trial Court's discretion);
Michigan: 1893, Haines *v.* Hayden, 95 Mich. 332, 346, 54 N. W. 911 (declarations after execution, as to the supposed illegitimacy of a child, admitted to show the state of mind as to that child then and at execution; "such declarations are admissible in any case where the fair inference from all the circumstances is that they truly represent the testator's state of mind at the time"); 1902, Zibble *v.* Zibble, 131 Mich. 655, 92 N. W. 348 ("she dingdongs at me from morning till night," held admissible to show "the effect of the alleged influence," but not to "establish such fact" of influence); 1908, O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59; 1917, Fay's Estate, 197 Mich. 675, 164 N. W. 523;
Mississippi: 1921, Sanders *v.* Sanders, 126 Miss. 610, 89 So. 261 (undue influence; declarations that "he had not made the will he wanted to, but had been forced by his wife and his son Joe," etc., held admissible to evidence the testator's state of mind, but not to evidence the fact of force);
Missouri: 1897, Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642 (declarations that the devisees had worked upon the testatrix, excluded; but her weeping at the time of the declarations, admitted); 1903, Crowson *v.* Crowson, 172 Mo. 691, 72 S. W. 1065; 1908, Teckenbroeck *v.* McLaughlin, 209 Mo. 533, 108 S. W. 46 (prior cases examined; liberal and sensible opinion by Lamm, J.); 1916, Thomas *v.* Thomas, — Mo. —, 186 S. W. 993 (undue influence by creating false beliefs of the conduct of relatives);
Nebraska: 1897, Clark *v.* Turner, 50 Nebr. 290, 69 N. W. 843 (apparently sanctioning the indirect use to show the existence of a will; but not allowing them to suffice as sole evidence of contents);
New Jersey: 1883, Rusling *v.* Rusling, 36 N. J. Eq. 603 (quoted *supra* in the text);
New York: 1854, Waterman *v.* Whitney, 11 N. Y. 157 (Selden, J.: "The difference is certainly very obvious between receiving the declarations of the testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator"); 1912, Gick *v.* Sturnpf, 204 N. Y. 413, 97 N. E. 865 (undue influence; certain subsequent writings of the testatrix, excluded, as not illustrative of mental condition); 1912, Smith *v.* Keller, 205 N. Y. 39, 98 N. E. 214 (inadmissible "as affirmative statements of fraud"); 1922, Eno's Will, Surr. Ct., 192 N. Y. Suppl. 840 (testamentary capacity; range of conduct of testator held "improper," as bearing mainly upon undue influence, which was not in issue);
North Carolina: 1885, Macrae *v.* Malloy, 93 N. C. 159; 1920, Hinton's Will, 180 N. C. 206, 104 S. E. 341 (testimony to mental capacity, admissible, though involving testator's conversations on sundry matters);
Pennsylvania: 1821, Rambler *v.* Tryon, 7 S. & R. 93; 1889, Herster *v.* Herster, 122 Pa. 239, 16 Atl. 342; 1902, Robinson *v.* Robinson, 203 Pa. 400, 53 Atl. 253 (declarations admitted to show "the mental weakness of the testatrix and that the will was procured by the undue influence of her son");
Tennessee: 1905, Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152 (cited *infra*, n. 4);
Texas: 1879, Johnson *v.* Brown, 51 Tex. 80 (the issue was the genuineness of an offered will; Bonner, J.: "The declarations of [the testator], before and after the date of the proposed will, expressive of feelings of ill-will toward the beneficiaries, as were his feelings of kindness towards them, were properly admitted in evidence, . . . not so much as declarations disparaging a duly executed will, as evidence of an independent collateral fact — the state of feeling between the parties — and which would in some degree tend to prove the issue before the court"); 1914, Scott *v.* Townsend, 106 Tex. 322, 166 S. W. 1138 (that testator said his wife "had been after him to make a will," and "had always wanted him to make a will," excluded; but it seems strange that we can endure a system of trials which sets aside a verdict and remands a case for the exclusion of such evidence);
Vermont: 1853, Robinson *v.* Hutchinson, 26 Vt. 46;
West Virginia: 1869, Thompson *v.* Updegraff, 3 W. Va. 629, 636 (testator's declarations that devisees T. did not want him to give anything to certain grandchildren, admitted to show his condition of mind); 1918, Beamer *v.* Clayton, 82 W. Va. 580, 96 S. E. 969;
Wisconsin: 1897, Bryant *v.* Pierce, 95 Wis. 331, 70 N. W. 297 ("not evidence that extraneous and undue influence was actually exerted, but to prove or disprove the capacity of the testator to discover and resist importunities, flatteries, or other acts tending to undue influence").

Smith *v.* Fenner, 1 Gall. Fed. 171 (1812), a case often cited but of obscure import and little value, seems to belong here.

1883, DIXON, J., in *Rusling* v. *Rusling*, 36 N. J. Eq. 603, 607: "When undue influence is set up in impeachment of a will, the ground of invalidity to be established is that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which of his free will he would not have assented. This involves two things: first, the conduct of those by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise, the state of mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of permanency. Hence in an inquiry respecting the testator's state of mind, before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. They cannot be regarded as evidence of previous occurrences, unless they come within one of the recognized exceptions to the rule excluding hearsay testimony."

It is no doubt often difficult to distinguish between this legitimate use and the improper one noted in par. (1), *supra;* for example, when the utterance offered is "The will that I made was signed only to keep the peace with James." Such utterances will probably be received or rejected according to the kind of use of which they seem to the Court in the case in hand to be most susceptible:

1912, CHASE, J., in *Smith* v. *Keller*, 205 N. Y. 39, 98 N. E. 214: "Evidence of acts and conversations of a deceased, bearing upon her mental strength, is not incompetent simply because it bears upon some question other than that of the mental strength of the deceased. The difficulty in this case is that counsel for the plaintiff, taking advantage of a rule correctly stated by the Court, proceeded to call many witnesses, and from them to elicit testimony bearing in a very slight degree, if at all, on the question of the mental strength of the testatrix; but in that way he obtained a large number of declarations by her, subsequent to the date of the will, which were well calculated to influence the jury, and which doubtless did influence the jury, in determining the question submitted to it, as to whether the will was the free and voluntary act of the testatrix. . . . Questions to elicit the mental strength of a testator should be asked for that purpose and not for an incompetent and improper purpose. . . . Is it not perfectly clear that counsel for the plaintiff asked questions calling for particular conversations for the express purpose of getting before the jury statements of fact that might affect them in determining whether the will was the result of coercion and duress? Efforts to obtain from witnesses conversations, including improper and incompetent statements of fact, under the guise of showing the mental strength of a testatrix, should be and are condemned; and where, as in this case, such effort has been repeated and continuous, and the evidence so obtained is to a large extent relied upon to show undue influence, and is not a mere incident in the receipt of evidence for a proper purpose, it requires that the judgment should be reversed."

(*b*) Furthermore, the *normality of the will's dispositions,* with reference to the natural and uninfluenced desires of the testator, must be investigated.

That influence is "undue" implies in part that the testamentary disposition in controversy deviates from that which the testator under the influence of his ordinary inclinations would have made. If the tribunal can ascertain his normal tendencies and plans, a standard is found by which to test the dispositions in issue. If these harmonize with this normal standard, the charge of undue influence can have little or no support; if they diverge abnormally, there is then some inducement to examine further into the nature of the influence producing this divergence. Accordingly, to establish this normal tendency or inclination, the testator's condition of mind before and after the time in issue not only may be but must be examined; his state of affection or dislike to specific persons, and his general testamentary attitude towards them, will help to form the standard of his normal dispositions. For this purpose, his utterances indicating the state of his affections and intentions, and in particular his other testamentary acts or expressions, if any, whether prior or subsequent, may all be considered; the evidential principles already noted (par. (*a*), *supra*) sufficing equally for this purpose. This use of such evidence is also universally sanctioned: [4]

[4] *Accord:* ENGLAND: 1864, Quick *v.* Quick, 3 Sw. & Tr. 442, *semble.*

UNITED STATES: *Federal:* 1901, Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. 474, *semble* (declarations indicating the testator's affections, admissible on an issue of capacity, when not too remote; opinion confused and useless; three judges dissenting);
Alabama: 1845, Couch *v.* Couch, 7 Ala. 524 (Ormond, J.: "The will itself being made in conformity to a fixed determination, entertained and expressed for years, is the strongest proof of her capacity"); 1849, Roberts *v.* Trawick, 17 Ala. 58 (quoted *supra;* this case, however, excluded facts showing the normal intentions to be different from the will; but this untenable distinction was repudiated in Hughes *v.* Hughes' Ex'r, quoted *supra*); 1853, Gilbert *v.* Gilbert, 22 Ala. 529, 533 (before and at the time of execution); 1859, Seale *v.* Chambliss, 35 Ala. 19, 22; 1900, Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687;
Arkansas: 1905, Flowers *v.* Flowers, 74 Ark. 212, 85 S. W. (the provisions of an alleged will may be compared with his "fixed purposes and intentions," including declarations that he had made no will; but the opinion erroneously admits this on an issue of "mental capacity");
California: 1892, McDevitt's Estate, 95 Cal. 11, 30 Pac. 101 (the declarations must be fairly near the time of examination of the will); 1896, Calkins' Estate *v.* Calkins, 112 Cal. 396, 44 Pac. 577; 1904, McKenna's Estate, 143 Cal. 580, 77 Pac. 461 (conversations, on the issue of insanity, distinguished from the present question);
Delaware: 1838, Rash *v.* Purnel, 2 Harringt. 448, 457; 1838, Duffield *v.* Morris' Ex'r, 2 Harringt. 375, 381 (a former will, admitted on an issue of sanity, to show the normal state of purposes and affections);
Georgia: 1853, Williamson *v.* Nebers, 14 Ga. 311; 1900, Cato *v.* Hunt, 112 Ga. 139, 37 S. E. 183;
Illinois: 1867, Roe *v.* Taylor, 45 Ill. 485, 488, *semble;* 1875, Rutherford *v.* Morris, 77 Ill. 421, *semble;* 1894, Taylor *v.* Pegram, 151 Ill. 106, 115, 37 N. E. 837 (declarations as to contents of former wills, admitted); 1895, Hill *v.* Bahrns, 158 Ill. 314, 318, 41 N. E. 912 (other testamentary intentions admissible, "where it appears that such disposition of his property by such prior will is approximately the same"); 1897, Harp *v.* Parr, 168 Ill. 459, 48 N. E. 113 (declarations as to an intention of disposition before execution, receivable to show normal intentions); 1899, Kaenders *v.* Montague, 180 Ill. 300, 54 N. E. 321 (prior statements, including revoked wills, as to testamentary plans, admitted to show normal intent and disprove undue influence, provided they are in harmony with the will in question; a distinction made to reconcile the cases before Harp *v.* Parr, but unsound in principle; compare Hughes *v.* Hughes' Ex'r, Ala.); 1894, Bevelot *v.* Lestrade, 153 Ill. 625, 631, 38 N. E. 1056 (declarations conflicting with the provisions of the will, not admitted); 1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678 (declarations of testamentary plans, admitted so far as harmonious with the will, *i. e.* in rebuttal of the alleged undue influence; but not so far as they conflict with the will's provisions; like Kaenders *v.* Montague, but not citing it); 1906, Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1 (rule of Kaenders *v.* Montague followed); 1907, Cheney *v.* Goldy, 225 Ill. 394, 80 N. E. 289 (rule of Compher *v.* Browning

applied); 1908, Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712 (same); 1908, Freund *v.* Becker, 235 Ill. 513, 85 N. E. 610 (rule of Kaenders *v.* Montague followed); 1910, Hurley *v.* Caldwell, 244 Ill. 448, 91 N. E. 654 (opinion unclear; Dowie *v.* Driscoll and Compher *v.* Browning cited); 1916, Lyman *v.* Kaul, 275 Ill. 11, 113 N. E. 944 (testator's declarations as to his intentions to dispose of his property, held admissible for the proponent, but not for the contestant following Kaenders *v.* Montague and Cheney *v.* Goldy); 1916, Pilstrand *v.* Swedish Methodist Church, 275 Ill. 46, 113 N. E. 958 (undue influence; that a former will did not make the contestant a beneficiary, held "not improper or at least not reversible error"; but there is no sound reason for regarding it as improper); 1919, McCune *v.* Reynolds, 288 Ill. 188, 123 N. E. 317 (undue influence; contents of a former variant will excluded, purporting to follow Roe *v.* Taylor); 1921, Noone *v.* Olchy, 297 Ill. 160, 130 N. E. 476 (unsound mind; testatrix' expression at former times, as to a devisee, of her "intention to see that she was taken care of," admitted);
Indiana: 1889, Staser *v.* Hogan, 120 Ind. 207, 216, 21 N. E. 911, 22 N. E. 990 (conduct of the testator showing his normal affections, admitted); 1893, Goodbar *v.* Lidikay, 136 Ind. 1, 8, 35 N. E. 691; 1905, Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089 (Goodyear *v.* Lidikay, approved);
Iowa: 1880, Dye *v.* Young, 44 Ia. 435; 1899, Perkins' Est., 109 Ia. 216, 80 N. W. 335 (declarations of affection, etc., admitted; also statements as to advancements to omitted children, as showing the state of his mind); 1904, Selleck's Will, 125 Ia. 678, 101 N. W. 453 (terms of a prior will, admitted); 1905, Glass' Estate, 127 Ia. 646, 103 N. W. 1013 (a trust deed of three years before, admitted, on an issue of undue influence, as a "written declaration");
Kentucky: 1894, Barlow *v.* Waters, — Ky. —, 28 S. W. 785; 1896, Kirkpatrick *v.* Jenkins, — Ky. —, 33 S. W. 830;
Maryland: 1878, Griffith *v.* Diffenderffer, 50 Md. 482; 1920, Hutchins *v.* Hutchins, 135 Md. 401, 109 Atl. 121 (testamentary intentions, admitted to show "settled convictions of the testator");
Massachusetts: 1868, Shailer *v.* Bumstead, 99 Mass. 112, 122 (admissible "in proof of long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections, or prejudices, or other intrinsic or enduring peculiarities of mind inconsistent with the dispositions made in the instrument attempted to be set up as the formal and deliberate expression of the testatrix's will"); 1905, Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073 (transfer of stock, etc., under undue influence; the deceased transferor's declarations of intent as to the devolution of her property, admitted, following Shailer *v.* Bumstead);
Michigan: 1864, Beaubien *v.* Cicotte, 12 Mich. 488; 1894, Renaud *v.* Pageot, 102 Mich. 568, 61 N. W. 3; 1897, Bush *v.* Delano, 113 Mich. 321, 71 N. W. 628; 1904, Roberts *v.* Bidwell, 136 Mich. 191, 98 N. W. 1000 (Bush *v.* Delano followed); 1909, Loree's Estate, 158 Mich. 372, 122 N. W. 623 (former wills, etc.);
Mississippi: 1896, Sheehan *v.* Kearney, 82 Miss. 694, 21 So. 41 (to show the normality of his testamentary plans, declarations of intent to make a will and of having made a will were admitted; quoted *supra*); 1920, Moore *v.* Parks, 122 Miss. 301, 84 So. 230 (testatrix' statements as to leaving all her property to two grandchildren, etc., admitted on the issue of mental capacity);
Missouri: 1910, Lindsey *v.* Stephens, 229 Mo. 600, 129 S. W. 641 (former will, admitted); 1920, Yant *v.* Charles, — Mo. —, 219 S. W. 572 (undue influence and mental incapacity; a prior will, admitted); 1921, Kuehn *v.* Ritter, — Mo. —, 233 S. W. 5 (testator's memorandum prior to will, admitted to show the "state of his natural affections");
New Jersey: 1858, Pancoast *v.* Graham, 15 N. J. Eq. 309;
Pennsylvania: 1822, Irish *v.* Smith, 8 S. & R. 579 (former wills); 1854, Wilkinson *v.* Pearson, 23 Pa. 119 (former plans); 1861, Neel *v.* Potter, 40 Pa. 483 (previous declarations of a purpose to dispose as in the will were admitted; Thompson, J.: "It would strongly rebut the idea of any such influence on the mind of the testator when making his will, *if* it were shown that he made it in accordance with a long-cherished purpose"); 1867, Titlow *v.* Titlow, 54 Pa. 216, 221 (similar; yet not consistently); 1898, Perret *v.* Perret, 184 Pa. 131, 39 Atl. 33 (former intentions, receivable to show normal wishes);
Rhode Island: 1889, Gardner *v.* Frieze, 16 R. I. 641, 19 Atl. 113 (declarations of a testatrix as to an intention to dispose in accordance with the will's terms were admitted; Durfee, C. J.: "When the will corresponds to the declarations, it excites much less apprehension of improper practices than when it differs from them");
South Carolina: 1897, Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16;
Tennessee: 1895, Peery *v.* Peery, 94 Tenn. 328, 29 S. W. 1; 1905, Hobson *v.* Moorman, 115 Tenn. 73, 90 S. W. 152 (declarations admissible to "illustrate the mental capacity of the testator and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends," but not "as substantive evidence of undue influence"; the opinion specially denies that ante-testamentary declarations are usable for the last-named purpose, *i.e.* that noticed *supra*, n. 1);
Texas: 1895, Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621;
Utah: 1908, Young's Estate, 33 Utah 382, 94 Pac. 731 (former will, admitted);
Vermont: 1862, Fairchild *v.* Bascomb, 35 Vt. 398, 417 (affection for brothers and sisters,

1849, CHILTON, J., in *Roberts* v. *Trawick*, 17 Ala. 58: "This proof conduced to establish that the testator, many years previous to the execution of the will in controversy, had a fixed and settled purpose to make a will similar to the one he is alleged to have executed. It was then proper . . . [as tending to disprove that] the will was not the deliberate act of the deceased."

1858, STONE, J., in *Hughes* v. *Hughes' Ex'r*, 31 id. 524: "Is it not equally true, if a will be made which is variant from the testator's determination entertained and expressed for years, that this fact is admissible evidence against the capacity of the testator? If the conformity tend to establish the will, does not the non-comformity tend to impair its validity?"

1860, HINMAN, J., in *Denison's Appeal*, 29 Conn. 402: "Declarations and acts of kindness and affection towards a legatee . . . go to show that a legacy, otherwise inexplicable upon the ordinary motives of human conduct, is a natural and probable act and therefore a free and reasonable one. Of course it would seem to follow that contrary declarations and acts must have a contrary effect. . . . That such declarations might be made at so remote a period as to be entitled to little if any weight, unless succeeded by other acts or declarations, showing that the state of feeling that called them forth continued up to the time the will was executed, is undoubtedly true."

1879, BREWER, J., in *Mooney* v. *Olsen*, 22 Kan. 78: "Where, as in a case like this, the circumstances attending the execution raise a doubt as to the mental strength of the testatrix, evidence that the disposition of the property runs along the line of her established friendships and previously expressed intentions tends strongly against the idea of any undue influence, while evidence that it is contrary to such friendships and intentions makes in favor of improper influences."

1896, WHITFIELD, J., in *Sheehan* v. *Kearney*, 82 Miss. 694, 21 So. 41: "It may be that the true solution of the apparent confusion is this: That what such declarations are evidence of is, not in themselves alone that the testator did have the testamentary intentions he declared he had, for he may have wished to conceal his intentions, but that he did say he had the testamentary intentions testified to; and the jury are then to draw such inference as the whole evidence warrants, that they were or were not his real testamentary intentions at the time of making the declarations, from these declarations, as compared with those set forth in the will, and looking to the change or absence of change in his condition, family, property, state of feelings, affections, etc., between the time of making them and the will. . . . And if, from the whole evidence, they believe they were really as declared, at that time, an inference might legitimately be drawn that, when the subsequent will conformed to them, they had continued down to the making of the will, and, when the subsequent will did not conform to them, the testator had purposely misstated his intentions for some reason, or that he had changed his intentions, or that the will was not his will, but the product of undue influence."

In surveying these three distinctions, together with those already noticed for other kinds of post-testamentary declarations (*ante*, § 1736), one is impressed with the practical futility of attempting to enforce them strictly. It

knowledge of a brother-legatee's intemperance, etc., admitted); 1866, Thornton *v.* Thornton, 39 Vt. 122, 158 (prior wills drawn up but not executed, admitted);
West Virginia: 1881, McMechen *v.* McMechen, 17 W. Va. 683, 714, *semble;* 1888, Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493; 1907, Wallen *v.* Wallen, 107 W. Va. [131, 57 S. E. 596 (the several uses obscurely merged);
Wisconsin: 1870, Jackman's Will, 26 Wis. 104, 122, 130 (declarations before and after making, receivable to show the state of his feelings and intentions in regard to a will).

Contra: in two early cases, not well considered, the evidence was rejected: 1819, Den *v.* Vancleve, 2 South. N. J. 589, 657; 1822, Stevens *v.* Vancleve, 4 Wash. C. C. 263; also in Muir *v.* Miller, 72 Ia. 585, 590, 34 N. W. 429 (1887), overlooking Dye *v.* Young, *supra*.

For the admissibility in general of a *prior* or *subsequent condition*, to evidence *undue influence* or *insanity*, see *ante*, § 233.

is doubtful if often they amount to anything more than quibbles which a Supreme Court may lay hold of for ordering a new trial where justice on the whole seems to demand it. It would seem more sensible to listen to all the utterances of a testator, without discrimination as to admissibility, and then to leave them to the jury with careful instructions how to use them. The doctrine of multiple admissibility (*ante*, § 13) almost always would justify this. If the jury are plainly acting upon their prejudices only, when the verdict is returned, the Court's control of new trials affords an ample safeguard.

§ 1739. **Statements Showing Intelligent Execution.** Where the question is raised whether the testator signed the will understandingly (usually in cases of alleged undue influence), the fact of a *previous* or *subsequent understanding* of its terms or of a satisfaction with them is relevant (*ante*, §§ 233, 242, 266) to show a comprehension of its terms at the time of execution; and subsequent ignorance or dissatisfaction could be used in the same way. The argument is equally applicable to the execution of deeds and other documents:[1]

1846, GREEN, J., in *Patton* v. *Allison*, 7 Humph. 335: "Previous declarations of a testator, in conformity to the will, often repeated and continuing up to near the time of its execution, all indicating the purpose which the contents of the will develope, is certainly in reason, as well as in authority, satisfactory evidence that the testator knew the contents of the will."

§ 1740. **Statements as to Insanity.** The utterances of a testator indicating circumstantially his present sanity or insanity are governed by no different principles from those applicable to evidence of insanity in other cases; and these principles have already been considered (*ante*, §§ 227–233). But a direct assertion by a testator that he *was at a past time sane or insane* stands on no better footing than any other hearsay assertion; it is not admissible under the present Exception, because it does not assert a present mental condition.[1]

§ 1739. [1] 1909, Thomas' Estate, 155 Cal. 488, 101 Pac. 798 (forged will; decedent's declarations as to his age and relationships, variant with the recitals of the will, admitted as evidence that the will was a forgery); 1868, Howe *v.* Howe, 99 Mass. 98 (subsequent mention and approval of a deed, admitted to show that it was understood at the time); 1894, Nelson's Will, 141 N. Y. 152, 157, 36 N. E. 3 (declarations after execution of a will, admitted to disprove ignorance of its terms); 1890, Maxwell *v.* Hill, 89 Tenn. 595, 15 S. W. 253 (the issue being whether the testatrix, an illiterate person, fully understood the will she signed, declarations at other times showing intentions similar to the terms of the will were admitted); 1898, Barney's Will, 70 Vt. 352, 40 Atl. 1027 (subsequent ignorance of the terms of the will, admitted to indicate undue influence); 1904, Wheelock's Will, 76 Vt. 235, 56 Atl. 1013 (testator's letters, showing knowledge of the will, admitted).

Contra: 1906, Lipphard *v.* Humphrey, 28 D. C. App. 355, 361 (the opinion oddly asserts that "the proposition is without any foundation either on principle or authority"); 1920, McFarland *v.* Bishop, 282 Mo. 534, 222 S. W. 143 (action by trustees under a second trust deed by G. revoking a prior trust deed of his made to defendants; issue as to G.'s mental capacity; declarations of G. before and after the first deed, concerning its contents, not admitted to show his understanding of its contents; ignoring the present principle).

§ 1740. [1] 1839, Norwood *v.* Marrow, 4 Dev. & B. 451. *Contra:* 1876, Ross *v.* McQuiston, 45 Ia. 147 (the declaration of a testator, when sane, that he had for 20 years been insane, was admitted, no special principle being named).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE

TOPIC XIV: SPONTANEOUS EXCLAMATIONS[1] (RES GESTÆ)

CHAPTER LVII.

A. GENERAL FORM OF THE EXCEPTION

§ 1745. **Introductory; Res Gestæ; Discrimination between the Verbal Act Doctrine and the Exception for Spontaneous Exclamations.** The exposition of this Exception is to be approached with a feeling akin to despair. There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth 'res gestæ,' that it is perhaps impossible to disentangle the real basis of principle involved. On the one hand, to repeat without comment the often meaningless and unhelpful language of the Courts is to shirk the duty of the expositor of the law as it is, and to delay the day of clear notions that must inevitably come. On the other hand, to discriminate between the principles genuinely involved is to risk the reproach of representing as law that which the Courts do not concede. The expositor of the law can only endeavor to avoid impalement upon either horn of the dilemma; relying, in any event, upon the plain language of those Courts which have sought to recognize the Exception in its real character, and calling to mind

§ 1745. [1] The term "Spontaneous Exclamations," as a name for this Exception, has been employed in default of a better one. It has been judicially used in Lander *v.* People, 104 Ill. 256; Mitchum *v.* State, 11 Ga. 621; Dismukes *v.* State, 83 Ala. 289.

the frank concession of Chief Justice Beasley:[2] "I think I may safely say that there are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the 'res gestæ.'"

To begin with, then, there are two distinct and legitimate principles; each in some situations applied to its proper material without doubt or confusion, but both occasionally confused, interchanged, and made to overlap in certain classes of cases. One of these principles establishes a *real Exception to the Hearsay rule* and sets certain limitations to the kinds of statements admissible under this Exception. The other principle does not establish an exception to the Hearsay rule, but merely defines those classes of *utterances to which the rule is* in its nature *not applicable.* The former principle admits certain statements because, though hearsay, they form a genuine Exception to the rule; the latter principle admits certain other utterances because they never came within the prohibition of the rule at all, and therefore do not need any Exception to sanction them. The confusion consists in applying the limitations of the one principle to cases calling only for the application of the other. The result has been partly to narrow needlessly the scope of certain kinds of evidence, partly to broaden loosely certain other kinds, and in general to deprive important distinctions of their true significance.

In this place, we are concerned only with the former principle, the genuine Exception to the Hearsay rule; and the explanation of the second principle, *i. e.* Verbal Acts, including the various senses of the term 'res gestæ,' may be reserved (*post,* §§ 1767–1797); the history of the term is there explained (*post,* § 1767). Some of the limitations of the present Exception are based upon a mistaken borrowing of the Verbal Act doctrine (*post,* §§ 1772–1786), and therefore an acquaintance with those limitations will be assumed; but it is necessary to expound the Exception separately here in its proper place.

§ 1746. **The Present Cases a Genuine Exception to the Hearsay Rule.** The problem is this: Certain kinds of statements are admissible, by universal concession, and without the help of the preceding Exceptions. If, then, these admissible statements cannot be accounted for as being without the prohibition of the Hearsay rule (*i. e.* under the principle of the next Chapter), they must plainly constitute a separate and additional Exception to the rule. It cannot matter what names or phrases the Courts chance to use,—whether they disguise the ruling under the phrase 'res gestæ' or otherwise. The material thing is what the Courts actually do, not what names they use; and if they actually do admit a class of assertions to which the Hearsay rule is applicable, then the truth is that a distinct Exception to it is recognized.

[2] In Hunter *v.* State, 40 N. J. L. 536. But the best thing ever said of the problem is one of Chief Justice Bleckley's, in Cox *v.* State, 64 Ga. 374, 410 (1879): "The difficulty of formulating a description of the 'res gestæ' which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family."

The typical case presented is a *statement or exclamation, by a participant, immediately after an injury, declaring the circumstances of the injury,* or *by a person present* at an affray, a railroad collision, or *other exciting occasion,* asserting the circumstances of it as observed by him. Now this kind of statement cannot ordinarily be accounted for as one to which the prohibition of the Hearsay rule is not applicable. The Hearsay rule, as already noted (*ante,* §§ 1361, 1362), forbids the use of an assertion, made out of court, as testimony to the truth of the fact asserted. It follows that utterances *not* thus used testimonially as assertions to prove the truth of the fact asserted are without the scope of the prohibition and are receivable in spite of the Hearsay rule. Such utterances may be of three different sorts (more fully examined in the next chapter): (1) words the utterance of which is a fact forming part of the issue (*e. g.* the words of a contract or a slander); (2) words uttered at the time of doing a material equivocal act, and forming part of the total conduct which determines the legal significance of the act (*e. g.* words of ownership-claim accompanying the occupation of land); and (3) words used circumstantially as indirect evidence (*e. g.* words of notification, as evidence that the person notified received knowledge). In all these three classes the utterances are offered, not as assertions to prove the truth of the fact asserted, but irrespective of their truth. Whenever, therefore, an utterance is used as testimony that the fact asserted in it did occur as asserted, *i. e.* on the credit of the speaker as a credible person, it is being used testimonially, and is within the prohibition of the Hearsay rule.

Now this testimonial use is precisely the use that is made of the present class of statements. On the one hand, they cannot be accounted for under any of the three classes above mentioned to which the Hearsay rule does not apply. They clearly do not fall within either the first or the third class. They do not fall within the second class, because in that class there is by hypothesis a material equivocal act which needs to be colored and completed in legal significance by the words of the actor accompanying it — for example, the occupation of land, the handing over of money, the tearing of a will. That fundamental requisite is lacking in this class of cases. On the other hand, they clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted,— for example, when the injured person declares who assaulted him or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; *i. e.* we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts,—which is essentially the feature of all human testimony (*ante,* § 25).[1]

There was a time when the state of the judicial precedents was such that no established Exception of this tenor could yet be said to exist. But now, and

§ 1746. [1] This aspect is pointed out lucidly by Cullen, J., in Patterson *v.* Hochster (1899), 38 N. Y. App. Div. 398, 56 N. Y. Suppl. 467. So also: 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690 (approving the above theory of the exception).

for two generations past, it does exist, under one or another guise of phraseology. Since in the law, then, it does exist — since the Courts actually do admit a class of statements to which the prohibition of the Hearsay rule applies — since we must shape our treatment of the law of Evidence by what the Courts do, and not by what they say, the time seems to have come to call these doings by their true name, — in other words, to recognize the existence of this Exception to the Hearsay rule. The limits of the Exception may be elusive and the practice in different courts may vary. But that the core and substance of such an Exception is universally accepted cannot be open to doubt.

Historically, this conscious recognition appears in England before the end of the 1700s, beginning with Thompson *v.* Trevanion and Aveson *v.* Kinnaird; though it is only within the last two generations that it is firmly and unquestionably established. Such is, however, the inherent congruity of the doctrine that we are still able to resort to the earliest precedent for a succinct and accurate statement of the principle.

§ 1747. (I) **General Principle of the Exception.** This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.[1] The ordinary situation presenting these conditions is an affray or a railroad accident. But the principle itself is a broad one.

Its phrasings differ widely in different Courts; but there is in the judicial opinion of to-day something of an approach to uniformity. In essence, the language of Lord Holt, in Thompson *v.* Trevanion, still serves to indicate clearly and concisely the principle of the Exception. In the following passages, the most satisfactory expositions are those of Mr. Justice Barrows, in State *v.* Wagner, Mr. Justice Lacombe, in U. S. *v.* King, and Chief Justice Bleckley, in Insurance Co. *v.* Sheppard:

1693, *Thompson* v. *Trevanion*, Skinner 402; action for assault and battery upon the wife of the plaintiff. Lord HOLT "allowed that what the wife said immediate upon the

§ 1747. [1] *Accord:* 1916, Monroe, C. J., in State *v.* McLaughlin, 138 La. 958, 70 So. 925 (citing the above text with approval).

The theory is thus somewhat analogous to that of dying declarations, as pointed out in State *v.* Wagner, quoted *post.*

For 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), especially § 235.

hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence."

1805, *Aveson* v. *Kinnaird*, 6 East 193. *Counsel:* "Declarations by the wife upon her elopement from her husband, accusing him of misconduct, could not be given in evidence against him in an action against the adulterer." ELLENBOROUGH, L. C. J.: "It is not so clear that her declarations made at the time would not be evidence under any circumstances. If she declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence; though not if it were a collateral declaration of some matter which happened at another time"; citing Thompson *v.* Trevanion.

1834, *R.* v. *Foster*, 6 C. & P. 325; manslaughter by driving a cabriolet over a person; a statement made by the deceased, to one who did not see the accident but immediately afterward heard the deceased groan and went up and asked what was the matter, was admitted. PARK, J.: "It was the best possible testimony that under the circumstances can be adduced to show what it was that had knocked the deceased down"; citing Aveson *v.* Kinnaird.

1839, GIBSON, C. J., in *Reed* v. *Dick*, 8 Watts 481 (admitting the remarks of a crew as to the soundness of a cable while paying it out in a storm): "The objection to the opinion of the crew in consultation with the master was not for its supposed incompetence in the abstract, but for the want of an attestation of it by the oaths of those who had expressed it. . . . Seamen are expert in nautical affairs, and their judgment in matters of opinion, touching the working and preservation of a ship, may be as satisfactorily attested by their acts when impelled by motives of duty and self-preservation as if it were given under the sanction of an oath. . . . Certainly their opinions cannot be better manifested by their oaths than they are by their acts, which go to make up the usages of the port."

1852, NISBET, J., in *Mitchum* v. *State*, 11 Ga. 621: "They derive their credibility not from his veracity, but from their relation to the transaction out of which they spring. Made at the same time with the main fact, evoked by it without premeditation, and for that reason explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable, as reliable, as the fact itself, and would derive no enhancement of their credibility from the oath of the declarant. Such I take to be the philosophy of 'res gestæ,' so far as constituted of declarations. . . . [In this case] his coming to where the witness was seems to have been voluntary and the exclamation spontaneous. . . . The short period of time that had intervened, and the agitated manner of the prisoner, forbid the idea of deliberate design. . . . His distressed and agitated appearance when he reached the witness exhibit a state of mind incompatible with such a belief."

1855, LUMPKIN, J., in *Hart* v. *Powell*, 18 Ga. 639 (the declarations here related to a conflict between the declarant and a slave, and were made after the affray): "If the declarations derive a degree of credit from their connection with the surrounding circumstances, and independently of any credit to be attached to the speaker, they should, in such cases, be admitted. . . . Were not the jury authorized to believe that they were made without premeditation or artifice, and without a view to the consequences? We think so unquestionably. . . . To preclude this proof would be to shut out the party's only defence."

1869, SWAYNE, J., in *Insurance Co.* v. *Mosley*, 8 Wall. 397 (here the deceased described his alleged injury shortly after its occurrence): "The 'res gestæ' are statements of the cause made by the assured almost contemporaneously with its occurrence and those relating to the consequences made while the latter subsisted and were in progress. . . . Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. . . . In the ordinary concerns of life, no one would doubt the

truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned." [2]

1873, BARROWS, J., in *State* v. *Wagner*, 61 Me. 195: "We think that the precise ground upon which their admission [evidence of outcries naming an assailant] should be placed in a case like this is substantially the same as that upon which dying declarations are admissible [*i. e.* necessity and sincerity.] . . . No one can doubt that the exclamations of these two women embodied the truth as it appeared to each, and that the cries of alarm and supplication uttered by any and all human beings under similar circumstances would express their perceptions of existing facts as truly as if backed by the sanction of all the oaths known in Christendom. . . . We merely say that, whatever force is given to dying declarations as the utterances of those who on account of their peculiar situation may be relied on to tell the exact truth as it appears to them, must needs be accorded also to the exclamations of mortal terror caused by a deadly assault. . . . To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with an uplifted weapon, when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections darkened and dimmed by the mists and shadows of approaching dissolution, would be, we think, but a bad sample of 'the perfection of human reason.'"

1882, HARGIS, C. J., in *McLeod* v. *Ginther's Adm'r*, 80 Ky. 405: "The declarations of Fish were made within a few seconds after the casualty. . . . He had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances which form a part of this case, as to give it importance in determining the fact that he and his engineer had run the engine in the honest belief that they had until 10.10 o'clock to reach Beard's Station. . . . It was made prior to any knowledge that he . . . had misconstrued the dispatch. . . . Therefore, if we ignore the credit to which Fish may have been entitled as a truthful man, his declaration, made under the circumstances, impresses the mind with confidence in its truth, and is entitled to be given its weight as any other fact going to make up the whole transaction."

1886, BATTLE, J., in *Little Rock R. Co.* v. *Leverett*, 48 Ark. 343, 3 S. W. 50: "The statement of Leverett was made immediately after he was run over. . . . It was an emanation of the act in question and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement impress the mind with confidence in its truth."

1887, SOMERVILLE, J., in *Dismukes* v. *State*, 83 Ala. 289, 3 So. 671: "The exclamation of Miss Harris, [on running from her room in her night-clothes, that she saw some one at the window,] . . . being uttered so near the scene of the transaction, and being apparently spontaneous in its nature, . . . was free from all suspicion of device, premeditation, or afterthought," and was therefore properly admitted.

1888, LACOMBE, J., in *U. S.* v. *King*, 34 Fed. 314 (charging the jury): "There is a principle in the law of evidence which is known as 'res gestæ'; that is, the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have. . . . But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth, forced out against his will or without his will, and at a period

[2] This language has been in substance adopted in Brownell *v.* R. Co., 47 Mo. 246, Wagner, J. (1871), and in Harriman *v.* Stowe, 57 id. 93, Wagner, J. (1874), two cases much cited and perhaps to be termed leading cases.

of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say."

1890, BLECKLEY, C. J., in *Travelers' Ins. Co.* v. *Sheppard*, 85 Ga. 751, 776, 12 S. E. 18: "There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declarations must be the utterance of human nature, of the 'genus homo,' rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be sufficient sanction for the speech of man as such, — man, distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy."

§ 1748. **The Necessity Principle; Death, Absence, etc., need not be shown.** It has already been noticed (*ante*, § 1421) that through the Exceptions to the Hearsay rule run two general principles, one of which is that some necessity shall exist for resorting to hearsay statements. This Necessity, for the first six Exceptions, consists in the impossibility of obtaining from that person testimony on the stand; for the seventh it consists in the general scantiness of other evidence on the same subject; for the eighth, ninth, tenth, and eleventh, in the practical inconvenience of requiring the person's attendance upon the stand; and, for the thirteenth, in the superior trustworthiness of his extrajudicial statements as creating a necessity or at least a desirability of resorting to them for unbiassed testimony. It is this last reason that suffices equally for the present Exception. The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it. This reason, though rarely noted by the Courts, appears clearly to be the sufficient one.[1] The rarity of its mention may be ascribed to the influence of the Verbal Act doctrine (*post*, § 1772), which has concealed the analogy of the other exceptions and has thus usually obviated argument as to the propriety of showing a specific necessity for the hearsay.

It follows that the *death*, *absence*, or *other unavailability* of the declarant need never be shown under this Exception, — a proposition never disputed.

§ 1749. **The Circumstantial Guarantee of Trustworthiness: Spontaneousness.** The second principle (*ante*, § 1422) running through all the Exceptions is that the statement must have been made under circumstances calculated to give some special trustworthiness to it, and thus to justify us in exempting

§ 1748. [1] The following passages illustrate its recognition: Scates, C. J., in Galena & C. U. R. Co. *v.* Fay, 16 Ill. 568 ("It is impossible for a witness to convey such scenes to the mind and their effect and influence upon it"); Lumpkin, J., in Hart *v.* Powell, 18 Ga. 639, *supra* ("To preclude this proof would be to shut out the party's only defence"); Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 31 ("more convincing than the testimony of the persons themselves some time after the occurrence"); and particularly the opinion of Barrows, J., quoted *supra*, in State *v.* Wagner, 61 Me. 195; so also Staples, J., in Jordan Case, Gratt. Va. 945.

it from the ordinary test of cross-examination on the stand. This principle is represented, in the present Exception, by the phrase, often repeated,[1] that the statement must from the circumstances "derive a degree of credit independently of the declaration," *i. e.* other than the faith to be given to an ordinary extrajudicial assertion. This circumstantial guarantee here consists in the consideration, already noted (*ante*, § 1747), that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be "spontaneous," "natural," "impulsive," "instinctive," "generated by an excited feeling which extends without let or break-down from the moment of the event they illustrate." [2]

What practical limitations does this principle place upon the conditions under which such statements become admissible? Before attempting to generalize, typical passages applying the principle may be compared:

1693, *Thompson* v. *Trevanion*, Skinner 402; assault and battery upon a wife; Lord HOLT admitted what the wife said "immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage."

1845, DUNCAN, J., in *Hill's Case*, 2 Gratt. 604: "And why are not [the decedent's] declarations as to the commission of the act [a part of the 'res gesta']? The [supposed] reason is that he may have fabricated or made up a story. But on the one hand, if under the circumstances of the case he could not have had time to make up a story, and the declarations were made when the 'lis mota' did not exist, then they may be received as part of the 'res gesta.' On the other hand, if made after time sufficient had been allowed to fabricate a story, or 'lis mota' may be supposed to exist, they are not to be considered as part of the 'res gesta.' . . . 'A priori' a stab in the heart would instantaneously suspend the powers of reflection. . . . All the time, then, from receiving the stab until he revived from his fit of fainting he was clearly not in a condition to arrange his ideas and fabricate a story. . . . All that is necessary . . . to make the declaration part of the 'res gesta' is that it should be made recently after the injury and before he had time to make up a story 'or devise anything for his own advantage.'"

1847, THACHER, J., in *Scaggs* v. *State*, 8 Sm. & M. 724: "Declarations are admitted . . . only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice and without a view to the consequences. . . . It was reasonable to presume that he had premeditated his explanation of its cause [blood upon his hands] when it was also shown that he was half a mile from the spot where the crime was alleged to have been committed and had sufficient time to determine upon the explanation he would give concerning the circumstance. The explanation . . . was not of that impulsive character which distinguishes declarations at the time of the transaction."

1869, LEWIS, C. J., in *State* v. *Ah Loi*, 5 Nev. 101: "Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. Hence, from the very nature of the thing, very much must be left to the discretion of the presiding judge."

1884, EARL, J., in *Waldele* v. *R. Co.*, 95 N. Y. 274: "This [present piece of] evidence cannot be received upon the theory that there is a very strong probability that the declarations made by the intestate were true. . . . Declarations which are received as part of

§ 1749. [1] Apparently first used by Upham, J., in Hadley *v.* Carter, 8 N. H. 42 (1835).
[2] For these phrasings, see the ensuing quotations.

the 'res gesta' are to some extent a departure from or an exception to the general rule [requiring confrontation, cross-examination, and oath]; and when they are so far separated from the act which they alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances. . . . [In this case, made thirty minutes after the injury,] they are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased and the veracity of the witness who testified to them."

1884, STAYTON, J., in *Galveston* v. *Barbour*, 62 Tex. 176 (declarations being offered of a child interrogated by the father on the day after being injured): "Too great a time elapsed; the statements and acts of the son were not the natural utterances of a simple, truthful child prompted by the suffering endured at the time through the injury; there was too much calculation and method on the part of the father. . . . It was simply hearsay, with no feature to relieve it from the operation of the rule. . . . [Then, of other declarations,] the declarations made to the mother, by the child, were of a different character; he came home immediately after he had received the injury, crying, and smarting with the pain resulting from it, and, childlike and naturally, made known to her how he had been hurt."

1885, COOLEY, C. J., in *Merkle* v. *Bennington*, 58 Mich. 163, 24 N. W. 776: "These declarations were not made on the spot and spontaneously. . . . One very good reason for excluding such narratives is that the party has had time to deliberate and shape them in his own interest and may be under strong temptation to do so. . . . In this case . . . it was for his interest, if he could do so, to fix the responsibility for the injury upon the township. . . . The longer the time allowed for deliberation, the greater would be the danger that his utterances would be unreliable. But after such lapse of time as appeared in this case the declarations cannot with any propriety be considered part of the 'res gestæ.'"

1886, FIELD, J., in *Vicksburg R. Co.* v. *O'Brien*, 119 U. S. 99, 7 Sup. 118, 172: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers. . . . The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the 'res gestæ,' must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. . . . An accident happening to a railway train, by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of the explanation for a considerable time afterwards by persons connected with the train. . . . The admissibility of a declaration, in connection with evidence of the principal fact, . . . must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

1888, BLACK, J., in *Leahy* v. *R. Co.*, 97 Mo. 172, 10 S. W. 58: "The better reasoning is that the declaration, to be a part of the 'res gestæ,' need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause." [3]

[3] Compare also the following, in which the idea of spontaneity is emphasized: 1893, Ryan, C., in Missouri P. R. Co. *v.* Baier, 37 Nebr. 235, 245, 55 N. W. 913 (the declaration must be "a spontaneous explanation of the real cause"); 1900, Baker, C. J., in Green *v.* State, 154 Ind. 655, 57 N. E. 637 (the declarant must "appear to be the spontaneous spokesman of the act and not the deliberate utterer of an afterthought").

§ 1750. **Same: Requirements: (*a*) a Startling Occasion; (*b*) a Statement made before Time to fabricate; (*c*) Relating to the Circumstances of the Occurrence.** From the judicial expositions the following limitations, and these only, may legitimately be deduced:

(*a*) *Nature of the occasion.* There must be some *shock, startling enough* to produce this nervous excitement and render the utterance spontaneous and unreflecting. Such a limitation does not appear to be in terms expressly required in the judicial definitions; but it is a necessary implication from their language. Moreover, in practically all of the instances — involving statements after corporal injury by violence — such conditions are in fact present, and this requirement is fulfilled.

There is, however, in some Courts, a limitation which practically takes the place of the present one, — the limitation that there must be a "main" or "principal fact." This limitation (noticed *post*, § 1753) is mistakenly borrowed from the Verbal Act doctrine, and improperly enlarges the scope of the present Exception.

(*b*) *Time of the utterance.* The utterance must have been *before there has been time to contrive and misrepresent, i. e.* while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings.

It is to be observed that the statements *need not be strictly contemporaneous* with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. The fallacy, formerly entertained by a few Courts, that the utterance must be strictly contemporaneous (*post*, § 1756), owes its origin to a mistaken application of the Verbal Act doctrine:

1852, NISBET, J., in *Mitchum* v. *State*, 11 Ga. 626: "Where the books say, when this Court has said, that the declarations must be contemporaneous with the act, . . . [it is a question] which must depend upon the application of the principle upon which the rule is founded. . . . If the declarations appear to spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous." [1]

1884, SMITH, J., in *Carr* v. *State*, 43 Ark. 104: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate."

1889, STINESS, J., in *State* v. *Murphy*, 16 R. I. 528, 17 Atl. 998: "The second statement . . . was later in time by several minutes; but we do not think this is decisive, since the controlling element of admissibility is not the interval of time, but the real and illustrative connection with the thing done, in which the interval of time is a factor. . . . That which is recognized by common experience as the instinctive outcome of an act is for this reason deemed to be a part of it, whether the time of expression be five or fifteen minutes after."

1890, BLECKLEY, C. J., in *Travelers' Ins. Co.* v. *Sheppard*, 85 Ga. 751, 775, 776, 12 S. E.

§ 1750. [1] The language of this opinion has been often reproduced, in one form or another; examples of almost exact reproductions are found in Landy *v.* Humphries, 35 Ala. 624 (1860); People *v.* Vernon, 35 Cal. 49 (1868).

18: "What the law altogether distrusts is not after-speech but after-thought. . . . That the declarations shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy." [2]

Furthermore, there can be *no definite and fixed limit* of time. Each case must depend upon its own circumstances:

1891, PARKER, J., in *Kennedy* v. *R. Co.*, 130 N. Y. 656, 29 N. E. 141: "There is no imaginary line somewhere between a few hours and a few days or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the 'res gestæ' they are inadmissible; and if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the 'res gestæ.'"

1902, SHELBY, J., in *Jack* v. *Mutual R. F. Life Ass'n*, 51 C. C. A. 36, 113 Fed. 49 (admitting statements made by an insured after being poisoned and just before his death): "While it is said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near, in point of time, they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the 'res gestæ' would extend over a day, or a week, or a month. In this case the fatal capsule was handed to the victim in the afternoon, but not taken till bedtime. If Lipscomb, instead of giving him the capsule and prescription on the streets in the afternoon, had called at his house, and given it to him, and left a minute before it was swallowed, the declarations would have been brought nearer in point of time to the moment that Lipscomb had handed Stewart the medicine; but we cannot see that the rule as to the admissibility of Stewart's declarations would have been different. If one threw a bomb, which immediately exploded, and killed another, the declaration of the dying man as to who threw it would be a part of the 'res gestæ.' If the assailant, instead of throwing the bomb, had placed it concealed, and fixed to explode in an hour or in ten hours, when it exploded, the involuntary exclamation of the fatally wounded man, naming the person who had placed the bomb near him, would be, we think, a part of the 'res gestæ.' So we do not think that these objections gain any weight from the length of time which elapsed between Lipscomb's act of handing the capsule to Stewart and his declarations."

1920, BAKER, J., in *Solice* v. *State*, 21 Ariz. 592, 193 Pac. 19 (quoting with approval the text below): "Were the statements a part of the 'res gestæ'? We have examined a large number of authorities upon the abstract propositions involved in the rules on which testimony is received or not received as part of the 'res gestæ.' These authorities satisfy us that the close connection in time between the statements or declaration and the act of which it is said to be a part is an element for consideration; that being close in point of time is not, however, all of the basis for receiving such evidence, and that the ultimate test is spontaneity or instinctiveness and logical relation to the main event; that the tendency of the modern cases is to be liberal in the reception of such testimony."

Since the application of the principle thus depends entirely on the circumstances of each case,[3] it is therefore impossible to regard

[2] See similar passages quoted *supra*, and *ante*, § 1749, from Vicksburg R. Co. *v.* O'Brien, State *v.* Ah Loi, Mitchum *v.* State, and Hill's Case; State *v.* Ramsey, 48 La. An. 1407, 20 So. 904; 1906, Christopherson *v.* Chicago M. & St. P. R. Co., 135 Ia. 409, 109 N. W. 1077; 1904, State *v.* Foley, 113 La. 52, 36 So. 885; 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N.E. 690 (approving the above theory of the exception).

[3] No attempt will here be made to state in detail the rulings of the various Courts upon cases wholly unavailable as precedents. To the cases quoted *supra*, add the following:

ENGLAND: 1859, The Schwalbe, Swab. 521

rulings upon this limitation as having in strictness the force of precedents. To argue from one case to another on this question of

(in a collision, evidence was admitted that, as the defendant steamer was backing clear of the plaintiff brig, the pilot of the steamer, who was on the bridge, stamped his foot and said: "The damned helm is still a-starboard"); 1912, Thomson's Case, 7 Cr. App. 276 (abortion on Mar. 21; the woman's statement on Mar. 28 that she had done it herself, excluded).

IRELAND: 1854, R. *v.* Lundy, 6 Cox Cr. 477 (deceased's statements on the arrival of help, admitted).

CANADA: *Dom.* 1907, Gilbert *v.* The King, 38 Can. Sup. 284 (murder; deceased's statement when fleeing from the defendant); *N. Br.* 1883, Small *v.* Belyea, 24 N. Br. 16 (master of a vessel, at the time of grounding); 1891, Rainnie *v.* St. John C. R. Co., 31 N. Br. 553 (street car driver); *N. W. Terr.* 1905, R. *v.* Gilbert, 6 N. W. Terr. 396 (murder); *N. Sc.* 1920, R. *v.* Peel, No. 1, 60 D. L. R. 469, N. Sc. (arson); *Ont.* 1901, Armstrong *v.* Canada, A. R. Co., 2 Ont. L. R. 219 (railway injury); 1903, Garner *v.* Stamford, 7 Ont. L. R. 50 (highway injury).

UNITED STATES: *Federal:* 1873, Newton *v.* Ins. Co., 2 Dill. 154; 1894, Delaware L. & W. R. Co. *v.* Ashley, 14 C. C. A. 368, 67 Fed. 209; 1895, North American Acc. Ass'n *v.* Woodson, 12 C. C. A. 392, 64 Fed. 689; 1896, National Masonic Acc. Ass'n *v.* Shryock, 20 C. C. A. 3, 73 Fed. 774, 776 (by the deceased, after falling on the sidewalk); 1896, Gowen *v.* Bush, 22 C. C. A. 196, 76 Fed. 349 (by one injured in a mine, when taken out, three-quarters of an hour afterwards); 1896, St. Louis I. M. & S. R. Co. *v.* Greenthal, 23 C. C. A. 100, 77 Fed. 150 (conductor of a train); 1897, Cross L. L. Co. *v.* Joyce, 28 C. C. A. 250, 83 Fed. 989 (injured person's remark, immediately after the injury); 1900, Travelers' Protective Ass'n *v.* West, 42 C. C. A. 284, 102 Fed. 226 (statements after an injury); 1902, Westall *v.* Osborne, 53 C. C. A. 74, 115 Fed. 282 (fellow-employees on a vessel); 1903, Marande *v.* R. Co., 59 C. C. A. 562, 124 Fed. 42 (fire); 1904, Guild *v.* Pringle, 64 C. C. A. 621, 130 Fed. 419, 422 (person injured in the highway); 1911, American Mfg. Co. *v.* Bigelow, 110 C. C. A. 77, 188 Fed. 34 (superintendent's statement to injured employee); 1918, Aetna Life Ins. Co. *v.* Ryan, 2d C. C. A. 255 Fed. 483 (accident insurance);

Alabama: 1867, Hall *v.* State, 40 Ala. 698, 700, 706 (accused's statements after a homicide); 1875, Wesley *v.* State, 52 Ala. 187; 1882, Alabama, G. S. R. Co. *v.* Hawk, 72 Ala. 112; 1890, Richmond & D. R. Co. *v.* Hammond, 93 Ala. 185, 9 So. 577; 1898, Burton *v.* State, 118 Ala. 109, 23 So. 729; 1899, Bankhead *v.* State, 124 Ala. 14, 26 So. 979 (affray); 1901, Hall *v.* State, 130 Ala. 45, 30 So. 422; 1901, Nelson *v.* State, 130 Ala. 83, 30 So. 728 (deceased's declarations when assaulted); 1902, Campbell *v.* State, 133 Ala. 81, 31 So. 802 (accused's statements during a quarrel); 1903, Collins *v.* State, 137 Ala. 50, 34 So. 403 (third person at a murder); 1903, Jones *v.* State, 137 Ala. 12, 34 So. 681 (by the deceased); 1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101 (accused); 1904, Harbour *v.* State, 140 Ala. 103, 37 So. 330 (murder; exclamation of the defendant's daughter, an eye-witness, admitted); 1905, State *v.* Stallings, 142 Ala. 112, 38 So. 261 (accused); 1905, Nordan *v.* State, 143 Ala. 13, 39 So. 406 (deceased); 1912, Alabama C. G. & A. R. Co. *v.* Heald, 178 Ala. 636, 59 So. 461 (injury by a street-car); 1912, Bessierdre *v.* Alabama C. G. & A. R. Co., 179 Ala. 317, 60 So. 82 (motorman); 1916, Southern R. Co. *v.* Fricks, 196 Ala. 61, 71 So. 701 (engineer of the train); 1920, Jones *v.* Central of Ga. R. Co., 204 Ala. 148, 85 So. 428 (injury upon entering a car); 1921, Birmingham Macaroni Co. *v.* Tadrick, 205 Ala. 540, 88 So. 858 (affray in a factory);

Arizona: 1908, Soto *v.* Terr., 12 Ariz. 36, 94 Pac. 1104 (boy's complaint after an assault); 1920, Solice *v.* State, 21 Ariz. 592, 193 Pac. 19 (quoted *supra*);

Arkansas: 1884, Flynn *v.* State, 43 Ark. 293; 1886, Little Rock M. R. & T. R. Co. *v.* Leverett, 48 Ark. 333, 338, 3 S. W. 50 (by a person injured in a railroad accident); 1893, Fort Smith Oil Co. *v.* Slover, 58 Ark. 168, 179, 24 S. W. 106 (by a person injured in an explosion); 1899, Little Rock T. & E. Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7 (by a motorman after an injury); 1901, Blair *v.* State, 69 Ark. 558, 64 S. W. 948 (by defendant, after a killing); 1901, Elder *v.* State, 69 Ark. 648, 65 S. W. 938 (by a participant, after an affray); 1906, Kansas C. S. R. Co. *v.* Morris, 80 Ark. 528 98 S. W. 363 (person killed at a railroad); 1908, Beal-Doyle D. G. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053 (elevator accident); 1919, Walker *v.* State, 138 Ark. 517, 212 S. W. 319 (homicide);

California: C. C. P. 1872, § 1850 ("Where, also, the declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction"); 1868, People *v.* Vernon, 35 Cal. 49; 1882, People *v.* Ah Lee, 60 Cal. 85; 1886, Durkee *v.* R. Co., 69 Cal. 533, 11 Pac. 130; 1897, Lissak *v.* Crocker Est. Co., 119 Cal. 442, 51 Pac. 688 (fall of an elevator; statement of the servant in charge, made after the fall); 1899, Heckle *v.* R. Co., 123 Cal. 441, 56 Pac. 56 (railroad injury); 1901, Williams *v.* Southern P. Co., 133 Cal. 550, 65 Pac. 1100 (railroad collision); 1903, Boone *v.* Oakland T. Co., 139 Cal. 490, 73 Pac. 243 (street-car

"time to devise or contrive" is to trifle with principle and to cumber the records with unnecessary and unprofitable quibbles. There is a

injury); 1905, Murphy *v.* Board, 2 Cal. App. 468, 83 Pac. 577 (injured person; a glaring instance of illiberal ruling);
Colorado: 1873, Solander *v.* People, 2 Colo. 48, 63 (abortion); 1911, Salas *v.* People, 51 Colo. 461, 118 Pac. 992 (murder);
Columbia: (*Dist.*): 1897, Washington & G. R. Co. *v.* McLane, 11 D. C. App. 220 (railroad accident); 1904, District of Columbia *v.* Dietrich, 23 D. C. App. 577 (sidewalk injury); 1905, Patterson *v.* Ocean A. & G. Co., 25 D. C. App. 46, 66 (injured person); 1906, Grant *v.* U. S., 28 D. C. App. 169 (deceased in homicide); 1912, Washington R. & E. Co. *v.* Wright, 38 D. C. App. 268 (street-car accident); 1915, Traver *v.* Smolik, 43 D. C. App. 150 (assault and battery);
Connecticut: 1897, State *v.* Bradneck, 69 Conn. 212, 37 Atl. 492 (statements by an adulterer, running away); 1898, McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603; 1901, State *v.* Yanz, 54 Conn. 177, 50 Atl. 37 (murder);
Delaware: 1904, Di Prisco *v.* Wilmington C. R. Co., 4 Del. 527, 57 Atl. 906 (child run over);
Florida: 1895, Lambright *v.* State, 34 Fla. 564, 16 So. 582;
Georgia: Rev. C. 1910, § 5766, P. C. § 1024 (admitting statements "accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought"); 1873, Hall *v.* State, 48 Ga. 607; 1878, Burns *v.* State, 61 Ga. 194; 1880, Johnson *v.* State, 65 Ga. 99; 1884, Augusta Factory *v.* Barnes, 72 Ga. 226; 1887, State *v.* Driscoll, 72 Ga. 584; 1887, State *v.* Schmidt, 73 Ga. 473; 1887, Augusta & S. R. Co. *v.* Randall, 79 Ga. 311, 4 S. E. 674; 1888, Savannah F. & W. R. Co. *v.* Holland, 82 Ga. 267, 10 S. E. 200; 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 769, 776, 12 S. E. 18 (whether S. accidentally fell overboard or committed suicide by shooting or was alive; declarations of a companion, after hearing a shot, and upon meeting a second companion, admitted; quoted *supra*); 1893, Von Pollnitz *v.* State, 92 Ga. 16, 17, 18 S. E. 301 (by the deceased, at the door of the room where assaulted); 1894, Boston *v.* State, 94 Ga. 590, 21 S. E. 603 (accused's explanations that he shot by accident, made after arrest, excluded; but similar statements made on voluntarily surrendering himself shortly after the shooting, admitted); 1896, Electric R. Co. *v.* Carson, 98 Ga. 652, 27 S. E. 156; 1897, Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16 (defendant's declarations to a policeman, a few minutes after a homicide); 1899, Dill *v.* State, 106 Ga. 683, 32 S. E. 660 (deceased in an affray); 1899, Thornton *v.* State, 107 Ga. 683, 33 S. E. 673 (by defendant, after killing his wife); 1899, Weinkle *v.* R. Co., 107 Ga. 367, 33 S. E. 471 (by the engineer of a train, after killing mules); 1899, Milam *v.* State, 108 Ga. 29, 33 S. E. 818 (by deceased, after being shot); 1899, Caines *v.* State, 108 Ga. 772, 33 S. E. 632 (by a wounded person, made immediately after); 1901, Western & A. R. Co. *v.* Beason, 112 Ga. 553, 37 S. E. 863; 1905, Goodman *v.* State, 122 Ga. 111, 49 S. E. 922 (deceased); 1905, Kemp *v.* Central of Ga. R. Co., 122 Ga. 559, 50 S. E. 465 (engineer); 1905, Pool *v.* Warren Co., 123 Ga. 205, 51 S. E. 328 (injury at a bridge); 1905, White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411 (railroad injury); 1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (accused); 1906, McBride *v.* Georgia R. & E. Co., 125 Ga. 515, 54 S. E. 674 (injured person); 1906, Southern R. Co. *v.* Brown, 126 Ga. 1, 54 S. E. 911; 1908, Herrington *v.* State, 130 Ga. 307, 60 S. E. 572 (deceased in homicide); 1908, Lyles *v.* State, 130 Ga. 294, 60 S. E. 578 (defendant in homicide); 1911, Walker *v.* State, 137 Ga. 398, 73 S. E. 368 (murder; deceased's statements); 1915, Gibbs *v.* State, 144 Ga. 166, 86 S. E. 543 (murder); 1916, Central of Georgia R. Co. *v.* Brinson, 18 Ga. App. 113, 88 S. E. 1003 (engineer and conductor);
Hawaii: 1913, Nawelo *v.* Hamm-Young Co., 21 Haw. 644 (injury by automobile);
Idaho: 1908, Anderson *v.* Great Northern R. Co., 15 Ida. 513, 99 Pac. 91 (engineer after an injury); 1909, Wheeler *v.* Oregon R. & N. Co., 16 Ida. 375, 102 Pac. 347 (here excluded as opinion); 1920, Erickson *v.* Rutledge Timber Co., 33 Ida. 179, 191 Pac. 212 (injury in a lumber yard); 1921, Wilson *v.* St. Joe Boom Co., — Ida. —, 200 Pac. 884 (injury on a steamboat; the captain's remark soon afterward, admitted on the facts);
Illinois: 1841, Gardner *v.* People, 4 Ill. 90 (a statement made after a killing was rejected, because "the length of time which must have elapsed in travelling the three-quarters of a mile was sufficient to enable the prisoner to become cool and deliberate and even to invent an ingenious account of the hurried transaction"); 1855, Galena & C. U. R. Co. *v.* Fay, 16 Ill. 568; 1889, Chicago W. D. R. Co. *v.* Becker, 128 Ill. 548, 21 N. E. 524; 1891, Quincy Horse R. & C. Co. *v.* Gnuse, 137 Ill. 264, 269, 27 N. E. 190 (by a car-driver, after an accident); 1895, Springfield Con. R. Co. *v.* Welch, 155 Ill. 511, 40 N. E. 1034 (by a motorman just after the car had stopped); 1896, Globe Accident Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563 (statements from several hours to three days later, excluded); 1902, Springfield C. R. Co. *v.* Puntenney, 200 Ill. 9, 65 N. E. 442; 1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (arrest of train employees after an accident, excluded); 1910, Belskis *v.* Dering Coal Co., 246 Ill. 62, 92 N. E. 575 (mine injury);

lamentable waste of time by Supreme Courts in here attempting either to create or to respect precedents. Instead of struggling

Indiana: 1851, Bland *v.* State, 2 Ind. 608, 610 (accused's statement after a homicide); 1880, Jones *v.* State, 71 Ind. 83; 1894, Parker *v.* State, 136 Ind. 284, 290, 35 N. E. 1105 (by the deceased, shortly after a shooting); 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637 (murdered person); 1903, Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125, 66 N. E. 433; 1907, Pittsburgh C. C. & St. L. R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035 (passenger ejected); 1908, O'Connor Co. *v.* Gilaspy, 170 Ind. 428, 83 N. E. 738 (elevator); 1909 Fort Wayne & W. V. T. Co. *v.* Roudebush, 173 Ind. 57, 88 N. E. 676 (motorman); 1917, Cincinnati H. & D. R. Co. *v.* Gross, 186 Ind. 471, 114 N. E. 962 (trial Court's discretion);
Iowa: 1871, State *v.* Porter, 34 Ia. 137; 1886, Armil *v.* R. Co., 70 Ia. 131, 30 N. W. 42; 1894, Smith *v.* Dawley, 92 Ia. 312, 60 N. W. 625; 1899, Keyes *v.* Cedar Falls, 107 Ia. 509, 78 N. W. 227 (injured person after a fall); 1902, Alsever *v.* Minneapolis & S. L. R. Co., 115 Ia. 338, 88 N. W. 841 (engineer's statement after an injury); 1903, Sutcliffe *v.* Iowa, S. F. M. Ass'n, 119 Ia. 220, 93 N. W. 90 (suicide); 1905, Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475 (injured person's statement after a fall); 1905, Hutcheis *v.* Cedar R. & M. C. R. Co., 128 Ia. 279, 103 N. W. 779 (passenger falling from a car; model opinion, by McClain, J.); 1906, Christopherson *v.* Chicago M. & St. P. R. Co., 135 Ia. 409, 109 N. W. 1077 (injured person); 1907, Clark *v.* Van Vleck, 135 Ia. 1904, 112 N. W. 648; 1908, Kern *v.* Des Moines C. R. Co., 141 Ia. 620, 118 N. W. 451 (street-car injury); 1915, Westcott *v.* Waterloo C. F. & N. R. Co., 173 Ia. 355, 155 N. W. 255 (collision with street-car); 1916, Peterson *v.* Phillips Coal Co., 175 Ia. 223, 157 N.W. 194 (employee killed in a coal mine); 1919, Stukas *v.* Warfield P.H.Co., 188 Ia. 878, 175 N.W. 81 (elevator accident); 1920, Barrett *v.* Chicago M. & St. P. R. Co., 190 Ia. 509, 175 N. W. 950, 180 N.W. 670 (engineer after a collision);
Kansas: 1871, State *v.* Montgomery, 8 Kan. 360; 1881, State *v.* Pomeroy, 25 Kan. 350; 1891, Tennis *v.* R. Co., 45 Kan. 509, 25 Pac. 876; 1898, Walker *v.* O'Connell, 59 Kan. 306, 52 Pac. 894 (by an engineer, two or three hours after an accident); 1902, State *v.* Morrison, 64 Kan. 669, 68 Pac. 48 (deceased's declaration after a stabbing); 1902, Atchison T. & S. F. R. Co. *v.* Logan, 65 Kan. 748, 70 Pac. 878 (railroad injury to employee); 1910, Campbell *v.* Brown, 81 Kan. 480, 106 Pac. 37 (death by wood alcohol; the deceased's remarks while drinking, as to where he got it, not admitted); 1914, State *v.* Powers, 92 Kan. 220, 139 Pac. 1166 (assault with intent to kill); 1920, State *v.* Pack, 106 Kan. 188, 186 Pac. 742; 1920, Mayeur *v.* Crowe C. & M. Co., 106 Kan. 123, 186 Pac. 1035 (death in a mine);
Kentucky: 1896, Norfleet *v.* Com., — Ky. —, 33 S. W. 938 (by a person shot, immediately after the shooting); 1896, Jackson *v.* Com., — Ky. —, 37 S. W. 847; 1897, Hughes *v.* Com., — Ky. —, 41 S. W. 294; 1898, Hughes *v.* R. Co., — Ky. —, 48 S. W. 671 (brakeman's injury); 1899, Brown *v.* R. Co., — Ky. —, 53 S. W. 1041 (injured person falling off a street-car); 1899, Louisville & N. R. Co. *v.* Shaw, — Ky. —, 53 S. W. 1048 (injured person put off a steam-car); 1900, Louisville & C. P. Co. *v.* Samuels, — Ky. —, 59 S. W. 3; 1901, Johnson *v.* Com., — Ky. —, 61 S. W. 1005 (assaulted woman's complaint); 1901, Floyd *v.* R. Co., — Ky. —, 64 S. W. 653 (by a motorman after an accident); 1904, Selby *v.* Com., — Ky. —, 80 S. W. 221 (accused, after a homicide); 1905, Lexington St. R. Co. *v.* Strader, — Ky. —, 89 S. W. 158 (motorman); 1906, Louisville & N. R. Co. *v.* Molloy's Adm'x, 122 Ky. 219, 91 S. W. 685 (railroad injury); 1912, Cincinnati N. O. & T. P. R. Co. *v.* Martin, 146 Ky. 260, 142 S. W. 410 (engineer's statement after accident); 1914, Rogers *v.* Com., 161 Ky. 754, 171 S. W. 464 (manslaughter); 1916, McCandless *v.* Com., 170 Ky. 301, 185 S. W. 1100 (accused in homicide); 1918, Barrett's Adm'r *v.* Brand, 179 Ky. 740, 201 S. W. 331 (malpractice); 1920, Louisville & N. R. Co. *v.* Horton, 187 Ky. 617, 219 S. W. 1084 (engineer, after running over a trespasser); 1921, Valentine *v.* Weaver, 191 Ky. 37, 228 S. W. 1036 (employee's death; statement made on return from work and after sleeping, as to receiving an injury, excluded);
Louisiana: 1885, State *v.* Melton, 37 La. An. 77, 79; 1886, State *v.* Molisse, 38 La. An. 381, 384; 1887, State *v.* Estoup, 39 La. An. 219, 1 So. 448 (by a murdered person); 1896, State *v.* Ramsey, 48 La. An. 1407, 20 So. 904; 1899, State *v.* Sadler, 51 La. An. 1397, 26 So. 390 (by a person shot); 1900, State *v.* Robinson, 52 La. An. 541, 27 So. 129 (by the deceased, in an affray); 1900, Marler *v.* R. Co., 52 La. An. 727, 27 So. 176 (railway injury); 1902, State *v.* Maxey, 107 La. 799, 32 So. 206 (injured person); 1902, State *v.* Blanchard, 108 La. 110, 32 So. 397 (accused); 1904, State *v.* Charles, 111 La. 933, 36 So. 29 (deceased in homicide); 1904, State *v.* Foley, 113 La. 52, 36 So. 885 (murder; prior cases cited and construed); 1916, State *v.* McLaughlin, 138 La. 958, 70 So. 925 (murder; the woman, with her throat cut, exclaimed, "George did it," having just been awakened by the assault; admitted; careful opinion by Monroe, C. J.);
Maine: 1899, State *v.* Maddox, 92 Me. 348, 42 Atl. 788 (assault); 1902, Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844 (highway accident);
Maryland: 1898, Wright *v.* State, 88 Md. 705, 41 Atl. 1060 (statements by the accused after an affray); 1900, Baltimore City P. R. Co. *v.*

weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are

Tanner, 90 Md. 315, 45 Atl. 188 (by an injured person while having his injuries dressed); *Massachusetts:* 1896, Eastman *v.* R. C., 165 Mass. 342, 43 N. E. 115 (injured person);
Michigan: 1877, Mobley *v.* Kittleberger, 37 Mich. 362; 1901, Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404 (street-car collision); 1903, Ensley *v.* R. Co., 134 Mich. 195, 96 N. W. 34 (railroad passenger); 1915, Rogers *v.* Saginaw B. C. R. Co., 187 Mich. 490, 153 N. W. 784; 1917, Hyatt *v.* Leonard Storage Co., 196 Mich. 337, 162 N. W. 951 (collision);
Minnesota: 1895, Firkins *v.* R. Co., 61 Minn. 31, 63 N. W. 173; 1903, State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723 (murder); 1905, State *v.* Williams, 96 Minn. 351, 105 N. W. 265 (deceased in a murder); 1913, State *v.* Findling, 123 Minn. 413, 144 N. W. 142 (murder); 1915, Lambrecht *v.* Schreyer, 129 Minn. 271, 152 N. W. 645 (collision of wagons);
Mississippi: 1883, Kramer *v.* State, 61 Miss. 161; 1896, Mobile & C. R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14 (statements while extinguishing a fire);
Missouri: 1860, State *v.* Dominique, 30 Mo. 586; 1871, State *v.* Sloan, 47 Mo. 610 (deceased's remarks while his wound was being dressed); 1877, State *v.* Brown, 64 Mo. 370; 1883, State *v.* Walker, 78 Mo. 386; 1894, State *v.* Martin, 124 Mo. 514, 28 S. W. 12; 1896, State *v.* Thompson, 132 Mo. 301, 34 S. W. 31 (statements by the deceased while eating a poisoned lunch); 1897, State *v.* Thompson, 141 Mo. 408, 42 S. W. 949; 1898, State *v.* Sexton, 147 Mo. 89, 48 S. W. 452 (murder); 1900, State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136 (injured person); 1900, Ruschenberg *v.* So. Electric Co., 161 Mo. 70, 61 S. W. 626 (motorman after an accident); 1902, State *v.* Lockett, 168 Mo. 480, 68 S. W. 563; 1903, State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194 (victim of an assault); 1903, State *v.* Pollard, 174 Mo. 607, 74 S. W. 969 (rape); 1912, Jewell *v.* Excelsior P. M. Co., 166 Mo. App. 555, 149 S. W. 1045 (injured person fleeing from an explosion); 1921, State *v.* Dougherty, 287 Mo. 82, 228 S. W. 786 (deceased in a shooting affray); 1922, State *v.* Harlan, — Mo. —, 240 S. W. 197 (murder);
Montana: Rev. C. 1921, § 10511 (like Cal. C. C. P. § 1850); 1895, State *v.* Pugh, 16 Mont. 343, 40 Pac. 861; 1903, State *v.* Tighe, 27 Mont. 327, 71 Pac. 3;
Nebraska: 1893, Missouri P. R. Co. *v.* Baier, 37 Nebr. 235, 241, 55 N. W. 913 (injured person); 1895, Collins *v.* State, 46 Nebr. 37, 64 N. W. 432 (by a person found wounded and unconscious and carried to a hotel; statement, made more than two hours after regaining consciousness, excluded); 1898, Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 60 (injured person); 1898, Union P. R. Co. *v.* Elliott, 54 Nebr. 299, 74 N. W. 627 (by an engineer and the injured person, just after the injury); 1899, Sullivan *v.* State, 58 Nebr. 796, 79 N. W. 721 (defendant's remarks after an affray); 1903, Pledger *v.* R. Co., 69 Nebr. 456, 95 N. W. 1057 (railroad injury); 1905, Lexington *v.* Fleharty, 74 Nebr. 626, 104 N. W. 1056 (injured person);
Nevada: 1915, State *v.* Pappas, 39 Nev. 40 152 Pac. 571 (assault);
New Hampshire: 1903, Murray *v.* R. Co., 72 N. H. 32, 54 Atl. 289; 1911, Dorr *v.* Atlantic S. L. R. Co., 76 N. H. 160, 80 Atl. 336 (no fixed period of time if recognized); 1914, Nawn *v.* Boston & Maine R. Co., 77 N. H. 299, 91 Alt. 181 (statement of an injured person who was unconscious in the interval; doctrine of the trial Court's discretion examined); 1917, Hansen *v.* Grand Trunk R. Co., 78 N. H. 518, 102 Alt. 625 (carrier's erroneous transportation; a telegram from the plaintiff to her sister, "The Grand Trunk conductor has put me on a wrong train," not admitted);
New Jersey: 1889, Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118 (apparently refusing to recognize any time-allowance at all); 1897, Trenton P. R. Co. *v.* Cooper, 60 N. J. L. 219, 221, 37 Atl. 730 (a driver's exclamations when his horse was hurt); 1905, State *v.* Laster, 71 N. J. L. 586, 60 Atl. 361 (deceased); 1919, Rathbun *v.* Brancatello, 93 N. J. L. 222, 107 Atl. 279 (automobile injury; the exclamation of M., a bystander, identifying the vehicle number, admitted; stated more fully *ante*, § 751, n. 2, where the ruling really belongs); 1918, Murphy *v.* Brown & Co., 91 N. J. L. 412, 103 Atl. 28 (statements as to cause of an accident while being bandaged, admitted);
New Mexico: 1916, State *v.* Chesher, 22 N. M. 319, 161 Pac. 1108 (homicide);
New York: 1874, People *v.* Davis, 56 N. Y. 102; 1904, Austin *v.* Bartlett, 178 N. Y. 310, 70 N. E. 855 (statements after a runaway accident); 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690 (murder; deceased's exclamations); 1913, Greener *v.* General Electric Co., 209 N. Y. 135, 102 N. E. 527 (injured person after a fall; here excluded; but the opinion misunderstands the theory and ignores the element of time);
North Carolina: 1843, State *v.* Tilly, 3 Ired. 424, 435 (defendant's declarations after a homicide, as to the mode of its occurrence); 1903, Bumgardner *v.* R. Co., 132 N. C. 438, 43 S. E. 948 (brakeman, at a railroad accident); 1915, State *v.* Peoples, 170 N. C. 763, 87 S. E. 328 (homicide); 1919, State *v.* Davis, 177 N. C. 573, 98 S. E. 785 (murder);
North Dakota: 1903, Balding *v.* Andreas, 12 N. D. 267, 96 N. W. 305; 1905, Puls *v.* Grand Lodge, 13 N. D. 559, 102 N. W. 165 (by one who was ill, as to having taken horse medicine,

able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial

admitted); 1911, Gebus *v.* Minneapolis St. P. & S. S. M. R. Co., 22 N. D. 29, 132 N. W. 227;
Ohio: 1852, Wetmore *v.* Mell, 1 Oh. St. 26; 1871, Forrest *v.* State, 21 Oh. St. 641 (accused after a homicide); 1875, Cleveland C. & C. R. Co. *v.* Mara, 26 Oh. St. 185, 190; 1914, State *v.* Lasecki, 90 Oh. 10, 106 N. E. 660 (murder; elaborate and liberal opinion by Wanamaker, J.);
Oklahoma: 1902, Smith *v.* Terr. 11 Okl. 669, 69 Pac. 805 (accused, after a homicide); 1905, Regnier *v.* Terr., 15 Okl. 652, 82 Pac. 509 (victim of a shooting); 1908, Price *v.* State, 1 Okl. Cr. 358, 98 Pac. 447 (homicide); 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561 (deceased, after a shooting); 1915, St. Louis & S. F. R. Co. *v.* Fick, 47 Okl. 530, 149 Pac. 1126 (passenger); 1916, Chicago R. I. & P. R. Co. *v.* Foltz, 54 Okl. 556, 154 Pac. 519 (death of an employee); 1916, Herring *v.* Hood, 55 Okl. 737, 155 Pac. 253 (injury in a store); 1916, Prickett *v.* Sulzberger & S. Co., 57 Okl. 567, 157 Pac. 356 (elevator accident); 1917, Chicago R. I. & P. R. Co. *v.* Jackson, 63 Okl. 32, 162 Pac. 823 (railroad employee's death while at work); 1918, Lail *v.* State, 14 Okl. Cr. 596, 174 Pac. 1099 (murder);
Oregon: Laws 1920, § 707 (like Cal. C. C. P. § 1850); 1903, State *v.* McCann, 43 Or. 155, 72 Pac. 137 (assault);
Pennsylvania: 1867, Hanover R. Co. *v.* Coyle, 55 Pa. 402; 1875, Elkins *v.* McKean, 79 Pa. 493, 501 (by deceased, after an explosion); 1889, Pennsylvania R. Co. *v.* Lyons, 129 Pa. 121, 18 Atl. 759; 1898, Com. *v.* Van Horn, 188 Pa. 143, 41 Atl. 469 (murder); 1902, Keefer *v.* Pacific M. L. Ins. Co. 201 Pa. 448, 51 Atl. 366 (declarations 15 or 30 minutes after a fall, excluded; Mitchell, J., diss.); 1918, Wegganet *v.* Bartle, 88 Or. 310, 171 Pac. 587 (automobile injury); 1917, Eby *v.* Traveler's Ins. Co., 258 Pa. 525, 102 Atl. 209 (deceased's statements made while strangling, admitted); 1922, Com. *v.* Puntario, — Pa. —, 115 Atl. 831(injured person losing speech-power when shot and making a statement immediately on its restoration);
Philippine Islands: C. C. P. 1901, § 279 (like Cal. C. C. P. § 1850);
Porto Rico: 1912, Rosado *v.* Ponce R. &. L. Co. 18 P. R. 593 (death by electric wire); 1914, People *v.* Crespo, 21 P. R. 285, 294 (murder);
Rhode Island: 1889, State *v.* Murphy, 16 R. I. 528, 17 Atl. 998 (deceased); 1903, State *v.* Epstein, 25 R. I. 131, 55 Atl. 204 (injured person); 1912, Champlin *v.* Pawcatuck V. St. R. Co., 33 R. I. 572, 82 Atl. 481;
South Carolina: 1880, State *v.* Belcher, 13 S. C. 459, 463; 1894, State *v.* Talbert, 41 S. C. 526, 530, 19 S. E. 852 (by the deceased, on crawling into a store after being shot); 1896, State *v.* Arnold, 47 S. C. 9, 24 S. E. 926 (a deceased person, a few minutes after being shot); 1903, Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810 (railroad accident); 1904, State *v.* McDaniel, 68 S. C. 304, 47 S. E. 384 (defendant in homicide); 1904, State *v.* Lindsey, 68 S. C. 276, 47 S. E. 389 (wife of the assaulted person); 1904, Williams *v.* Southern R. Co., 68 S. C. 369, 47 S. E. 706 (person injured on a railroad track); 1904, Nelson *v.* Georgia C. & N. R. Co., 68 S. C. 462, 47 S. E. 722 (conductor); 1907, State *v.* Way, 76 S. C. 91, 56 S. E. 653 (defendant in homicide);
South Dakota: 1904, Fallon *v.* Rapid City, 17 S. D. 570, 97 N. W. 1009 (sidewalk injury); 1909, Jungworth *v.* Chicago M. & St. P. R. Co., 24 S. D. 342, 123 N. W. 695 (cattle injured on track; conductor's conversation with the stock-tender, excluded; careful opinion, by McCoy, J.);
Tennessee: 1851, Denton *v.* State, 1 Swan 281; 1852, Nelson *v.* State, 2 Swan 237, 260 (statements by an accused, about the blood on him, made shortly after the affray); 1869, Riggs *v.* State, 6 Coldw. 518 (declarations after a homicide);
Texas: 1870, Colquitt *v.* State, 34 Tex. 550 (statements of the assaulted person); 1888, Railway *v.* Crowder, 70 Tex. 226, 7 S. W. 709; 1891, International & G. N. R. Co. *v.* Anderson, 82 Tex. 519, 17 S. W. 1039; 1891, Texas & P. R. Co. *v.* Robertson, 82 Tex. 660, 17 S. W. 1041; 1898, Freeman *v.* State, 40 Tex. Cr. 545, 46 S. W. 641 (murdered person); 1902, San Antonio & A. P. R. Co. *v.* Gray, 95 Tex. 424, 67 S. W. 763 (railroad accident); 1920, Panhandle & S. F. R. Co. *v.* Laird, — Tex. Civ. App. —, 224 S. W. 305 (railroad and automobile collision); 1922, Freeman *v.* State, — Tex. Cr. —, 239 S. W. 969 (homicide);
Utah: 1896, People *v.* Kessler, 13 Utah 69, 44 Pac. 97 (statements of the deceased, 45 minutes after being shot, excluded; disapproving Linderberg *v.* Mining Co., 9 Utah 163, 33 Pac. 692); 1896, Wilson *v.* S. P. Co., 13 Utah 352, 44 Pac. 1040 (switchman after an accident); 1905, Leach *v.* Oregon S. L. Co., 29 Utah 285, 8 Pac. 90 (brakeman knocked off a car);
Vermont: 1825, Ross *v.* Bank, 1 Aik. 43, 52 (issue as to the loss of bank bills said to have been delivered in a package to a steamboat captain; the shipper's declarations, before delivery, as to the contents of the package, admitted as trustworthy); 1896, State *v.* Badger, 69 Vt. 216, 37 Atl. 293 (affray);
Virginia: 1874, Com. *v.* Little, 25 Gratt. 926; 1883, Kirby *v.* Com., 77 Va. 689; 1902, Andrews *v.* Com., 100 Va. 801, 40 S. E. 935 (injured person's cries); 1904, Bowles *v.* Com., 103 Va. 816, 48 S. E. 527 (deceased);

Court.[4] Until such a beneficent result is reached, the lucubrations of Supreme Courts over the details of each case will continue to multiply the tedious reading of the profession:

1916, DIBELL, J., in *Roach* v. *Great Northern R. Co.*, 133 Minn. 257, 158 N. W. 232: "There is some element of discretion in the trial Court in determining whether a statement is a part of the 'res gestæ.' . . . In passing upon the admissibility of testimony claimed to constitute a part of the 'res gestæ,' the trial Court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it, and in determining this it considers whether the statements are spontaneous; whether there was an opportunity for fabrication or a likelihood of it; the lapse of time between the act and the declaration relating to it; the attendant excitement; the mental and physical condition of the declarant, and other circumstances important in determining whether the trustworthiness of the unsworn statements is such that they may safely go to the jury. In reviewing the trial Court's ruling, this Court defers to its determination of the preliminary facts bearing upon the propriety of receiving the testimony. To this extent its admissibility is within the sound discretion of the trial Court."

(*c*) *Subject of the utterance.* The utterance must *relate to the circumstances of the occurrence preceding it.* This is perhaps a cautionary rather than a logically necessary restriction. If, for example, after an assault, the injured person exclaims that in the previous week the attacking party had tried to shoot him, there is perhaps no less reason for trusting that part of his utterance than any other part. Nevertheless, it is possible to argue that such utterances imply to some extent a process of reflection or deliberate reason-

1908, Blue Ridge L. & P. Co. *v.* Price, 108 Va. 652, 62 S. E. 938 (motorman after an accident); 1919, Washington-Virginia R. Co. *v.* Deahl, 126 Va. 141, 100 S. E. 840 (railroad and vehicle collision);

Washington: 1902, Roberts *v.* Port Blakeley Mill Co., 30 Wash. 25, 70 Pac. 111 (railroad accident); 1903, State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036 (statements just after regaining consciousness, admitted); 1905, Dixon *v.* Northern P. R. Co., 37 Wash. 310, 79 Pac. 943 (trespasser ejected from car); 1905, Starr *v.* Ætna L. Ins. Co., 41 Wash. 199, 83 Pac. 113 (person injured on a railroad track); 1909, Henry *v.* Seattle Electric Co., 55 Wash. 444, 104 Pac. 776 (conductor, after a collision); 1910, Swanson *v.* Pacific Shipping Co., 60 Wash. 87, 110 Pac. 795 (injury in a shipyard); 1913, State *v.* Hazzard, 75 Wash. 5, 134 Pac. 514 (murder by starvation; the deceased's statements as to the food she was receiving, admitted); 1918, Singer *v.* Metz Co., 101 Wash. 67, 171 Pac. 1032 (motor car collision); 1922, State *v.* Goodwin, — Wash. —, 204 Pac. 769 (injury at an explosion; citing the above text with approval);

West Virginia: 1871, Crookham *v.* State, 5 W. Va. 510; 1901, Sample *v.* Consol. L. & R. Co., 50 W. Va. 472, 40 S. E. 597 (child run over by a car; motorman's declaration, immediately after, while the body was under the car, as to his having seen the child, admitted); 1904, Williams *v.* Belmont C. & C. Co., 55 W. Va. 84, 46 S. E. 802 (motorman); 1905, State *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545 (murder; accused's statement); 1921, State *v.* McKinney, 88 W. Va. 400, 106 S. E. 894 (malicious shooting of a brother-in-law; defendant's sister's statement of physical injury by her husband the same day, admitted);

Wisconsin: 1877, Felt *v.* Amidon, 43 Wis. 470; 1890, Hooker *v.* R. Co., 76 Wis. 542, 547, 44 N. W. 1085 (by an engineer, after an accident); 1891, Hermes *v.* R. Co., 80 Wis. 590, 50 N. W. 584 (similar); 1893, Reed *v.* Madison, 85 Wis. 667, 674, 56 N. W. 182 (pointing out the place of an accident); 1894, Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272; 1896, Steinhofel *v.* R. Co., 92 Wis. 123, 65 N. W. 852 (injured person); 1896, Christianson *v.* Furniture Co., 92 Wis. 649, 66 N. W. 699 (person injured in a factory); 1903, Bliss *v.* State, 117 Wis. 596, 94 N. W. 325; 1903, Hupfer *v.* National D. Co., 119 Wis. 417, 96 N. W. 809 (death in a vat); 1905, Tiborsky *v.* Chicago M. & St. P. R. Co., 124 Wis. 243, 102 N. W. 549 (telegraph operator's reply to the injured person); 1906, Johnson *v.* State, 129 Wis. 146, 108 N. W. 55 (defendant after a homicide);

Wyoming: 1899, Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761 (by deceased, after being shot).

[4] 1907, Pittsburg C. C. & St. L. R. Co. *v.* Haislup, 39 Ind. App. 394, 79 N. E. 1035 (the above passage quoted with approval).

ing; and practically there is not the same necessity for employing them. It seems clear, on the precedents, that utterances thus relating to some distinct prior circumstance would not be received. But this result is usually reached by invoking the language of 'res gestæ'; and the authorities are more conveniently considered under that head (*post*, § 1754).

§ 1751. **Knowledge Qualifications (Observation), Infancy, Infamy, etc.** (*a*) Upon the ordinary principle applicable to all testimonial evidence (*ante*, § 656), and therefore to Hearsay statements offered under these Exceptions (*ante*, § 1424), the declarant must appear to have had *an opportunity to observe personally* the matter of which he speaks. This requirement is in practice usually fulfilled in the case of all declarations otherwise admissible; for they are made by injured persons or others present and concern the circumstances of the injury as observed by them; and thus no occasion arises for calling attention to the requirement. Nevertheless, in an appropriate case, it would without doubt be enforced; for example, if a passenger in a railroad collision should exclaim, "The engineer did not reverse the lever," or "The conductor did not read the train-despatcher's orders."

(*b*) Any one possessing such qualifications would be a competent speaker. In particular, a *bystander's* declarations would be admissible. In a few Courts, such declarations are excluded (*post*, § 1755) upon a mistaken application of the Verbal Act doctrine.

(*c*) By the general principle applicable to these Exceptions to the Hearsay rule (*ante*, § 1424), the declarant must at least not lack the usual *testimonial qualifications* (*ante*, § 480) that would be required of him if testifying on the stand. Which of those qualifications are here to be treated applicable and indispensable?

(1) Does the disqualification of *infancy* (*ante*, §§ 505–509) exclude declarations otherwise admissible? It would seem not;[1] because the principle of the present Exception obviates the usual sources of untrustworthiness (*ante*, § 506) in children's testimony; because, furthermore, the orthodox rules for children's testimony are not in themselves meritorious (*ante*, § 509); and, finally, because the oath-test, which usually underlies the objection to children's testimony, is wholly inapplicable to them (*post*, § 1821, § 1828, notes 3–5).

(2) Does the disqualification of *infamy by conviction of crime* (*ante*, §§ 519–524) here exclude spontaneous exclamations uttered under the influence of the 'res gestæ'? Considering the peculiar nature of the present exception, and the now conceded anachronism of the disqualification by infamy, it ought not to be extended to apply here.[2]

§ 1751. [1] *Accord:* 1908, Soto *v.* Terr., 12 Ariz. 36, 94 Pac. 1104 (child of four years; complaint after an assault, admitted); 1908, Beal-Doyle D. G. Co. *v.* Carr, 85 Ark. 479, 108 S. W. 1053 (approving the text above); 1904, Kenney *v.* State, 45 Tex. Cr. 500, 79 S. W. 570, 817 (good opinion by Henderson, J., Davidson, P. J., diss.).

For the cases as to a child's *complaint of rape*, see *post*, § 1761, n. 2.

Distinguish the rule for *dying declarations*, which may well be different (*ante*, § 1445, n. 1).

[2] *Accord:* 1900, Neeley *v.* State, — Tex. Cr. —, 56 S. W. 625; 1904, Flores *v.* State, — Tex. Cr. —, 79 S. W. 808; 1904, Kenney *v.* State, — Tex. Cr. —, 79 S. W. 817 (approving

(3) For similar reasons, the marital disqualification should not exclude utterances of *husband* or *wife* otherwise receivable for each other;[3] for the present principle is assumed to override any considerations of interest in the declarant, and moreover the marital disqualification (*ante*, § 601) is now an anachronism; though the marital *privilege* rests on different grounds, and would equally exclude extrajudicial utterances.[4]

(4) The disqualification of *insanity* (*ante*, § 492) should probably be treated for the present purpose like that of infancy.[5]

(5) The *oath-capacity* is a purely artificial one (*post*, §§ 1820–1829), and has no inherent relation to testimonial capacity. It has no place in excluding extrajudicial declarations forming exceptions to the Hearsay rule (*ante*, § 1362). The close resemblance of its requirements to those of the Exception for dying declarations (*ante*, § 1443) and for children's testimony (*ante*, § 1595) will account for the supposition, occasionally found, that those requirements have some general application to extrajudicial declarations of the present sort.[6]

§ 1752. (II) **Certain Spurious Limitations borrowed from the Verbal Act Doctrine.** Owing to the mistaken application of the Verbal Act doctrine to cases falling properly under the present Exception, certain limitations have by some Courts been added to the foregoing legitimate ones. These may now be considered. Yet it is to be noted, once for all, that none of these have legitimately any place in the present Exception; they are improperly borrowed, by reason of a failure to perceive that the present Exception, and the Verbal Act doctrine (as already noticed in §§ 1747, 1746) are distinct domains in the law of Evidence. Before examining these limitations, a summary survey of the scope of the Verbal Act doctrine (*post*, §§ 1772–1786) is desirable:

The Verbal Act doctrine presupposes that there is an act, relevant in some way under the issue, which needs for its full purport to be construed together with the words of the actor. For example, in cases of acquisition of title by adverse possession, the mere fact of occupation is in itself colorless and indecisive, and the other conduct and the words accompanying the occupation must be considered. Thus, if Roe has said, during his occupation, "This is my own land, not Doe's; I have a deed to it," the complexion of the act of occupation appears to be adverse. The utterance is not offered testimonially, *i. e.* as an assertion evidencing the existence of the deed asserted, but as a verbal part of the act of occupation, giving definite significance to it irrespective of the assertion's truth. Thus, certain limitations are to be deduced

the foregoing cases, and distinguishing Long *v.* State, 10 Tex. App. 186).

By an analogous principle a *slave's* declarations of this sort were not excluded by his disqualifications to testify: 1845, Yeatman *v.* Hart, 6 Humph. 375; 1867, Rogers *v.* Crain, 30 Tex. 284, 288.

[3] Cases cited *ante*, § 604, n. 3.

[4] Cases cited *post*, § 2233.

[5] 1905, Wilson *v.* State, 49 Tex. Cr. 50, 90 S. W. 312.

Distinguish, however, the rule for *dying declarations* (*ante*, § 1445, n. 2).

[6] *E. g.* the dissenting opinion of Davidson, P. J., in Kenney *v.* State, Tex., *supra*, n. 1, and the treatises therein quoted.

in using such verbal parts of acts: (1) There must be a main or principal act, relevant under the issue, the significance of which needs to be made definite; (2) The words must genuinely elucidate or give character to this act; (3) The words must be by the actor himself, not by another person; and (4) the words must be precisely contemporaneous with the act. Now all four of these limitations, though entirely peculiar to the Verbal Act doctrine, have been by some Courts misapplied more or less extensively to the present Exception for Spontaneous Explanations. That it is a case of misapplication is clear; for here the concern is with a hearsay or testimonial use of the words, while there no such function is attributed to them. The history of this transfer of language and of ideas is obscure, in so far as no precise case or point of time can be fixed upon as exhibiting it. But it is easily accounted for by the superficial resemblance of the two doctrines in some instances and by their undeveloped forms at the time of the confusion. The practical effect of this misapplication of the above four limitations may now be considered.

§ 1753. **Same: (1) There must be a Main or Principal Act.** The limitation is sometimes mentioned, for cases under the Exception, that there must be a "main" or "principal act," already relevant in the case to which the declarations relate:

1867, O'BRIEN, J., in *Gresham* v. *Manning*, Ir. R. 1 C. L. 125 (action for obscuring lights; guests of the hotel had objected, in leaving, to take the rooms alleged to be darkened, and asserted the darkness as their reason): "The act which they [the declarations] accompany should be one that would be evidence in the cause without any such declarations. . . . The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross-examination; and though they were accompanied by acts tending to show that those parties really entertained the opinion they so expressed, still their statements would not on that account be exempted from the general rule excluding hearsay evidence, where the acts which they accompanied would not be evidence 'per se.'"[1]

This form of expression is frequent enough. But there seems to be in the United States no ruling turning directly upon the supposed limitation, and it is perhaps not too much to hope that the language hitherto employed with only nominal effect may yet be discarded. Practically the requirement is satisfied in every case where declarations are offered under this Exception, *i. e.* in cases of affrays and accidents; and where it would be in strictness not satisfied, a loose interpretation of the phrase seems to hold it satisfied. But such a limitation has no place in this Exception. What is required here is merely that there shall be some startling occurrence calculated to produce nervous excitement and spontaneous utterance (*ante*, § 1749). It is immaterial

§ 1753. [1] In the following case, however, no attention was paid to this rule: 1872, R. *v.* Edwards, 12 Cox Cr. 230 (Quain, J., admitted remarks of the deceased wife, a week before being killed, and upon taking an axe and a knife to her neighbor, that her husband often threatened her with them and "she wished to get them out of the way"). It may be added that the declarations in Gresham *v.* Manning, *supra*, so far as evidencing the mental effect produced upon the guests, were admissible under § 1729, *ante*.

whether or not that startling occurrence is itself relevant under the issue; though in the ordinary case it does happen to be relevant.

§ 1754. **Same: (2) Declaration must elucidate the Act.** In the genuine Verbal Act doctrine, the admissibility of the actor's utterances is based on the assumption that the main act itself was colorless, and required to be made more definite in one respect or another; the test is whether the act was "equivocal," and whether the utterance tends to remove this equivocality and give definite effect. Now the language of this limitation is also found borrowed for the present Exception. But in this spurious use of it there is found no requirement that the act itself shall have been equivocal, but merely the requirement that the declaration shall tend to "illustrate" it, to "elucidate" it, to "throw light" upon it, to "explain" it, or to "characterize" or "give character to" it.[1] In other words, merely the general phrases from the Verbal Act doctrine are used without the fundamental reason for them. Practically, this language amounts usually to little or nothing as a limitation; declarations which do not in some way or other "elucidate" or "explain" the occurrence are naturally not likely to be offered, and it is therefore easy enough to find that they do furnish this required elucidation.[2]

There is, however, one aspect in which the limitation becomes a real one; for the matter to be "elucidated" is, by hypothesis, the *occurrence* or *act which has led to the utterance*, and not some distinctly separate and prior matter. Suppose, for example, an injured passenger in a railway collision, thinking of his family's condition, exclaims, "I hope that my insurance-premium, which I mailed yesterday, has reached the company," referring to premium-money alleged by the insurance-company not to have been received. Such an utterance would by the present spurious limitation clearly be inadmissible. On principle, however, it would seem also inadmissible under the legitimate principles of the Exception, as already noted (*ante*, § 1749, par. *c.*). Apparently the Courts are disposed, on one theory or another, to enforce this restriction:[3]

1805, Ellenborough, L. C. J., in *Aveson* v. *Kinnaird*, 6 East 193 (admitting declarations of a wife upon elopement, charging the husband with misconduct causing it): "[I should not admit it] if it were a collateral declaration of some matter which happened at another time."

§ 1754. [1] The instances are innumerable; illustrations are found in Chicago W. D. R. Co. *v.* Becker, 128 Ill. 545, 21 N. E. 524; Baker *v.* Gausin, 71 Ind. 319; 1908, Hyvonen *v.* Hector Iron Co., 103 Minn. 331, 115 N. W. 167 (mining accident); Castner *v.* Slicker, 33 N. J. L. 97; State *v.* Belcher, 13 N. C. 463; 1914, State *v.* Hosmer, 72 Or. 57, 142 Pac. 581 (statements by a nun alleged to have been kidnapped); 1914, Ferance *v.* Forestdale Mfg. Co., 36 R. I. 154, 89 Atl. 339 (factory injury).

[2] For illustrations of this mode of using such language, see Scaggs *v.* State, Mitchum *v.* State, quoted *ante*, §§ 1747, 1749.

[3] Nevertheless, here too may be found extremely liberal interpretations of this limitation: 1902, Jack *v.* Mutual R. F. Life Ass'n, 51 C. C. A. 36, 113 Fed. 49 (statements by the deceased insured, that "J. had his life insured, that he had hired L. to kill him," admitted; quoted *ante*, § 1750); 1882, Lander *v.* People, 104 Ill. 256 (admitting evidence of exclamations recognizing an alleged violator on the day after; "The spontaneous exclamation, 'There goes the man,' with the response, 'Yes, there he goes,' is highly characteristic of the fact of their recognition").

1873, *Agassiz* v. *Tramway Co.*, 21 W. R. 199 (after an accident the conductor mentioned that the driver "has been off the line five or six times to-day"). KELLEY, C. B.: "The conductor's remark had no relation to the accident in question, but referred to the conduct of the driver at another time or times." BRAMWELL, B.: "It tends to criminate the driver on account of conduct displayed on a perfectly different occasion."

§ 1755. **Same: (3) Declaration must be that of the Actor himself; Bystander's Utterances.** Under the genuine Verbal Act doctrine, the object being to give definite legal effect to a certain act, by means of ascertaining its total purport as intended by the actor (*post*, § 1775), it is obvious that the conduct and the verbal utterances must be by the same person. For example, in ascertaining adverse possession, it is only the occupant's utterances that can give significance to the quality of his occupation as adverse. But, under the present Exception, that nervous excitement which renders an utterance admissible may exist equally for a mere bystander as well as for the [illegible]d or injuring person, and therefore the utterances of either, concerning [illegible]hey observed, are equally admissible:

1862, POLLOCK, C. B., in *Milne* v. *Leisler*, 7 H. & N. 786, 796: "Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue and advance the search after truth. No doubt, for that reason, in the case of an exclamation by any one in a crowd, when an accident occurs, and the conduct of a particular person is in question, it may be asked whether some one did not call out 'shame!'; for it is part of the 'res gestæ.'"

Fortunately, there has been little inclination towards the error of fixing upon the present Exception the inappropriate limitation of the Verbal Act doctrine. In a few courts, the declarations of a mere bystander have been excluded.[1] But, in the greater number, no such discrimination is made,[2] —

§ 1755. [1] Note that in Louisiana these later cases deviate from the original orthodox rule as found in the cases in the next note:

ENGLAND: 1887, R. *v.* Gibson, L. R. 18 Q. B. D. 537, 541 (assault; immediately after the stone was thrown, "a lady going past, pointing to the prisoner's door, said, 'The person who threw the stone went in there'"; excluded).

UNITED STATES: *Federal:* 1911, American Mfg. Co. *v.* Bigelow, C. C. A., 188 Fed. 34 (superintendent's statement to injured employee); *Alabama:* 1911, Pope *v.* State, 174 Ala. 63, 57 So. 245; *Arkansas:* 1884, Flynn *v.* State, 43 Ark. 293; *Indiana:* 1905, Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155, 72 N. E. 1045 (railroad injury; excluded on the facts); *Kentucky:* 1892, Stroud *v.* Com., — Ky. —, 19 S. W. 976; 1916, Louisville & N. R. Co. *v.* Sinclair, 171 Ky. 562, 188 S. W. 648 (railroad collision); *Louisiana:* 1887, State *v.* Oliver, 39 La. An. 470, 472, 2 So. 194 (citing only the Moore case, *infra*, note 2, and that erroneously); 1890, State *v.* Riley, 42 La. An. 995, 8 So. 469 (citing the Oliver case only); 1896, State *v.* Ramsey, 48 La. An. 1407, 20 So. 904 (expressing no opinion as to actual participants or parties present; but here excluding the statement of a mere "observer," who expressed an opinion only, "R. shot M. and shot him down for nothing"); 1898, State *v.* Bellard, 50 La. An. 594, 23 So. 504 (murder; exclamations of bystanders, excluded); *New York:* 1907, State *v.* Howard, 120 La. 311, 45 So. 260 (like State *v.* Bellard); 1894, Butler *v.* R. Co., 143 N. Y. 417, 422, 38 N. E. 454 (brakeman's remark after an injury, not admitted; "declarations of third persons not in their nature a part of the fact," inadmissible); 1897, Felska *v.* R. Co., 152 N. Y. 339, 46 N. E. 613 (remark by one of a crowd assembling after an accident); *Utah:* 1898, Ganaway *v.* Dramatic Ass'n, 17 Utah 37, 53 Pac. 830 (battery).

[2] ENGLAND: 1862, Milne *v.* Leisler, 7 H. & N. 786, 796 (quoted *supra*).

UNITED STATES: *Ala.* 1872, Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 31; 1918, Travelers' Ins. Co. *v.* Whitman, 202 Ala. 388, 80 So. 470 (fall on a pavement); *Ark.* 1896, Appleton *v.* State, 61 Ark. 590, 33 S. W. 1066 (admitting exclamations by the defendant's wife during

assuming, of course (*ante*, § 1750), that the bystander's declarations relate only to that which has come under his observation.

§ 1756. **Same: (4) Declaration must be Contemporaneous.** Under the genuine Verbal Act doctrine, it is necessary that the actor's utterance accompany the act, and thus be precisely contemporaneous with it (*post*, § 1776); otherwise it does not make a part of the act itself, but is merely an ordinary testimonial assertion of a past fact. Thus, if after the occupation of land has ceased, the former occupant declares "The land was mine, for I had a deed of it," this utterance, not having been made during occupation, leaves the act of occupation as equivocal and indefinite as before, and has therefore no significance as a verbal act; its only possible use could be as an ordinary hearsay assertion, and as such it is inadmissible. But under the present Exception an utterance is, by hypothesis, offered as an assertion to evidence the fact asserted (for example, that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, *i. e.* as the natural effusion of a state of excitement (*ante*, § 1749). Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, *provided it is near enough in time to allow the assumption that the exciting influence continued.*

It is therefore an error to apply to the present Exception the Verbal Act rule that the utterance must be precisely contemporaneous with the act or occurrence. There was in the beginning a tendency to commit this error. But at the present day this error seems to have been almost everywhere

the affray); *D. C.* 1893, Metropolitan R. Co. *v.* Collins, 1 D. C. App. 383, 386 (bystander, at a railroad accident); *Fla.* 1907, Atlantic C. L. R. Co. *v.* Crosby, 53 Fla. 400, 43 So. 318; *Ky.* 1902, Louisville and N. R. Co. *v.* Carothers, — Ky. —, 65 S. W. 833, 66 S. W. 385 (the fact of outcries by other passengers in a collision, but not the details of them, held admissible; the opinion in Louisville & N. R. Co. *v.* Simpson, 111 Ky. 754, 64 S. W. 733, qualified); 1907, Kennedy *v.* Com., — Ky. —, 100 S. W. 242 (child of murdered man); *La.* 1881, State *v.* Horton, 33 La. An. 289; 1886, State *v.* Moore, 38 La. An. 66; 1886, State *v.* Corcoran, La. An. 949; 1896, State *v.* Desroches, 48 La. An. 428, 19 So. 250 (utterance of a bystander during a robbery, identifying the defendant, admitted); *Mass.* 1897, Hartnett *v.* McMahan, 168 Mass. 3, 46 N. E. 392 (remarks of a bystander during an affray, telling the plaintiff to let the defendant alone, admitted as "a kind of sidelight without which the picture would be incomplete"); *Mich.* 1878, Hitchcock *v.* Burgett, 38 Mich. 505; *Mo.* 1883, State *v.* Walker, 78 Mo. 386; 1886, State *v.* Gabriel, 88 Mo. 631, 639; 1893, State *v.* Duncan, 116 Mo. 288, 292, 310, 22 S. W. 699 (by a bystander to an arresting officer, "There is the man that did it," admitted); 1894, State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182; *Mont.* 1896, State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709 (deceased and others exclaimed as the defendant approached, "There he comes with a gun"; admitted); *N. J.* 1868, Castner *v.* Sliker, 33 N. J. L. 97; *N. C.* 1901, State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; 1903, Seawell *v.* R. Co., 133 N. C. 515, 45 S. E. 850 (mob at a railroad station); 1921, State *v.* Carraway, 181 N. C. 561, 107 S. E. 142 (manslaughter; bystander's exclamation, admitted); *Oh.* 1914, State *v.* Lasecki, 90 Oh. 10, 106 N. E. 660 (murder); *Okl.* 1905, Baysinger *v.* Terr., 15 Okl. 428, 82 Pac. 728 (murder); *Or.* 1922, Hornschuch *v.* Southern Pac. R. Co., — Or. —, 203 Pac. 886 (personal injury; statement of a passenger in the destroyed automobile, admitted); *Pa.* 1897, Coll *v.* Transit Co., 180 Pa. 618, 37 Atl. 89 (admitting declarations of a bystander, who had run up to help the plaintiff); *Tenn.* 1911, Cooper *v.* State, 123 Tenn. 37, 138 S. W. 826 (homicide); *Tex.* 1884, Missouri P. R. Co. *v.* Collier, 62 Tex. 320; *Ut.* 1910, Cromeenes *v.* San Pedro L. A. & S. L. R. Co., 37 Utah 475, 109 Pac. 10 (passenger on a train running over a boy; one judge diss.); *Wis.* 1893, Reed *v.* Madison, 85 Wis. 667, 673.

repudiated. This is sufficiently shown in the quotations already set forth (*ante*, § 1749, par. *b*).[1] It remains here to note a few persisting traces of this early and spurious limitation to strict contemporaneity.

(*a*) First, in the quotations already set forth (*ante*, § 1749), a constant effort is noticeable to answer the argument that the utterance must be exactly contemporaneous. This is merely the result of the earlier prevalence of the spurious doctrine, which had to be met and disposed of.

(*b*) Secondly, the early Massachusetts cases of Com. *v.* McPike[2] and Com. *v.* Hackett,[3] which were in this country the landmarks of the borrowed doctrine, are still occasionally quoted or cited, even in opinions accepting the modern and correct doctrine; and these cases are still capable of misleading. It is to be noted that they are unsound and obsolete. They and their followers are distinguishable by the fact that they borrow almost literally the language of the Verbal Act doctrine (*post*, §§ 1770, 1776).

(*c*) Thirdly, in the Courts where this borrowed doctrine of strict contemporaneity still appears, the inclination is to stigmatize an excluded declaration as "narrative;" this term being used as meaning an assertion of a past fact.[4] This test for exclusion is of course unsound, because practically all the utterances offered under the present Exception are "narrative," in the sense of an assertion of a past fact. The statements, constantly admitted, of the circumstances of a homicidal quarrel or of a railroad collision, are commonly of facts occurring prior in time to the utterance; and wherever such are admitted, it must be in spite of their being "narrative." Moreover, a "narrative" may in strictness be of events occurring at the moment of speaking (as, "I am bleeding"), and its application to past events alone is a misuse of words. The term "narrative" serves merely to mislead, and should be discarded.

(*d*) Fourthly, the confusion between the Verbal Act doctrine of strict contemporaneity and the liberal time-allowance of the present Exception (*ante*,

§ 1756. [1] The authorities cited in § 1750 show the general state of the law to-day.

Distinguish also the application of the phrase 'res gestæ' to the declarations of an *agent* or *conspirator*, during the agency or conspiracy; *e. g.:* 1903, Koenig *v.* Union D. R. Co., 173 Mo. 698, 73 S. W. 637; 1903, Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305; 1902, Lambert *v.* La Conner T. & T. Co., 30 Wash. 346, 70 Pac. 960; and cases cited *ante*, §§ 1078, 1079.

[2] 1849, 3 Cush. 184.

[3] 1861, 2 All. 136 (Bigelow, C. J., treats the words "I'm stabbed — I'm gone — Dan Hackett has stabbed me," as "not an abstract or narrative statement of a past occurrence, . . . but an exclamation or statement contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of 'res gestæ'"); so also the following: 1857, Lane *v.* Bryant, 9 Gray Mass. 245; 1871, Brownell *v.* R. Co., 47 Mo. 239; 1874, Rockwell *v.* Taylor, 41 Conn. 59.

The hybrid effect of the two principles blended is seen in the language of the Georgia Code (Rev. C. 1910, § 5766) on this subject, which admits declarations accompanying an act (the Verbal Act doctrine) or so nearly connected therewith in time as to be free from all suspicion of device or afterthought (the present Spontaneous Declarations exception).

[4] See Com. *v.* Hackett, quoted *supra;* Williamson *v.* R. Co., 144 Mass. 150, 10 N. E. 790; McKinnon *v.* Norcross, 148 Mass. 538, 22 N. E. 183. In the following case this logic was carried to extremes: 1880, Jones *v.* State, 71 Ind. 83 (Warden, J.: "The deceased is supposed to have said a few minutes after the shooting, 'Prince Jones shot me.' This is as clearly narrative as if a greater length of time had elapsed").

§ 1749, par. *b*) left its mark, in England, in the shape of a long and somewhat acrimonious controversy over the ruling in R. *v.* Bedingfield.[5] This ruling was as follows:

1879, *R.* v. *Bedingfield*, 14 Cox Cr. 341: "The prisoner had relations with the deceased, . . . and had distinctly threatened to kill her by cutting her throat. She carried on the business of a laundress, with two women as assistants, the prisoner living a little distance from her. . . . They were together in a room [in her house] some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a foot-stool. He went to a spirit-shop and bought some spirits, which he took to the house, and went again into the room where she was, both the assistants being at that time in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards towards the house. In a few minutes she was dead. In the course of the opening speech on the part of the prosecution it was proposed to state what she said. It was objected to on the part of the prisoner that it was not admissible, and COCKBURN, C. J., said: He had carefully considered the question and was clear that it could not be admitted. . . . Could it be admissible, having been made in the absence of the prisoner, as part of the 'res gestæ'? But it is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard. . . . When the witness was called, . . . she was first asked as to the circumstances, and stated that the deceased came out of the house bleeding very much at the throat, and seeming very much frightened, and then said something, and died in ten minutes. It was then proposed to prove what she said, but COCKBURN, C. J., said it was not admissible. Anything, he said, uttered by the deceased at the time the act was being done would be admissible, as for instance if she had been heard to say something, as 'Don't, Harry.' But here it was something stated by her after it was all over, whatever it was, and after the act was completed."[6]

[5] The controversy will be found abbreviated by Professor Thayer in his article on Bedingfield's Case, in 14 Amer. L. Rev. 817, continued in 15 id. 1. The controversial articles appeared in full in pamphlets by the eminent Chief Justice and by the learned Mr. (later Justice) Wm. Pitt Taylor, author of Taylor on Evidence. Chief Justice Cockburn's article was printed in the Law Journal, 1880, p. 5.

[6] Of this ruling it may be said: (1) From the Verbal Act point of view, the declaration did not accompany the fatal deed, was not contemporaneous, and therefore was rightly excluded; from the same point of view, moreover, a declaration by one person about the deed of another could not possibly be received; (2) as involving a question under the present Exception for Spontaneous Exclamations, the ruling in Bedingfield's Case is plainly erroneous, and would almost certainly not be followed in this country; the facts of the case, in respect to the controlling influence of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals. The arguments of the ensuing controversy between Chief Justice Cockburn and Mr. Taylor dealt indiscriminately with the Verbal Act precedents, as well as with others more germane; but, without attempting to examine the merits of these arguments, it is sufficient to say that the general practice in England up to that time — the practice which did not lead to rulings published in the law-reports — seems to have been as liberal as that which has since obtained in this country. In the Palmer poisoning trial (1856; Notable British Trials Ser.), some of the most damaging evidence, admitted without question by any one, is supportable only on the liberal principle of Spontaneous Declarations; for example, when the deceased was asked, after recovering from one of his attacks of convulsions: "What do you think was the cause of that, Mr. Cook?" he replied, "The pills that Palmer gave me at half-past ten o'clock."

It may be thought that the case of R. *v.* Bedingfield will not be observed in England as a precedent; 1902, Phipson, Evidence, 3d ed., London, p. 49: "In R. *v.* Bedingfield, it has generally been thought that Cockburn, C. J., applied the rule too strictly"; 1914, Christie's Case, 10 Cr. App. 141 (indecent assault on a boy; R. *v.* Bedingfield commented on).

§ 1757. (III) **Certain Spurious Enlargements, borrowed from the 'Res Gestæ' phrase; all Declarations which are "Part of the Transaction" are admissible.** The true scope and application (so far as there can be any) of the 'res gestæ' phrase is later examined in detail (§§ 1666–1770). It is proper here, however, to endeavor to ascertain what influence it has had practically in shaping the rules for the present Exception.

The phrase 'res gestæ,' so far as it has a legitimate use, implies that when we are disputing about a particular occurrence, evidence relating to any part of the occurrence is admissible. This is a mere truism; it is the converse of the fundamental proposition that evidence can be offered only of facts in issue or relevant to the issue (*ante*, § 9). Thus nothing is added in the way either of limitation or of enlightenment. We are told merely that evidence may be offered on a certain point because that point is part of the matter we are disputing about.

(1) *Origin of the phrase.* How then did the phrase come to be applied in the present class of cases? First, it had already been much used in expressing the Verbal Act doctrine (*post*, § 1767); the declaration accompanying and making definite an equivocal act was seen to be not really testimonial in effect and therefore not subject to the Hearsay rule, and this distinction was expressed by saying that it was admissible as "a part of the 'res gestæ,'" *i. e.* a part of the act in question, — as it undoubtedly was. Next, this phrase, "a part of the 'res gestæ,'" in itself conveniently and enticingly obscure, was given an independent and self-sufficient force, and all sorts of spoken words, not genuinely verbal parts of the act, were admitted as "part of the 'res gestæ'" or details of the affair. Thus the phrase "part of the 'res gestæ'" came to be the shibboleth for admitting anything in the shape of words which could not be brought under one of the standard exceptions to the Hearsay rule. This loose usage was materially assisted, if not originally propagated, by a paragraph of Professor Greenleaf's (as well as by his indiscriminate use of 'res gestæ' for sundry kinds of hearsay evidence):

1842, Professor *Simon Greenleaf*, Evidence, § 108: "There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the 'res gestæ,' may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

This passage, and the structure of decisions resting on it, have no basis of principle. They commit the fallacy of confusing the details of an occurrence with human assertions about those details. No doubt, in genuine cases of

Verbal Acts — such as claims of ownership by one in possession — where the words are not taker assertively or testimonially, they may be properly described as verbal parts of the act, of the "principal fact," of the 'res gestæ.' But where (for example) in a marine collision the pilot exclaims, "The helm is hard a-starboard, and the steering-gear does not work," or in a railway accident a passenger exclaims, "The cars are off the track and the coupling is broken," we are using these utterances in a purely assertive and testimonial manner. The fact (if a fact) that the cars were off the track, or that the helm was hard a-starboard, *is* one of the external items of the tortious act, — a "part of the 'res gestæ,'" if the phrase pleases us. But the statement of the pilot or the passenger that this was what happened is just as plainly a human assertion and testimony as if it were said on the stand, and is therefore clear hearsay, and must be brought under some definite Hearsay Exception before it can be received. Calling an assertion "a part of the transaction" cannot make it any the less hearsay testimony, when it is used assertively and testimonially, no matter how "inseparable from" or "intimately interwoven with" the affair it may be:

1888, *Parnell Commission's Proceedings*, 11th, 13th, 17th, 18th days, Times' Rep. pt. 3, pp. 154, 170, pt. 4, p. 3, pt. 5, pp. 103, 179; the Irish Land League and its leaders being charged with a conspiracy to encourage outrage and agrarian violence, and the general state of the country as to disquiet and apprehension being a part of the issue, it was conceded that the fact of repeated complaints being made to the police and to employers by tenants and others was provable; in this process, testimony was proposed of employers as to reports made to them by herdsmen and others of injuries to cattle, etc., the reports being offered in verbal detail. To this Sir *Charles Russell* objected, for Mr. Parnell, as hearsay. The *Attorney-General*, in reply: "I would respectfully submit that my learned friend has forgotten the rule that the 'res gestæ' may be proved, and if in the course of the proof of the facts it is shown that servants have made inquiries with regard to them and reported the result, those reports form part of the 'res gestæ' for the purpose of ascertaining under what circumstances the occurrences took place." *Sir C. Russell:* "As regards the 'res gestæ,' what is the 'res'? That certain cattle were injured. How can it be part of the 'res gestæ' that a man who was present, and saw the injury, afterwards made a statement to a third person of what he had seen? To *say* that this is part of the 'res gestæ' is an entire misapprehension of the rule." . . . President *Hannen:* "The *fact* that a particular report had been made by a person in discharge of his duty was admissible in evidence, — not that the *contents* of that report should be taken as evidence of the facts to which it related. If the matter rested there, without there being any other evidence of the facts except that contained in the report, that could not be regarded as evidence of the facts by the Court. . . . There is a broad distinction between a thing being merely admissible in evidence and its being taken as proof of the facts alleged." [1]

It is important to observe this vital distinction between the testimonial and the non-testimonial use of language, for its neglect has been the root of the fallacy and the source of the whole confusion. To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle; and this has been the result.

§ 1757. [1] See another good illustration in Milne v. Leisler, quoted post, § 1768.

(2) *Enlargement of the rule.* The effect of the employment of this phrase, "part of the 'res gestæ,'" "part of the transaction," on the present Exception for Spontaneous Exclamations has been the opposite of that of the Verbal Act doctrine just noticed (*ante*, §§ 1752–1756). It has enlarged rather than limited the rule, though the effect has been none the less confusing. Instead of narrow restrictions, excluding that which ought to be admitted, we have here broad and almost meaningless phrases, admitting testimonial utterances pell-mell, and making havoc with principle. What specific effects may be detected in the present Exception?

First, there are a few cases, typified by State *v.* Wagner and U. S. *v.* King (quoted *ante*, § 1747), in which the Spontaneous Exclamations exception is found practically unadulterated by this 'res gestæ' phrasing.

Secondly, there are many cases, typically Hill's Case and Merkle *v.* Bennington (quoted *ante*, 1749), in which the 'res gestæ' language appears, but as a mere flavoring. The words are used ("part of the transaction," and the like), but they have no force and no practical significance, and the genuine principle of Spontaneous Exclamations is the essential doctrine.[2]

Thirdly, there are numerous cases in which the 'res gestæ' phrasing is given a more than nominal force. There is an effort to work it out in application, and, while the Spontaneous Exclamations principle actually controls and the result is the same as in the preceding class, it appears in the form of a development of the 'res gestæ' doctrine. There is said to be a "causal connection" between the accident or the affray and the declaration; the latter is an "emanation" of the former, or "springs from" it; there are "connecting circumstances"; and thus the declaration is construed as "a part of the transaction."[3]

Fourthly, there are cases, mainly earlier ones, in which the two doctrines are applied side by side, the 'res gestæ' language expressing the main principle, and the Spontaneous Exclamations doctrine (in the form of a pointing out that the statements are apparently sincere and natural) appearing subordinately, rather as corroborating and justifying the other than as an independent or self-sufficient principle.[4]

[2] Another example: 1855, Scates, C. J., in Galena & C. U. R. Co. *v.* Fay, 16 Ill. 568 ("The conduct and exclamations of passengers in the cars were not improperly admitted . . . Such general conduct, with the exclamations involuntarily thrown out by appearances of imminent peril, may be regarded as a part of the 'res gestæ' for this purpose").

[3] No doubt these phrases also, to some extent, serve to express (unconsciously on the part of the judges) the same idea described in § 1749, par. *a*, *ante*, — the idea that the declaration must have been caused by some exciting influence startling enough to produce it and make it natural. The thought that the declaration must "spring from" or be "an emanation of" the occasion is the same in practical effect as the thought that there must be an occasion startling enough to cause them naturally; but the former and correct notion is veiled in the borrowed and meaningless phraseology of 'res gestæ.' Clear examples of this attitude are found in Little Rock R. Co. *v.* Leverett and Louisville N. A. & C. R. Co. *v.* Buck, quoted *ante*, § 1747. The following passage illustrates a more elusive form: 1875, Brickell, C. J., in Wesley *v.* State, 52 Ala. 187: "The exclamation of the deceased, 'Jake, what are you doing here?' was coincident in point of time with the main fact, — the violence producing his death. . . . It sprung from the very character of the facts,—was natural, voluntary, spontaneous, and was not the result of design."

[4] The following passages illustrate this,

Fifthly, there are many cases in which the 'res gestæ' phraseology is applied in its pure and arbitrary form; *i. e.* there is no attempt to discover a circumstantial guarantee of sincerity (whether there was time to concoct a story, whether the excitement of the moment dominated), and the decision turns merely upon the question whether the declaration can be regarded as "a part of the transaction," or "a part of the 'res gestæ.'" This sort of case is common. Probably in recent times, however, its numbers are greatly in the minority. It may be said to have two varieties, one representing a tendency to stricter construction, the other a tendency to liberal and looser construction. Of the former, R. *v.* Bedingfield (quoted *supra*) is typical; in a mixed phraseology of Verbal Act and 'res gestæ' language, the Court argue out the arbitrary and insoluble question whether the declaration is "a part of the transaction" and "contemporaneous with it," adopting the strictest view of what constitutes the "transaction" and of what may be said to be "contemporaneous." Of the latter sort are dozens of American cases in which the Courts stretch the idea of a "transaction" to the most liberal and unjustifiable extent." [5]

The important line to be drawn is between the first four and the fifth sorts. In the first four classes, we are dealing with a genuine Hearsay Exception of Spontaneous Exclamations, more or less tainted by spurious phraseology and ideas from the 'res gestæ' doctrine. But in the fifth sort we are not dealing with any doctrine of Spontaneous Exclamations at all; we have simply an unmeaning and useless form of words — possibly not a Hearsay Exception, certainly not anything definite— usurping the place of the principle truly applicable.

Sixthly, it must be added, a few rulings show a hopeless conglomeration of ideas, invoking the 'res gestæ' phrase for various kinds of utterances not akin either to Spontaneous Exclamations or to Verbal Acts, and even applying

Pool *v.* Bridges being often cited: 1826, Parsons, C. J., in Pool *v.* Bridges, 4 Pick. Mass. 378 (declarations were offered of an absconded debtor, to show the ownership of goods; the declarations being made while the debtor was sorting the goods of different creditors; they were held admissible "as a part of the transaction"; "It gives some importance to such declarations that they are made in the ordinary course of transactions, without reference to any controversy or any counter claim of property, and also that the declarations are against the interest of the party. Now the declarations of Scholfield have these circumstantial interwoven or connected with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony").

[5] The following passages will serve as an instance: 1890, Avery, J., in Boyer *v.* Teague, 106 N. C. 623, 11 S. E. 665: ("The declarations of a voter as to his qualifications generally, if made at the time of voting, are competent as a part of the 'res gestæ'"); 1882, Niblack, J., in Dyer *v.* Dyer, 87 Ind. 20 ("As regards the execution of the will, . . . everything which occurred the day before, in connection with the execution of the first will, was under the circumstances part of the 'res gestæ'").

It must be added that it is possible in this view to use previous decisions to some extent as precedents determining what shall be taken as "a part of the transaction"; while, as already pointed out (*ante*, § 1749, par. *b*) under the pure Spontaneous Exclamations doctrine each case would rest upon its own circumstances.

1882, Mulkey, J., in Lander *v.* People, 104 Ill. 256 (the fact of recognition of a violator on the day after was admitted, with an accompanying declaration: "The spontaneous exclamation, 'There goes the man,' with the response, 'Yes, there he goes,' is highly characteristic of the fact of their recognition. The true test . . . is, the act, declaration, or exclamation must be so intimately

it to evidence not consisting in verbal utterances; this and other uses of the phrase, not affecting cases coming under the present Exception, are elsewhere analyzed (*post*, §§ 1796, 1797).

B. SPECIAL FORMS OF THE EXCEPTION

§ 1760. **Woman's Complaint of Rape; (1) Doctrine in England and Canada.** The use in evidence of a woman's complaint of rape, either as a simple fact or in its detailed statements, to corroborate her testimony on the stand or to rebut the inference from her supposed failure to complain, has already been treated in dealing with the Corroboration of Witnesses (*ante*, §§ 1134–1140). It has, however, by some Courts been believed that such utterances, including their details of statement, could be received on the footing of genuine hearsay assertions, apparently under the present Exception. The practical difference would be that the limitations necessary in using such evidence merely in testimonial corroboration [1] would not apply, and the evidence could be more freely received. It remains, therefore, to ascertain how far such a complaint is receivable as a direct Exception to the Hearsay rule. If it is so receivable, its proper place would seem to be under the present head.

In England, the evidential use of those outcries and explanations came down to us in the 1700s as a traditional relic of the old law of hue and cry. Not only in such cases, but in all charges of violence, the accuser must show, to sustain his charge, that he made hue and cry, alarming the neighborhood, freshly after the occurrence.[2] The application of this principle to rape cases is seen in the following passage:

> 12— (?), *H. de Bracton*, f. 147: "When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the serjeant of the lord the king and to the coroners and to the viscount and make her appeal at the first county court." [3]

This practice seems not to have been seriously questioned until towards the end of the 1700s. Then, in Brazier's Case, the use of these complaints, not merely as a formal prerequisite nor yet as corroborative, but assertively as evidence of the details related, was perceived; and it was seen to be necessary to use them, if at all, as a Hearsay exception. If the female was an infant and incompetent to testify, there would be some reason for doing this, on the principle of necessity (*ante*, § 1421). But the judges in this case finally decided that the infant would have been competent, and therefore that the extrajudicial evidence could not be used:

§ 1760. [1] As noted *ante*, §§ 1134–1140.
[2] Pollock and Maitland, History of English Law, II, 576.
[3] See also Bracton, f. 121; Hale, Pleas of the Crown, I, 634, II, 279, 284.

1779, *Brazier's Case*, East's Pleas of the Crown, I, 433; a child of five years, after the rape, made statements to the mother on reaching home; and on the next day identified the prisoner; "All the judges, except Gould and Willes, Js., held that this evidence of the information of the child ought not to have been received, as she herself was not heard on oath. . . . Gould and Willes, Js., held that, it being recently after the fact, so that it excluded a possibility of practising on her, it was a part of the fact or transaction itself and therefore admissible; and Buller, J., held the same, if by law the child could not be examined on oath. But as to what happened the next day, Gould, J., thought it not admissible, by reason of the danger of her being influenced in the interval. But on the 29th April all the judges, being assembled, unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined upon oath, and consequently that evidence of what she had said ought not to have been received."

This laid the foundation for a subsequent course of rulings in England by which it was settled that the *details of the woman's statement* could not be received, *i. e.* that the statement could not be used testimonially and as a hearsay exception. The settlement was reached only through a series of Nisi Prius rulings, and the matter may be said to have remained long in doubt. The doubt apparently came chiefly from a failure to appreciate clearly why the Courts should be willing to receive the *fact* of the complaint, *i. e.* corroboratively (*ante*, § 1134), but should reject the *details* stated; and the judges seemed singularly unwilling or unable to elucidate the reason (as it has been elucidated in later times in this country). But the rule of thumb was settled,[4] though not without some misgivings, as the following language of Baron Parke shows:

1839, PARKE, B., in *R.* v. *Walker*, 2 Moo. & Rob. 212: "The sense of the thing certainly is that the jury should in the first instance know the nature of the complaint made by the prosecutrix and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination."

Finally, a series of rulings, beginning with the close of the 1800s, repudiated the original practice and declared the statement admissible; though with limitations borrowed from the principle of corroboration (*ante*, § 1134).[5]

[4] 1817, R. *v.* Clarke, 2 Stark. 242; 1839, R. v. Walker, 2 Moo. & Rob. 212; 1840, R. *v.* Megson, 9 C. & P. 420; 1841, R. *v.* Alexander, 2 Craw. & D. 126, *semble;* 1842, R. *v.* Osborne, 1 Car. & M. 622; 1846, R. *v.* Nicholas, 2 C. & K. 246; 1860, R. *v.* Eyre, 2 F. & F. 579; 1877, R. *v.* Wood, 14 Cox Cr. 46.

[5] 1896, R. *v.* Lillyman, 2 Q. B. 167, 170, 177, 18 Cox Cr. 345 (but here the peculiar distinction is taken that "we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made; . . . when the whole statement is laid before the jury, they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused"; yet "it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated," *i. e.* "to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent"); 1898, R. *v.* Kiddle, 19 Cox Cr. 77 (cited *ante*, § 1136, n. 2; R. *v.* Lillyman followed); 1900, R. *v.* Merry, 19 Cox Cr. 442 (indecent assault upon a child; a complaint not volunteered, but elicited by a question from the mother,

The modern English doctrine is accepted in Canada.[6]

§ 1761. **Same: American Doctrine.** In the United States, the general consensus of decision has accepted the original and orthodox result, and does not receive the complaints as testimony under a hearsay exception; although practically the effect of this exclusion has been undermined in some instances by a liberal employment of the complaint-details as corroborative of the woman's testimony.[1]

But by a few Courts the complaints have been received testimonially, on the case in chief, to prove the facts asserted, and thus as an exception to the Hearsay rule. There is some use of the 'res gestæ' phraseology; but the clear idea of the Spontaneous Exclamations exception seems to have dominated the result:[2]

held not admissible under R. *v.* Lillyman); 1905, R. *v.* Osborne, 1 K. B. 551 (indecent assault upon a child of twelve; a complaint made in answer to a question by a companion, held admissible on the facts; but "questions of a suggestive or leading nature will indeed . . . render it inadmissible"); 1907, Chesney *v.* Newsholme, [1908] P. 301 (immoral acts by a clergyman with a boy; the boy's statement to his mother on the same evening, admitted, but not his statement made the next evening); 1909, Hedges' Case, 3 Cr. App. 262 (complaint 8 days afterwards, received); 1910, Graham's Case, 4 Cr. App. 218 (complaint a month later, received); 1914, Christie's Case, 10 Cr. App. 141, A. C. 45 (indecent assault upon a little boy; the boy's identification of the accused within a few minutes, held inadmissible, per Lord Atkinson, on the ground that "complaint is only admissible to negative assent," following R. *v.* Lillyman; Osborne's Case was cited in argument, but the other judges did not pass upon the point; the above-quoted statement is of course unsound, on the present theory of the hearsay exception); 1916, R. *v.* Norcott, 1 K. B. 347 (indecent assault; a statement made in answer to an imperative question, here admitted; R. *v.* Osborne explained).

[6] 1906, R. *v.* Spuzzum, 12 Br. C. 291 (complaint made on the next day, admitted, in discretion); 1907, R. *v.* Clarke, 38 N. Br. 11 (certain complaint details here admitted on other grounds); 1909, R. *v.* Bowes, 20 Ont. L. R. 111 (carnal knowledge of a child of 7 or 8; statement to the mother, admitted); 1908, R. *v.* Dunning, 1 Sask. 391 (complaints made in answer to leading questions, excluded; following R. *v.* Osborne, Eng.); 1914, R. *v.* McGivney, 15 D. L. R. 550, B. C. (indecent assault on a child of 6 years; the complaint made to the grandmother, in answer to leading questions, and not until 10 days or 2 weeks later, held admissible, in the trial Court's discretion, following R. *v.* Osborne, Eng.; two judges diss.); 1918, Shorten *v.* The King, 42 D. L. R. 591, Can. I. C. (carnal knowledge of a female child; the child's statement to the mother, admitted, though made after a threat by the mother to spank her if she did not tell the whole truth; R. *v.* Norcott and R. *v.* Osborne, Eng., followed); 1921, R. *v.* Schiraba, 62 D. L. R. 308, Man. (R. *v.* Lillyman, Eng., followed).

For the question whether the complaint is receivable on charges where the *woman's consent is immaterial*, see *ante*, § 1135.

§ 1761. [1] The cases are collected *ante*, §§ 1134–1140, under that rule.

[2] *Accord: Alabama:* 1871, Lacy *v.* State, 45 Ala. 80 (conceding the application of the theory, where "the accounts were so connected in point of time with the injuries inflicted on the victim as to constitute a part of the 'res gestæ'"); 1884, Griffin *v.* State, 76 id. 29, 31 (hinting at the same); *Columbia (Dist.):* 1893, Snowden *v.* U. S., 2 D. C. App. 89 (the girl's statements on the same day, when found by her grandmother, admitted on the 'res gestæ' theory); *Connecticut:* 1876, State *v.* Kinney, 44 Conn. 156 (quoted *supra*); *Georgia:* 1875, McMath *v.* State, 55 Ga. 303, 307; *Hawaii:* 1906, Terr. *v.* Schilling, 17 Haw. 249, 265 ("the entire conversation" admitted); *Illinois:* 1904, Cunningham *v.* People, 210 Ill. 410, 71 N. E. 389 ("such complaint is admitted upon the theory that the statement of the prosecutrix represents the spontaneous expression of her outraged feelings"; hence a statement made "in response to questions put to her" — here, three weeks after the alleged offence — may be excluded); 1916, People *v.* Moore, 276 Ill. 392, 114 N. E. 906 (complaint made in answer to a question, "What is the matter?" by another girl, who met the complainant and noticed that she had been crying, held inadmissible; this is an unsound limitation on the rule; in Cunningham *v.* People, the complaint was three weeks later, here it was the very same evening; moreover, the weeping was in effect a complaint which led to the question); *Iowa:* 1890, McMurrin *v.* Rigby, 80 Ia. 325, 45 N. W. 877 (quoted *supra*); 1905, State *v.* Andrews, 130 Ia. 609,

1876, PARK, C. J., in *State* v. *Kinney*, 44 Conn. 156: "Her natural impulses would prompt her to tell all the details of the transaction. Why, on the same principle, ought not her statement of the details to be evidence?"

1890, ROBINSON, J., in *McMurrin* v. *Rigby*, 80 Ia. 325, 45 N. W. 877 (citing *Ins. Co.* v. *Mosley*, *supra*, § 1747): "Moreover, we think the declaration was admissible as a part of the 'res gestæ.' It was made but a few moments after the alleged ravishment had been accomplished, and while declarant was under the influence of the mental excitement which it produced. It was made within such time after the act to which it referred and under such circumstances as to preclude the element of premeditation."

This heterodox result seems in policy a satisfactory one. If there is any situation in which the Spontaneous Exclamations principle finds typical application, it is to be found in the circumstances evoking these outcries and complaints. Why not discard the indirect method of securing their use and freely accept them under the present hearsay exception?

There is, however, an apparent flaw in this argument, which seems to nullify it. For example, in a railroad collision, we have the exciting causes known by other evidence; and under other Exceptions to the Hearsay rule — for example, regular entries, we first prove the regularity of the entries by other evidence. Now in the present case, if we accept the complaint testimonially, do we not admit it in advance as evidence of these very circumstances which should first be proved to make it admissible?

The solution seems to be as follows: If there is no other evidence of an assault, or where there is evidence merely of intercourse but not necessarily against the woman's consent, we are in truth committing the error of accepting her statement as itself evidence of the very facts which should first be otherwise shown in order to make the declarations spontaneous. But if there is already other evidence of a violent assault, and the statement is useful as disclosing the identity of the assailant or the further circumstances of the assault, we are not reasoning in a circle, and there is no objection to admitting the statement.

105 N. W. 215 (admissible; but not citing McMurrin *v.* Rigby, and making a distinction between the complaints of a "very young child" and others); 1911, State *v.* Novak, 151 Ia. 536 N. W. 26; 1917, State *v.* Powers, 181 Ia. 452, 164 N. W. 856; 1920, State *v.* John, 188 Ia. 494, 176 N. W. 280 (excluded here because of lapse of time); *Louisiana:* 1919, State *v.* Cole, 145 La. 900, 83 So. 184 (statement made immediately after the alleged act, admitted, but not statements made in subsequent conversations; no authorities cited); *Michigan:* 1874, People *v.* Lynch, 29 Mich. 279; 1884, People *v.* Brown, 53 Mich. 531, 534, 19 N. W. 172 (suggesting *obiter* the application of the present principle); 1886, People *v.* Gage, 62 Mich. 271, 273, 28 N. W. 835 (allowing it exceptionally; but confusing this principle with that of § 1134, *ante*, and therefore admitting a complaint made long after, because the silence has been accounted for); 1888, People *v.* Glover, 71 Mich. 303, 306, 38 N. W. 874 (approving the preceding); 1893, People *v.* Hicks, 98 Mich. 86, 89, 56 N. W. 1102 (treating the Gage case as going to the extreme, and refusing to apply its principle here under the circumstances); 1895, People *v.* Duncan, 104 Mich. 460, 62 N. W. 556 (same); 1906, People *v.* Harris, 144 Mich. 12, 107 N. W. 715 (not decided); *North Dakota:* 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60 (when made immediately after the crime; but sanctioning also the use under § 1138, n. 2, *ante*, where the limitations would be different); 1913, State *v.* Apley, 25 N. D. 298, 141 N. W. 740; *Porto Rico:* 1914, People *v.* Anglada, 20 P. R. 11 (citing with approval the text above); *Rhode Island:* 1893, State *v.* Fitzsimon, 18 R. I. 236, 241, 27 Atl. 446 ("what the prosecutrix said," admitted); *Texas:* 1904, Kenney *v.* State, — Tex. Cr. —, 79 S. W. 817 (collecting prior cases); 1905, Wiggins *v.* State, 47 Tex. Cr. 538, 84 S. W. 821.

For the cases in other jurisdictions, excluding the details of the complaint, and thus repudiating the Exception, see *ante*, §§ 1134–1140.

Where the prosecutrix is a child *too young to be a witness*, the statements should nevertheless be receivable;[3] because, although in general a hearsay declarant must not lack the qualifications of an ordinary witness (*ante*, § 1424), yet the peculiar nature of the present Exception (*ante*, § 1747) renders this principle substantially inapplicable to children; furthermore, the orthodox common-law limitations as to children's testimonial capacity are inherently unsound and impractical (*ante*, § 509) and should not be extended by analogy.

§ 1762. **Owner's Complaint after Robbery or Larceny.** The complaint of an owner or possessor of goods, made speedily after an alleged robbery or larceny, is by some Courts regarded as receivable upon the present theory. It may, however, also be treated as a prior consistent statement, receivable to repel the suggestion of recent contrivance, upon a general principle applicable to all witnesses (*ante*, § 1142).

§ 1763. **Charge made in Travail by Mother in Bastardy Case.** The charge uttered by the mother of a bastard in her travail, naming the defendant as the father, is by long tradition regarded as admissible, in some of the older States. Such a situation would seem to present genuinely and completely the circumstances which render a spontaneous exclamation admissible under the present principle. Nevertheless, the Courts have seemed to treat the subject wholly from the point of view of consistent statements corroborating a witness (*ante*, § 1141).

§ 1764. **Statements as to Private Boundary.** The Massachusetts doctrine admitting declarations about private boundary, by the owner in possession, made while on the land and pointing them out (*ante*, § 1567), is in the judicial language applied with some invocation of the 'res gestæ' phraseology. The circumstantial guarantee of its trustworthiness (*ante*, § 1422) resembles to some extent that required by the principle of the present Exception. But there is a vital distinction, namely, that under that doctrine the declarant must be shown to be deceased, — a requirement never made for the present Exception. The Massachusetts doctrine seems therefore to be widely separated from the present Exception.

§ 1765. **"Self-Serving" Statements by an Accused Person.** There is no principle of Evidence especially excluding "self-serving" statements by an accused or by any one else. The Hearsay rule excludes *all* extrajudicial

[3] *Accord:* 1779, Brazier's Case, *semble* (quoted *ante*, § 1760; so understood by Parke, B., in R. *v.* Guttridges, 1840, 9 C. & P. 471); 1900, People *v.* Marrs, 125 Mich. 376, 84 N. W. 284 (cited *ante*, § 1136, n. 1); 1899, Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882; 1904, Kenney *v.* State, — Tex. Cr. —, 79 S. W. 817 (repudiating Smith *v.* State, 41 Tex. 352; Davidson, P. J., diss.); 1905, Wiggins *v.* State, 47 Tex. Cr. 538, 84 S. W. 821; 1888, Hannon *v.* State, 70 Wis. 448, 452, 36 N. W. 1 (cited *ante*, § 1136, n. 1).

Contra: 1905, State *v.* Andrews, Ia., *semble* (cited *supra*, n. 2); 1869, Weldon *v.* State, 32 Ind. 81; 1845, People *v.* McGee, 1 Denio 19, 22.

But these last two cases, cited *ante*, § 1138, n. 2, are attributable to the different theory of rape-complaint there applied. In *England*, R. *v.* Nicholas, 2 C. & K. 246 (1846), is *contra*, but in England even an adult's statement was inadmissible (*ante*, § 1750); so that the Court there merely refused to do more for a child's statement than for an adult's.

assertions; and therefore the only inquiry need be whether such assertions are covered by some Exception to that rule, or whether utterances amenable to it are evidential in any indirect way apart from their assertive value. There are one or two instances in which such a use of an accused's utterances partakes somewhat of the reasons for the present exception (*ante*, § 1732, *post*, § 1781).

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

CHAPTER LVIII.

§ 1766. **General Principle; Limits of the Hearsay Rule and 'Res Gestæ.'** The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use.

The theory of the Hearsay rule (*ante*, § 1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an

assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule.

For example, in a prosecution against a defaulting embezzler Doe, it is desired to show that, after leaving his employment, he concealed himself and passed under a false name; here his statement, "My name is Roe," is not offered to evidence that his name was in truth Roe; on the contrary, it will be shown that his name was Doe; and the statement is not used as hearsay. Or, on an issue of insanity, it is offered to show that the party said, "I am the Emperor of Africa"; here the utterance is not offered as evidence that he was in truth the Emperor, but, on the contrary, as circumstantially indicating his mental aberration. Again, in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old; here the plaintiff will immediately proceed to prove that the horse is nevertheless twelve years old; he has not offered the defendant's statement with any view to using as evidence of its truth, but with just the contrary purpose. Or (to take an illustration of Lord Abinger's [1]) suppose, on an issue of mitigation of damages in an action for battery, the defendant offers to prove that the plaintiff, just before the assault, provoked the defendant by asserting that he was a liar; here the defendant by no means desires the jury to take this utterance as evidence of the truth of the fact asserted; he would be much disappointed if they should accept it in that aspect; his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it.

The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such.* If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as *assertions to evidence the truth of the matter asserted*:

1808, WASHINGTON, J., in *Blight* v. *Ashley,* 1 Pet. C. C. 15, 21: "There are certainly some cases where the declarations or letters of an agent are proper evidence; and others where he must be examined and his letters are not evidence, if he be alive. . . . If the object is to prove a fact, the agent is the proper person to prove it, and his evidence [in court] is better than his declarations. . . . But if the object is to prove what were the motives or inducements for a man to contract with the agent, what were the statements made by him, his letters or conversations are proper evidence, — not of the facts stated in them, but that such statements and inducements were made. . . . Upon this principle, many letters from Peter Blight to the defendant were read, not as evidence of a single fact mentioned in them, but that they communicated certain information to the defendants; [the truth of] which, however, if important to be established, it would have been incumbent on the plaintiff to establish by other evidence."

1823, Mr. *Gaston* (afterwards Judge), in *Cherry* v. *Slade,* 2 Hawks 400, 404, arguing

§ 1766. [1] In Fraser *v.* Berkeley, 7 C. & P. 625.

'pro querente' against declarations of residence: "It is sometimes said that there is an exception when words are the 'res gestæ' or part of the 'res gestæ.' But this seems not to be accurate. The words are then received, not as evidence of the *truth* of what was declared, but because the speaking of the words *is the fact*, or part of the fact, to be investigated. There may be a controversy whether A. B. at a certain time spoke certain words, and those who heard him are of course received to prove the fact. The words spoken concurrently with an act done are often a part of the act, and give it a precise and peculiar character, and therefore must be testified, — not to show that the words spoken are true, but to show that they were in fact spoken. For example: Did A commit an assault on B? What he said when he laid his hands on B will show whether it was an angry or friendly act. Did the agent of defendant make a certain representation in the course of a bargain? If so, that representation was an ingredient in the bargain."

1858, EASTMAN, J., in *State* v. *Wentworth*, 37 N. H. 217: "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were spoken, and not whether they are true."

1858, ERLE, J., in *Shilling* v. *Ins. Co.*, 1 F. & F. 116, 120 (admitting statements of T., on an issue whether the insurance of J. was in reality J.'s act for his own benefit or T.'s act in J.'s name): "Everything is admissible which was done by T.; and words are often acts. The question is not open to the objection against hearsay. It is not hearsay. It is a question as to an act done. One asks another to attest a document or to advance a sum of money; those are not merely words, but acts."

1862, *Milne* v. *Leisler*, 7 H. & N. 786, 796; the defendant having applied for and purchased goods from the plaintiff, and referred the plaintiff to a third person, the plaintiff, to show on whose credit the goods were sold, was allowed to put in a letter of inquiry to the party referred to, stating the sale to the defendant. POLLOCK, C. B.: "If a man on leaving his counting-house said to his servant 'I have just sold so and so,' that would not be evidence of the sale. Here, however, . . . this letter, being part of the transaction of a reference made in pursuance of the direction of the party purchasing, was admissible." WILDE, B.: "If the evidence were admissible on that ground, [namely, as a trustworthy assertion,] everything a man said on the day when he made a bargain, and still more, everything he did, would be admissible. It seems to me that would be very dangerous ground. . . . The real ground is that this was an inquiry made by the direction of the plaintiff in pursuance of an authority from Atkin [the defendant's agent], and therefore was part of the 'res gestæ.'"

1892, HARRISON, J., in *Smith* v. *Whittier*, 95 Cal. 279, 293, 30 Pac. 529 (admitting the directions given to an elevator-owner for the proper mode of using it, as showing his knowledge): "Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had no opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but, upon the theory that the information was correct, the plaintiff in the present instance had the right to show that the defendant had received such information. . . . Such evidence is admitted for the purpose of establishing merely the utterance of the words, and not their truth."

1900, DOSTER, C. J., in *State Bank* v. *Hutchinson*, 62 Kan. 9, 61 Pac. 443 (action on a homestead mortgage; defence, duress of the wife by threats to prosecute the husband, communicated by the latter to the former): "A daughter of the Hutchinsons testified that she overheard the conversation between her father and mother, in which the former disclosed to the latter the threats which Morris had made. Counsel for plaintiff in error also contend against the admissibility of this testimony, upon the ground that it was hearsay in character. . . . Neither of these contentions is sound. There were three substantive litigated questions in the case — First, were threats made? And, if so, secondly, were

they communicated to Mrs. Hutchinson? And, if so, thirdly, did they produce the claimed effect? As to the second of these as well as the first, the meritorious question was, had a verbal act been done? That is, had a communication been made? That act, if done, was not incidental or collateral in nature. It was one of the three principal litigated matters in the case, and, being such, the performance of the act was provable by the testimony of any one who, if competent, was a witness to it. The question was not whether Hutchinson's communication to his wife was truthful, but it was whether the communication had been in fact made. The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay."

What here remains, then, is to distinguish and mark off the various classes of utterances which legally pass the gauntlet of the Hearsay rule because it does not apply to them. The classes of utterances thus exempt may be grouped under three heads:

1. Utterances material to the case as a *part of the issue;*
2. Utterances accompanying an *ambiguous or equivocal act,* itself *material,* and serving to complete the act and give it definite legal significance; *i. e. verbal parts of an act;*
3. Utterances used *circumstantially,* as giving rise to indirect inferences, but not as assertions to prove the matter asserted.[2]

But before examining these several branches of the principle, it is necessary to turn aside for a moment and inquire into the origin and scope of the term 'res gestæ', which finds here its main and least inappropriate application.

§ 1767. **History and Meaning of the Phrase 'Res Gestæ.'** The discussion of several doctrines is commonly carried on, in judicial opinion, with more or less use of the phrase 'res gestæ' as the name of a doctrine under which certain kinds of evidence receive sanction. This phrase, as conceded on all hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine. If it were possible to say that it is properly applicable, in etymology or in usage, to any particular doctrine, it would be simple enough to ascertain this doctrine and to urge the restriction of the phrase to the one meaning. Or if the phrase genuinely indicated some independent principle of Evidence, existing in its own right and not otherwise named or namable, nor attributable to any other place in our system of Evidence, it would be allowable to preserve the name for that principle.

But neither of these things is true. The phrase has nothing to entitle itself on either ground to preservation. It has had various uses. But it is ambiguous and unmanageable in all of them. The doctrines to which it has been applied possess, all of them, a right to existence under well-recognized preëxisting principles and can be explained without a resort to this phrase. No more can be said for it than that it has been much used in the course of

[2] For another analysis of the several kinds of utterance, see the following article: Professor E. M. Morgan, "A Suggested Classification of Utterances Admissible as Res Gestæ" (1922; Yale Law J., XXXI, 229).

the development of some important aspects of two of these doctrines. The elusive history of its usage has been set forth in the following passage:

1881, Professor *James Bradley Thayer*, American Law Review, XV, 5, 81: "This phrase in one or another form, — 'res gesta,' 'res acta,' 'res gestæ,' — was familiar in classical Latin literature, as one may see by any dictionary. It is found, also, in the 'Corpus Juris.' . . . The meaning of the term seems to have been quite untechnical; it imported simply 'a fact,' 'a transaction,' 'an event.' The plural sometimes indicated not so much the plural of the English equivalent — facts, transactions — as the details or particulars of which a single fact or transaction might be composed. It would seem that either form was quite legitimately used as meaning what we should express by the singular form, — an occurrence, a transaction. Now, how came this term into our law?

"The first instance of the use of it, which the writer has observed, is in a brief discussion over a point of evidence in Horne Tooke's trial for high treason, 25 Howell's State Trials, 440 (1794).[1] A letter from a certain society had been sent to an association with which Tooke was connected, declining a previous proposal from the latter, . . . [and Mr. Garrow alluded to its admission as probably upon the ground that] 'it is fit to be received as a part of the "res gesta" upon the subject.' . . . The phrase is not found again until 1801, Hoare *v.* Allen, 3 Esp. 276, where in an action for seduction of the plaintiff's wife [her statement of her reason for leaving him was admitted by Lord Kenyon as "a part of the 'res gesta'"]. This was one of Lord Kenyon's latest rulings. In one of the early cases of his successor we find the same phrase; in Robson *v.* Kemp, 4 Esp. 233 (1802), . . . Lord Ellenborough said, 'Where the declaration of the bankrupt is part of the "res gesta," . . . it may be Evidence.' In 1801 Peake's 'Law of Evidence' was published; the phrase does not occur in that, nor is it in Buller, or Gilbert, or any of the other few books, before this century, in which the subject of evidence is dealt with. The first treatise in which it is found, so far as the writer has observed, is Evans' Appendix to Pothier on Obligations, printed in 1806; in vol. II, p. 217, Evans says: 'In questions of fraud or "bona fides," an adequate judgment can, in general, only be formed by having a perfect view of the whole transaction, which of course includes the conversation which forms a part of it; and, according to the phrase usually applied to this subject, the language which is used on any occasion forms a part of the "res gesta."' This passage is interesting as indicating that the phrase was in common use in 1806. . . . [The case of Aveson *v.* Kinnaird] decided in February, 1805, is found in 6 East 188, and here the phrase, in the plural form, 'res gestæ,' is freely used by counsel; Lord Ellenborough also, in addressing counsel, uses it once. It was not long before this case had crossed the water and appeared in our courts, bringing with it the Latin term, in Bartlett *v.* Delprat, 4 Mass. 702 (1808). . . . This is the first appearance of it in Massachusetts. In Swift's 'Digest of the Law of Evidence in Civil and Criminal Cases,' — the earliest American treatise, — printed in 1810, the phrase occurs, at p. 127, in stating when the admission of an agent is receivable as against his principal: 'What is said by the agent relating to such transaction, while acting under such authority, will be received as evidence against the principal, as part of the "res gestæ."'

"The phrase, then, was fairly afloat in the law of Evidence soon after the beginning of this century; but there are signs that it was not altogether regarded with favor. Phillipps' excellent treatise on evidence — so great an advance on anything that had preceded it — was published in 1814; in it (vol. I, p. 202) he said: 'Hearsay is often admitted in evidence as part of the "res gesta."' . . . But, having thus introduced the phrase, he struck it out in the fourth edition (1819), and substituted for it the English word 'transaction'; this word he retained through three other editions, and until he associated Mr. Amos with himself in getting out the eighth edition, in 1838. . . . Starkie published his book in 1824,

§ 1767. [1] An earlier instance than this has been found: 1637, Ship Money Case, 3 How. St. Tr. 988 (Mr. Holborne, arguing, refers to the truth of an historian "for 'res gestæ' as this").

and then and always used the phrase 'res gestæ.' As to the later leading treatises of Greenleaf, Taylor, and Wharton, it is unnecessary to say that they faithfully reflect the cases in using this term. . . .

"If it be true, as it seems to be, that the phrase first came into use in Evidence near the end of the last century, one would like to know what started the use of it just then. That is matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its 'convenient obscurity.' . . . The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term 'res gesta,' — . . . which was a foreign term, a little vague in its application, and yet in some applications of it precise,—they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one, — some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."

The phrase 'res gestæ' is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. It should never be mentioned. No rule of Evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of Evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision.

It therefore remains only to note here the various doctrines with which the phrase 'res gestæ' has been with any frequency associated, and, so far as they are doctrines of evidence, to refer to the heads under which they are properly determined.

§ 1768. **Doctrines of Evidence to which the Phrase is applied.** (1) A frequent application of the phrase is to the Hearsay Exception for *Spontaneous Exclamations* (*ante*, §§ 1747, 1757), *i. e.* statements made during or after an affray, a collision, or the like, used to prove the facts asserted in the statement.

This Exception has its earliest illustration in Lord Holt's ruling in Thompson *v.* Trevanion, in 1693; so that the doctrine may be said to have been recognized before the phrase 'res gestæ' came into use. Nevertheless, the development of this doctrine did not begin until after Aveson *v.* Kinnaird, in 1805, when the phrase in question had begun to be freely used in connection with it; and only since the middle of the 1800s has it been possible to say that this Exception was firmly established. Its application has almost invariably been made in terms of 'res gestæ'; but this does not mean that

there is any anomalous doctrine which must be recognized by that name. What is actually done by the Courts, and not what name they use, is always the important consideration in dealing with a rule of Evidence; and since what they do in this instance is to admit extrajudicial assertions as testimony to the fact asserted, the plain truth is that they have recognized a separate Exception to the Hearsay rule.

(2) An equally frequent subject for the application of the phrase, and a more plausible and nearly legitimate one, is the *Verbal Act* doctrine (*post*, §§ 1772–1786). Here the utterance is admitted as a verbal part of an act, *i. e.* of a 'res gesta.' Had there been no other and confusing associations of the phrase, it might suffice as a name for this Verbal Act doctrine. In the development of that doctrine, the phrase has been constantly used. But here, again, the rule of Evidence exists (and in some of its aspects was actually evolved) without any help from the phrase 'res gesta.' It follows from the very nature of the Hearsay rule that utterances used not assertively but as a part of some otherwise relevant act are receivable as not obnoxious to the rule; this is inevitably true on principles otherwise fixed, and would have been equally true had no mention of the Latin words ever been made in our courts or our books.

(3) The phrase is also found sometimes employed for utterances admissible as a *part of the issue under the pleadings* (*post*, § 1770). This use also is not inappropriate, so far as the mere translation of the words is concerned. But the material feature here is that the utterance of the words is a fact in issue. To speak of them as 'res gestæ' is at least half correct, for all matters in issue are things done. But not all things done are things in issue. The admitting circumstance is that the utterance is part of the issue, and the 'res gestæ' phrase, in omitting this element, condemns itself as inaccurate in its suggestion and misleading in its name.

(4) The phrase has also been much used in dealing with the Hearsay Exception for *Statements of a Mental Condition* (*ante*, § 1714). This is historically due to its use in Aveson *v.* Kinnaird, which in part concerned such declarations. Here there is least plausibility in its employment. A statement of a mental condition is not received because it is part of a "thing done," but because there is a degree of trustworthiness in such assertions and a necessity for resorting to them. Some Courts, for some classes of cases, require the statement to accompany an act by the declarant; but, as this feature would not necessarily contribute to the trustworthiness of the assertion (which is the real objective), it can be only an arbitrary limitation.

(5) There is, besides, an occasional employment of the phrase in *sundry cases* where utterances are relevant under any principle of Evidence whatever.[1] It then serves merely to aid, in the case in hand, the judicial disinclination to ascertain and state specifically the reason for admission.

§ 1768. [1] For one example only, the use of a certificate of marriage is treated under this name in State *v.* Isenhart, 32 Or. 170, 52 Pac. 569.

§ 1769. **Other Applications of the Phrase; Agent's and Conspirator's Admissions.** The phrase 'res gestæ' has been so convenient a term for judicial conjuring that it is even found applied to matters outside the domain of the rules of Evidence proper, whether or not the facts involve the utterance of words. In an action, for example, for injuries received by driving into a defect in the highway, the gentleness of the horse has been allowed to be proved as "part of the 'res gestæ.'" [1] Or, in an action for injuries received at a defective street-crossing, the absence of street-lamps at the place is "part of the 'res gestæ.'" [2] Or, in a prosecution for homicide, a quarrel occurring long before is not to be considered as provocation reducing the degree of homicide, because it is "not part of the 'res gestæ.'" [3] When the phrase is put to such uses, nothing can be done but ignore them. The law declared in such decisions is to be treated wherever it belongs by its own nature. It cannot be forced, in procrustean fashion, into the law of Evidence merely through the improper invocation of the term 'res gestæ.'

In two departments of substantive law this use of 'res gestæ' has been very common, namely, in the law determining liability for the acts of an *agent* and for the acts of a *co-conspirator*. The acts and admissions of an agent are available to charge the principal when they occurred in the course of his employment; and of a co-conspirator, when they occurred in the duration of the conspiracy. It is often attempted to designate this course of action, which thus limits the range of chargeable acts, as 'res gestæ.' But the scope of it is to be ascertained wholly from the substantive law on those topics, not from any rule of evidence. So far as any reference to these doctrines is necessary in dealing with the law of Evidence, it has been already made in dealing with Admissions (*ante*, §§ 1078, 1079). It is enough here to note the fallacy, and to quote the following plain exposition of it:

> 1881, Professor *James Bradley Thayer*, American Law Review, XV, 80: "The term 'res gesta' is freely used in another class of cases where the specific question is whether a party to the suit shall be affected with responsibility for the declaration of another; not merely whether it may be used as evidence against him, but whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own. When the inquiry is whether the utterance of an agent, or a co-conspirator, is receivable against a party, and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed, and while actually engaged in that business; and, of a co-conspirator, that he must have made his declaration while engaged in the common enterprise and regarding that, — in such cases it is common to express this idea by saying that the declaration must be made as a part of the 'res gesta'; and if it is not so made, it is deemed to be 'res inter alios gesta.' Now it is obvious, on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to settle a question in the law of agency or in the law regulating conspiracy, — a question in substantive law. . . . Observe, then, that the rule which says that a man shall be chargeable with the acts and declarations of his agent or

§ 1769. [1] Smith v. Taggart, 21 Ill. App. 538.
[2] Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33.
[3] Rosenbaum v. State, 33 Ala. 361.

fellow-conspirator is not a rule of evidence; and when in stating and applying this rule it is said that the agent's declaration must have been made in and about his principal's business, while actually engaged in it, and as a part of the 'res gesta'; or, again, when it is said of a conspirator's declaration, offered against his fellow-conspirator, that it must have been made while he was actually engaged in the common enterprise, about the affairs of it, and as a part of the 'res gesta'; the Latin phrase adds nothing; it is used as a compact expression for *the business*, as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements."

The limits of the Hearsay rule, as above analyzed (*ante*, § 1766), are now to be examined.

1. Utterances constituting a Part of the Issue

§ 1770. **Utterances of Contract, Marriage-Promise, Notice, Insurance "Proofs," Defamation, etc.** Where the *utterance of specific words* is itself *a part of the details of the issue under the substantive law and the pleadings*, their utterance may be proved without violation of the Hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein.

(1) In issues of *contract* in general, this use of utterances is of course common. In particular:

(*a*) The *making of a contract* necessarily involves utterances by conversation, letter, telegram, and the like; and these are admissible under the issue.[1]

(*b*) The *consent* which in Scotland and in the United States generally suffices to *constitute the marriage-contract* is thus to be learned from the utterances of the cohabiting persons. Utterances *during the time of cohabitation* would be receivable, so far as the present doctrine is concerned, only when they are in effect acts of consent forming a contract; yet in fact they are further admissible, though not 'per se' acts of consent, being construable as conduct ("habit") evidencing circumstantially the fact of past marriage consent (*ante*, § 268, *post*, § 2083). Utterances made *after cohabita-*

§ 1770. [1] The following will serve as illustrations: *Ala.* 1857, Stoudenmeier *v.* Wilson, 29 Ala. 564; *Ind.* 1880, Nave *v.* Tucker, 70 Ind. 17 (the action involved a contract employing the defendant as attorney, and the plaintiff called a witness to the conversation in which the plaintiff engaged the defendant; Worden, J.: "The evidence of the witness did not go to prove a mere declaration or statement of the plaintiff, but a fact, viz. that the plaintiff employed the witness to bring the action mentioned and authorized him to employ assistance"); *Ind. Ter.* 1897, Long-Bell L. Co. *v.* Thomas, 1 I. T. 225, 40 S. W. 773; *Ky.* 1911, Zinsmeister *v.* Rock Island C. Co., 145 Ky. 25, 139 S. W. 1068 (agent's letters, excluded); *Minn.* 1896, Fredin *v.* Richards, 66 Minn. 46, 68 N. W. 401 (defendant's ownership of notes in issue; correspondence between the defendant and a third person, the payee, admitted, as constituting the transaction determining the defendant's title); *N. Y.* 1847, Howard *v.* Ins. Co., 4 Den. 508 (the affidavit of an insured, read by the insurer as a foundation for showing its falsity and thus proving the right to forfeit the policy); *N. C.* 1905, King *v.* Bynum, 137 N. C. 491, 49 S. E. 955 (distinguishing testimony directly to the expressions of negotiation at a sale and testimony to subsequent hearsay statements of what occurred at the sale).

tion ended would ordinarily be inadmissible, because they cannot be construed as circumstantial conduct of marriage, nor yet as acts of consent, and their only service therefore can be as hearsay assertions of past marriage.[2] Nevertheless, such statements, if the person making them is a party-opponent, would be receivable as admissions (*ante*, § 1055, *post*, § 2086), or, if the person is deceased, as assertions of family history admissible under that Exception (*ante*, § 1500). Moreover, a letter by one to the other, expressly consenting to be husband or wife, would apparently be receivable under the present principle as an act of consent, even though written before or after cohabitation.

(*c*) A *promise to marry* is to be ascertained similarly from utterances of consent.[3] Nevertheless, to render them admissible under the present prin-

[2] 1898, Moore *v.* Heineke, 119 Ala. 627, 24 So. 374 (declarations after separation, not admissible); 1918, Coleman *v.* James, — Okl. —, 169 Pac. 1064 (claim of widow's share; on the issue whether a cohabitation "is matrimonial or meretricious, the declaration of the parties during such intercourse in relation to the nature thereof are admissible in evidence as part of the 'res gestæ'").

[3] ENGLAND: 1706, Hutton *v.* Mansell, 6 Mod. 172 (Holt, C. J.: "If there be an express promise by the man, and that it appear the woman countenanced it, and by her actions at the time behaved herself so as if she agreed to the matter, tho' there be no actual promise, yet that shall be sufficient evidence of a promise on her side").

UNITED STATES: *California:* 1873, Reed *v.* Clark, 47 Cal. 194, 198 (plaintiff's public announcement of the engagement, admissible as an element of damages); 1901, Leibrandt *v.* Sorg, 133 Cal. 571, 65 Pac. 1098 (woman's declarations to third persons, as to a promise inadmissible; distinguishing Reed *v.* Clark); 1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (the woman's preparations, unknown to the defendant, excluded); *Illinois:* 1872, Walmsley *v.* Robinson, 63 Ill. 41 (plaintiff's preparations, the family's reception, etc., not admissible to show the promise); *Indiana:* 1850, King *v.* Kersey, 2 Ind. 402 (woman's declarations of the contract to a sister, during the alleged engagement, admissible as "explanatory of her conduct and intention in receiving those visits," and "as tending to show a promise on her part, not upon his"); 1874, Cates *v.* McKinney, 48 Ind. 562, 566 (the woman's "declaration while receiving his visits," admissible as "evidence of a promise on her part," but not upon the defendant's; declarations to other persons in the absence of the defendant, not admissible); 1878, Graham *v.* Martin, 64 Ind. 567, 573 (plaintiff's preparations, not admitted to show the plaintiff's assent); 1889, Jones *v.* Layman, 123 Ind. 569, 575, 34 N. E. 363 (declarations two days after estrangement, excluded; "such evidence is only allowed to prove her consent to the alleged marriage contract, and must relate to [*i. e.* be made] at a time prior to the alleged estrangement, or to the time when first informed that her anticipated husband will not marry her"); 1895, Wilson *v.* Smelser, 13 Ind. App. 31, 41 N. E. 76 (declarations to parents, etc., of the fact of contract, during the alleged engagement, excluded); 1912, Hay *v.* State, 178 Ind. 478, 98 N. E. 712 (seduction; the woman's preparations for marriage, not admissible as corroboration); *Iowa:* 1859, Thurston *v.* Cavenor, 8 Ia. 155, 161 ("where the defendant's promise is once shown," then the plaintiff's demeanor of approval, to "establish the promise on her part" is admissible, "and this whether the defendant is present or not at the time of her conduct"); *Kansas:* 1908, Cooper *v.* Bower, 78 Kan. 156, 164, 96 Pac. 794 (the woman's statements that they were engaged to be married, admissible); *Kentucky:* 1855, Burnham *v.* Cornwell, 16 B. Monr. 284 (statements of plaintiff to a third person as to her willingness to marry defendant, excluded, apparently because no sufficient evidence of defendant's offer was given); *Massachusetts:* 1860, Russell *v.* Cowles, 15 Gray 582 (plaintiff's conduct in buying goods for the wedding and for housekeeping, held admissible, after evidence of a "contract to marry," as "an act done by the plaintiff toward the execution of the contract"; yet, since the plaintiff's assent to the offer must on general principles of contract "have been communicated to the party by whom the offer was made," the plaintiff's conduct "in the absence of the defendant, and not in any way connected with him," was held not to be admissible as evidence "that the plaintiff assented"; "the cases from Pennsylvania, Ohio, and New Jersey" are said to have gone too far through ignoring this distinction; yet the learned judge here himself ignores the principle upon which the plaintiff's subsequent assenting state of mind could be used for inferring a prior act of assent to the defendant himself; see *ante*, §§ 267,

ciple, it would seem (a) that they can in any case be regarded only as unilateral acts of consent, and thus are mere hearsay assertions so far as they state a *promise by the other party;* (b) that therefore they must be made *before negotiations* or courtship *broken off;* and (c) that they must be made to the promisor himself, or, *if to a third person,* that they can be received only on the theory that they state a present mental condition (*ante,* § 1714), which itself is evidence (*ante,* §§ 242, 267, 272) of a past act of consent expressed to the promisor; upon this principle most Courts seem to proceed. The precedents are in an uncertain condition.

(*d*) The *performance of a contract* may involve an utterance, written or oral, which therefore becomes receivable under the present principle;[4] in particular, the documents known as "*proofs of loss,*" commonly required in *insurance-contracts* as a condition precedent to the accruing of the insurer's liability, are receivable, because the fact that they were duly furnished must be shown.[5]

272); *Michigan:* 1886, McPherson *v.* Ryan, 59 Mich. 33, 37 (plaintiff's announcement of her engagement, and preparations for marriage, excluded, following Russell *v.* Cowles, Mass.; good opinion by Morse, J.); *New Jersey:* 1797, Peppinger *v.* Low, 1 Halst. 384 (declarations of the plaintiff to third persons, as to her willingness to marry the defendant, admitted, on the theory that it is difficult "to make out by direct evidence the assent of the woman," and that expressions to other persons of her willingness to marry him "would be 'prima facie' evidence that she had assented to his proposals"); *Ohio:* 1852, Wetmore *v.* Mell, 1 Oh. St. 26 (plaintiff's declarations to her sister in defendant's absence, admitted as declarations of her state of mind as to acceptance of the defendant's promise); *Oregon:* 1894, Osmun *v.* Winters, 25 Or. 260, 35 Pac. 250 (plaintiff's announcement of her engagement, made to relatives the day after, excluded; good opinion by Bean, J.); *Pennsylvania:* 1850, M'Night *v.* Biesecker, 13 Pa. 331, 334 (plaintiff's request to her brother to take her to buy wedding clothes and to a sister to be bridesmaid, admitted, on the theory that "her assent, however proved, is by her own act and her own declarations," "solely for the purpose of showing the readiness of the plaintiff to comply with her engagement"); 1855, Leckey *v.* Bloser, 24 Pa. 401, 406 (plaintiff's declarations to third person that she was engaged to be married to defendant, admitted); *Vermont:* 1920, Dyer *v.* Lalor, — Vt. —, 109 Atl. 30 ("all the facts and circumstances that took place between them from the time when they first became acquainted with each other in 1900 to the time of the alleged breach, were admissible"; the plaintiff's acts of preparation, admissible when "made with defendant's knowledge").

But a *seduction* should not be evidence of a prior promise of marriage; the principle of § 268, *ante,* is here out of place; 1906, Wrynn *v.* Downey, 27 R. I. 454, 63 Atl. 401 (citing other authorities).

[4] 1886, Ross *v.* Brusie, 70 Cal. 446, 11 Pac. 760 (an entry in an account-book, used simply to show that a credit had been given as agreed); 1904, Parke & L. Co. *v.* S. F. Bridge Co., 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71 (certain letters admitted, as constituting performance); 1896, Ellis *v.* Thompson, 1 App. Div. 606, 37 N. Y. Suppl. 468 (breach of a contract to produce a play and "to play it continuously if there was a reasonable success attending its production"; as a part of the issue of "reasonable success," *i. e.* favorable treatment by the public, the audiences' applause or silence, the critics' comment, and the like, were allowed to be shown).

[5] The theory of this is generally conceded, but Courts differ as to allowing the documents to be read or made known to the jury; considering the purposes of entrapment to which these documents are sometimes put by the insurer, there is no need of judicial scruple in excluding them: *Georgia:* 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 761, 765, 12 S. E. 18 (admissible only as a fact of performance, and not admissible to prove bad faith in the insurer in not paying; good faith not being in issue); *Illinois:* 1893, Railway P. & F. C. Ass. *v.* Robinson, 147 Ill. 138, 157, 35 N. E. 168 (doctor's certificate among proofs of death, admitted not to prove the facts asserted therein, but as an act of compliance with rules as to proof of death); *Kansas:* 1905, Order of U. C. Travellers *v.* Barnes, 72 Kan. 293, 82 Pac. 1099 (admissible for the plaintiff, but only with instruction limiting their use to their effect as performance of the condition precedent); *Massachusetts:* 1906, Paquette *v.* Prudential Ins. Co., 193 Mass. 215, 79 N. E. 250 ("Having been put in evidence generally,

(2) In *defamation*, the utterance charged as a libel or a slander is admissible, naturally, under the present principle. Whether a repetition of it is relevant as evidence of malice involves additional considerations (*ante*, § 403); as does also the question whether like rumors or reports against the plaintiff are admissible to mitigate damages (*ante*, § 74).[6]

(3) The fact of *sending a notice* is often essential as a part of the issue, — for example, a notice to an indorser, a notice of rescission, a notice of rejection of defective goods, a notice of injury by municipal negligence. In such cases the terms of the notice are receivable under the present principle, without regard to the truth of any assertion that may be contained in it.[7]

(4) *Reputation* may be in issue,[8] either in a civil case or as part of a criminal offence (*ante*, §§ 70–79). But it is also receivable evidentially, under a special Exception to the Hearsay rule (*ante*, § 1580).

(5) In *sundry other instances*, not presenting any misleading or complicated features, a variety of issues may involve the fact and terms of an utterance as a part of the case, and the present principle declares all such utterances not obnoxious to the Hearsay rule, so long as they are not sought to be used as assertions evidencing the matter asserted.[9]

2. Utterances constituting a Verbal Part of an Act

§ 1772. **General Principle.** A second kind of situation in which utterances are not offered testimonially arises when the utterance *accompanies*

it was within the discretion of the presiding judge either to submit or to withhold them from the consideration of the jury"); *Pennsylvania:* 1811, Thurston *v.* Murray, 3 Binn. 326, 328 (excluded; "the distinction of being evidence for one purpose and not for another is too subtle for the jury"; yet compare the citations *ante*, § 13, which dispose of this reasoning); 1863, Lycoming Co. M. I. Co. *v.* Schreffler 44 Pa. 269, 273 (similar); 1885, Kittanning Ins. Co. *v.* O'Neill, 110 id. 548, 553, 1 Atl. 592; 1899, Cummins *v.* Ins. Co., 192 id. 359, 43 Atl. 1016; *Wisconsin:* 1898, Foster *v.* F. & C. Co., 99 Wis. 447, 75 N. W. 69 (letters and affidavits admitted to show that sufficient proofs of death had been furnished to an insurer, but not as testimony to the fact of death).

For the use of "proofs of loss" as *admissions by the beneficiary*, see *ante*, § 1073.

For the use of a *coroner's verdict* in "proofs of loss," as an official statement admissible under the Hearsay Exception, see *ante*, § 1671.

[6] Distinguish the *report* by a *third person* of such utterances of the defendant, which is of course mere extrá-judicial assertion: 1909, Sheppard *v.* Austin, 159 Ala. 361, 48 So. 696.

[7] 1830, Whitehead *v.* Scott, 1 Moo. & Rob. 2 (a letter sent to notify the defendant to produce a document); 1896, Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121 (the statement of a policeman to the arrested person, naming the charge against him, as required by statute).

For *notice*, as evidence that *knowledge* was received by the person notified, see *post*, § 1789.

[8] For *reputation* as evidence of *knowledge* or *belief* by a person acquainted with the reputation, see *post*, § 1789.

[9] *E. g.:* 1840, Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. U. S. 462 (Story, J.: "The conversations and declarations of a patentee merely affirming that at some former period he invented that particular machine, might well be objected to. But his conversations and declarations . . . are properly to be deemed an assertion of his right at that time . . . and legitimate evidence that the invention was then known to and claimed by him, and thus its origin may be fixed at least as early as that period"); 1922, Tyree *v.* Tudor, N. C., 111 S. E. 714 (death, while riding in an automobile driven at reckless speed; the plaintiff intestate's assumption of risk being in issue, the intestate's conversation before starting, as to the speed desired, was in part excluded; Stacy, J., diss., and rightly).

In *bankruptcy*, the answer "not at home," given by a servant or other person to a creditor inquiring at the house of the debtor, may under the substantive law constitute a refusal or denial to his creditors and thus amount to an act of bankruptcy.

But whether the bankrupt's statements *after* absconding may be used involves the Verbal Act doctrine, treated *post*, § 1783.

conduct to which it is desired to attach some legal effect. The conduct or act has intrinsically no definite significance, or only an ambiguous one, and its whole legal purport or tenor is to be more precisely ascertained by considering the words accompanying it. The utterance thus enters merely as a verbal part of the act, or, in the common phrase, a "verbal act." [1]

Perhaps most of our acts to which legal effect is to be attached in creating, transferring, modifying, or extinguishing rights, consist in part of words. There are some legal acts which consist solely of words, — as, a notice to an indorser.[2] There are others in which it consists solely of wordless conduct, — as, where title is acquired by the confusion of goods. But, in the vast majority of instances, whether of contract, property, or torts, words uttered may play a part, along with conduct, in determining the total significance of any legal act. For example, the consideration for a promise of a reward may be furnished in part by a search for the criminal and in part by communicating his identity to the promisor; the delivery of goods sold may consist in part of a manual transfer and in part of words stating its purpose; the revocation of a will may consist in part of a tearing of it, in part of the words then used; the eviction from premises may consist in part of the corporal expulsion, in part of the words stating the reason for it; the making of an arrest may consist in part of a manual touching, in part of utterances then made. In these, and countless other instances, the uttered words are a verbal part of the act. Without the words, the act as a whole may be incomplete; and, until the words are taken into consideration, the desired significance cannot be attributed to the wordless conduct.

Thus the words are used in no sense testimonially, *i. e.* as assertions to evidence the truth of a fact asserted in them. On the one hand, therefore, the Hearsay rule interposes no objection to the use of such utterances, because they are not offered as assertions (*ante*, § 1766). On the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially, nor believed by the jury; for this would be to use them in violation of the Hearsay rule. In short, the utterances enter *irrespective of the truth of any assertion they may contain;* and they neither profit nor suffer by virtue thereof. For example, when an act of adverse possession is to be proved as the foundation of title, and the adverseness consists in a claim of ownership, the occupier's statement, "This land is mine; for I have a deed from Doe," is admissible as giving his occupation the significance of an adverse claim, but not as evidence that he has, as asserted, a deed from Doe.

§ 1772. [1] Perhaps first used by Mr. J. Clifford, in the opinion quoted *post*, § 1775.

Of course the conduct which the words accompany is not properly "*the act.*" The total of words plus other conduct is "the act" to which the law affixes or refuses to affix legal consequences. The words are as much a part of "the act" as is the delivery or occupation or other conduct. Nevertheless, in common usage the word "act" is usually appropriated to the other conduct which the words accompany. This loose usage may be followed, provided one keeps in mind the true nature of the situation.

[2] These form the subject of § 1770, *ante*.

These considerations point out the four simple limitations which attend this use of utterances as verbal acts; namely:

(1) The conduct to be characterized by the words must be *independently material to the issue;*

(2) The conduct must be *equivocal;*

(3) The words must aid in *giving legal significance to the conduct;*

(4) The words must *accompany the conduct.*

These limitations may now be considered in general, and afterwards, the chief specific classes of cases calling for their application.[3]

§ 1773. (1) **Conduct to be characterized by the Words must be Independently Material in the Case.** As a necessary deduction from the above principle, the conduct that is to be made definite must be *independently material and provable under the issues,* either as a fact directly in issue or as incidentally or evidentially relevant to the issue. The use of the words is wholly subsidiary and appurtenant to the use of the conduct. The former without the latter have no place in the case, and could only serve as a hearsay assertion in direct violation of the rule: [1]

1837, COLTMAN, J., in *Wright* v. *Tatham*, 7 A. & E. 361: "Where an act done is evidence 'per se,' a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is in its own nature irrelevant to the issue and where the declaration 'per se' is inadmissible, in which it has been held that the union of the two has rendered them admissible."

1847, PARKER, C. J., in *Patten* v. *Ferguson,* 18 N. H. 528: "Here it is admitted that neither the fact nor the declaration, standing alone, are evidence; and when put together it is the declaration which is significant, and not the fact. The fact was of no importance standing alone; and the declaration, standing alone, was incompetent. When they are united, the unimportant fact is [improperly desired to be] used as a vehicle to introduce the important declaration."

This limitation is a distinguishing mark for utterances used under this Verbal Act doctrine, as differing from utterances used assertively under the Exception for Spontaneous Exclamations; the improper use of the limitation in that Exception has been already noted (*ante,* § 1753).

[3] A few Codes attempt to cover this general principle in a section; *Cal.* C. C. P. 1872, § 1850 (quoted *ante,* § 1750); *Ga.* Rev. C. 1910, § 5766 (quoted *ante,* § 1750); *Mont.* Rev. C. 1921, § 10511 (like Cal. C. C. P. § 1850); *Or.* Laws 1920, § 707 (like Cal. C. C. P. § 1850); *P.I.* C. C. P. 1901, § 279 (like Cal. C. C. P. § 1850).

§ 1773. [1] *Accord:* 1838, Coleridge, J., in Wright *v.* Tatham, 5 Cl. & F. 689; 1894, Pinney *v.* Jones, 64 Conn. 545, 550, 30 Atl. 762 (on an issue of payment, to prove that the defendant had the means of payment, her declarations, while showing a place in her cellar, that she had money concealed there, excluded, because "the act of Mrs. J., irrespective of the accompanying statement, was not in itself admissible"); 1847, Patten *v.* Ferguson, 18 N. H. 528 (declaration, by one burning wood on disputed land, that he was doing it for P., not admitted; because the wood-burning was itself not in issue or material to be illustrated).

The following ruling is therefore erroneous: 1888, Card *v.* Foot, 56 Conn. 369, 371, 15 Atl. 371 (action for the price of bonds said to have been given to the defendant to sell for the plaintiff; in proving that the plaintiff had deposited a package with one L. for safe keeping, the plaintiff's declaration at the time that "they were my bonds" was admitted, "not as a declaration purporting to be truthful, but as a natural act in the circumstances"; this is unsound; the deposit with L. was immaterial; her statement was a mere hearsay assertion that she had bonds, and directly introduced her credit).

§ 1774. (2) **Conduct must be Equivocal.** The utterance serves merely to assist in completing and giving legal significance to the conduct. Hence it is not needed when the conduct is already complete and definite in itself. The conduct must be *equivocal* or incomplete as a legal act, before the utterances can be admissible:

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 242: "Speech is a mode of action; . . . and I conceive that the distinction between the cases in which the immediate action of speech furnishes a material indication with respect to the object of the inquiry, and those in which it is a mere act of narration, will in most cases furnish the proper principle. . . . Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed, which is in general best determined by the expressions accompanying them. Wherever, therefore, the demeanor of a person at a given time becomes the object of inquiry, his expressions, as constituting a part of that demeanor, and as indicating his present intent and disposition, cannot properly be rejected in evidence as irrelevant. . . . This proposition [that a declaration accompanied by an act is admissible] is only correct where the expressions are demonstrative of the nature of the act itself."

1854, HALL, J., in *Shuck* v. *Vanderventer*, 4 Ia. 264 (action for suing out an attachment without cause; the defendant's declarations, made when applying for the attachment, were not admitted for him): "How can he by his words give character to his acts, the propriety or impropriety of which depends upon facts that have transpired and exist independent of anything that he can say or do? . . . The defendant could say nothing that could give it character or qualify in his favor the true force of facts."

1879, MANNING, J., in *Cooper* v. *State*, 63 Ala. 80: "What a person says that is explanatory of an equivocal or ambiguous act which he is then doing or situation which he is then occupying — as that of a person in possession of property — may be proved as 'res gestæ,' a part of the thing then going on, to elucidate and define the character of such equivocal act or situation. Words so connected with and illustrative of it are considered as appertaining to the act or situation, and, like expression on the human face, as indicating character, — the character of the act or situation which they are related to and are blended with. This is the central idea of the doctrine respecting what is called 'res gestæ.'"

1884, ELLIOTT, C. J., in *Creighton* v. *Hoppis*, 99 Ind. 369, 370: "Possession by the person who has executed an instrument purporting on its face to be an absolute conveyance of title is in its nature equivocal; for it may be that he was in possession as tenant or as mortgagor or by the mere sufferance of the grantee. As the possession may be equivocal, it becomes material to show its true character; and, in order to show this, what was done by the person in possession may be proved. The character of the possession may be determined in part from the acts of the person in possession."

1895, SEARLS, C., in *Lewis* v. *Burns*, 106 Cal. 381, 39 Pac. 778: "'The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence.' It would be more accurate to say that, where the act may have been prompted by one of two or more motives or objects, the declarations of the actor made at the time, and illustrative of the motive or object, are admissible in evidence."

1899, HOLMES, C. J., in *Com.* v. *Chance*, 174 Mass. 245, 250, 54 N. E. 551 (murder of R.; the fact that one Mrs. O'B. during a quarrel with her husband took two bullets from a closet and said, "The third one killed R.," was excluded): "The act of taking out the bullets needed no explanation; it is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved."

In the great majority of accepted instances of the principle (as illustrated in the ensuing sections), this limitation is satisfied, and thus no special mention

of it is called for in the judicial opinions. But if it is not attended to, the utterance comes in with the practical effect of a hearsay assertion, and the present principle becomes merely a pretext for using hearsay. Such a misuse of the principle is often found in the rulings; and this result is to be attributed to certain judicial expressions, often quoted in this connection, which omit to notice the present limitation:

1837, 1838, COLTMAN, J., in *Wright* v. *Tatham*, 7 A. & E. 361: "When an act done is evidence 'per se,' a declaration accompanying that act may well be evidence if it reflects light upon or qualifies that act." COLERIDGE, J., in s. c., 5 Cl. & F. 670, 693: "The act itself being admissible, whatever accompanies it and serves to explain its character is relevant and admissible also."

1851, FLETCHER, J., in *Lund* v. *Tyngsborough*, 9 Cush. 42: "If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. . . . But when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. . . . Such a declaration derives credit and importance as forming a part of the transaction itself." [1]

In these passages the requirement that the act shall be an equivocal one, or shall in some respect be incomplete and indefinite in legal significance, is ignored; though it was probably not intended to be denied by the authors of these opinions. The result has been a frequent looseness in the application of the principle. This tendency may be noted here and there in the rulings of every Court; it is sufficient to observe that it is unsound. It has in one way, to be sure, led to good results; for it has served gradually to allow the building up of the Exception for Spontaneous Exclamations (*ante*, § 1745); the absence of any such limitation for that Exception is a marked feature of distinction for utterances thereunder admissible.

§ 1775. (3) **Words must merely Aid in Completing the Conduct.** It follows also, as a necessary deduction, that the utterances must be such as serve the assumed purpose, namely, give *more definite significance to the equivocal or indefinite conduct*, by adding a missing part. They must be such as do merely this, and not more. The common phraseology, however, is here so loose and inclusive that utterances may be held admissible which do not merely complete and define the very act by serving as a part of it, but make assertions about its preceding facts, and are in effect given credit as hearsay testimony of any other matter that may happen to be connected with the act in time and place. This phraseology goes back to the broad language of certain earlier opinions, chiefly that in Lund *v.* Tyngsborough,[1] and the following:

1820, HOSMER, C. J., in *Enos* v. *Tuttle*, 3 Conn. 250 (referring to declarations as to the purpose of giving a note): "[They were] well calculated to unfold the nature and quality

§ 1774. [1] This case has furnished the language for many later opinions. This and Enos *v.* Tuttle, in the next section, may be called leading cases on the subject.

§ 1775. [1] Quoted *supra*, § 1774.

of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction." [2]

1869, CLIFFORD, J., in *Insurance Co.* v. *Mosley*, 8 Wall. 411: "Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in any issue before the court, and if they were made to explain the act or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts, and, as such, are not hearsay, but may be introduced, with the principal act which they accompany and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality."

These phrases about "unfolding," "elucidating," and "explaining" the nature of the act, while not inaccurate in themselves, have served, in the hands of many later judges, as an open sesame for utterances used purely in an assertive or testimonial way. "Elucidation" and "explanation," taken literally, are broad enough to include mere narrations of preceding matters; and such has been the service to which these classical terms have frequently been put. It must be noted that this application of them is unsound on principle. "It is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved." [3]

In the following colloquy the correct application of the principle is illustrated:

1875, *Tilton* v. *Beecher*, Abbott's Rep., I, 800; with reference to the plaintiff's having made inconsistent statements or admissions of the falsity of his claim, by stifling the matter when first publicly investigated, it was desired to show the true significance of his conduct in handing to his agent, Mr. Moulton, a statement to be given by the agent to the investigating committee. Mr. *Fullerton*, for the plaintiff, to the witness, Mr. Moulton: "What did he say in regard to it at the time he gave it to you? [Objected to.] . . . If I hand your Honor a certain paper, with a request to do a certain thing with it, for a certain purpose, is not that direction evidence?" Mr. *Beach*, for the plaintiff: "Let me put an illustration to your Honor. . . . Suppose Mr. Evarts comes to me and delivers a blow in my face, and at the instant of delivering that blow he accuses me of having injured him in some form; he gives the motives and the purpose with which he delivers that act; can that act be proved against Mr. Evarts, without permitting him to give the declaration accompanying the act?" Mr. *Evarts*, for the defendant: "That is a spoken act. That is not hearsay. It is a part of the blow; it is a spoken act. Some confusion, no doubt, arises in lawyers' discussions about hearsay evidence that comes by word of mouth in connection with that act; but your Honor is familiar with the distinction that our learned friend has given. . . . Now if he [Mr. Tilton] gave instructions to take that paper and lay it before the council, or carry it to Mr. Beecher, that is a part of the act of delivering it to him. But this question is large enough to draw out, and so I suppose is intended to draw out, a larger line of hearsay evidence, to wit, conversations between Mr. Moulton and Mr. Tilton with which Mr. Beecher cannot be affected." Judge NEILSON: "That distinction must be observed."

§ 1776. (4) **Words must Accompany the Conduct in Time.** Since the words are used only as verbal parts of the whole act, filling out and giving

[2] This is perhaps the most widely quoted passage in the precedents upon this general topic.

[3] Holmes, C. J., in Com. v. Chance, quoted *supra*, § 1774.

legal significance to the conduct, it is obvious that the words must be *contemporaneous with the conduct*, or, in the usual phrase, must accompany the act. This requirement does not allow any flexibility or extension of time such as is allowable in using statements under the Exception for Spontaneous Exclamations (*ante*, § 1749, par. *b*, § 1756); for the principle is an entirely different one. Here the utterance is used irrespective of its trustworthiness as an assertion, and only as a verbal part of an entire act. The utterance must therefore accompany the other conduct, for otherwise it is no part of the act and can serve merely as an ordinary hearsay assertion of what has been already done. It is true that the conduct which the words must accompany may itself extend over a long period of time — as in the case of prescriptive occupation — and therefore an utterance at any moment during that period does in fact accompany the conduct. Nevertheless, even then, the utterance is in strictness still contemporaneous with the conduct; and whenever that conduct has come to an end, any subsequent utterance, however near in time, is inadmissible.

Courts are more or less liberal in applying this requirement, and the duration of the main conduct is often generously interpreted; but no Court seems to question in theory the existence of the limitation. The following passage illustrates it:

1865, PARK, J., in *Ford* v. *Haskell*, 32 Conn. 489 (excluding declarations by the defendant's intestate, while buying clothing for the plaintiff, as to the terms of an existing contract with the plaintiff): "The term 'res gestæ' includes a declaration that explains or characterizes some act that is then being performed by the declarant. . . . The defendant's intestate is purchasing an article of clothing. She says she is doing it in fulfilment of her contract with him in relation to carrying on her farm. This fully explains her act. The other terms of the contract [mentioned by her] could give no additional explanation. Her contract required her to furnish clothing. She is fulfilling that part of it." [1]

§ 1777. **Sundry Applications of the General Principle, in Acts of Payment, Sale, Loan, Gift, Advancement, Consideration, Dedication of Land, Entry on Land, Conversion, Larceny, etc.** The application of the Verbal Act doctrine is illustrated in a great variety of instances. Some of these, presenting special complications, may be taken up separately. In this place may be noticed sundry classes of cases not usually complicated by other questions.

(1) The act of *handing over* or of *receiving money* may have a varied legal significance, and words accompanying the receipt or delivery may therefore serve to make definite the effect of the act:

1780, Mr. *Jeremy Bentham*, Principles of Morals and Legislation, c. XVIII, par. xxxv. note: "What is meant by payment is always an act of investitive power, as above explained, — an expression of an act of the will, and not a physical act; it is an act exercised with relation indeed *to* the thing said to be paid, but not in a physical sense exercised *upon*

§ 1776. [1] *Accord:* 1844, Noonan *v.* State, 1 Sm. & M. 562, 571 (the statement must be "by one connected with the act in question and during its progress").

Other cases applying this limitation will be found under the various rulings classed according to subject-matter, *post*, §§ 1777–1785.

it. A man who owes you ten pounds takes up a handful of silver to that amount and lays it down on a table at which you are sitting. If then, by words or gestures or any means whatever, addressing himself to you, he intimates it to be his will that you should take up the money and do with it as you please, he is said to have paid you. But if the case was that he laid it down, not for that purpose but for some other—for instance, to count and examine it, meaning to take it up again himself or leave it for somebody else—he has *not* paid you. Yet the physical acts exercised upon the pieces of money in question are in both cases the same. Till he does express a will to that purport, . . . [there is no payment]."

1810, Chief Justice SWIFT, Evidence, 130: "The declarations of a party . . . when they tend to explain the fact and are necessary for that purpose, they may be given in evidence. . . . As in the case of a tender, the declaration of the party of the purpose for which the money is offered is part of the 'res gestæ' and must be proved; otherwise the transaction cannot be understood."

1853, ROACHE, J., in *Strange* v. *Donohue*, 4 Ind. 328 (payment was made to a sheriff holding an execution, the payor stating that he paid "not in satisfaction of the judgment, but merely to prevent a sale" by staying execution): "It frequently becomes material, as in the present case, to ascertain with what motive an act was done. The declarations made by the party himself, while doing the act, and explanatory of it, are admitted as being a part of the transaction and as serving to explain its real character."

Declarations accompanying a *delivery of money* may therefore be admissible,[1] in order to determine whether a loan or a payment was made, whether one debt or another was paid, whether it was accepted in full or in part payment, or whether any other specific significance is to be attributed to the act. Declarations by either party are receivable, except so far as a declaration by one could not legally affect the significance of the act done by the other.

(2) In the same way, when money is loaned or goods sold or services rendered, and issue is whether the other party acted *as agent or for himself*, declarations of the transactors at the time are admissible to make clear the meaning

§ 1777. [1] ENGLAND: 1873, Clewser *v.* Samuel, 15 N. Br. 58 (instructions how to apply money sent therewith, admitted).

UNITED STATES: *Federal:* 1863, Beaver *v.* Taylor, 1 Wall. 637, 642 ((issue as to payment of taxes; receipts being admitted, letters accompanying them and entries made on their arrival were also admitted); *Alabama:* 1853, Mims *v.* Sturtevant, 23 Ala. 664 (issue whether B. or J. owned a slave; B.'s declarations, when counting out money, that it was intended for the slave's purchase, not admitted in his favor); 1860, Dillard *v.* Scruggs, 36 Ala. 372; *Connecticut:* 1863, North Stonington *v.* Stonington, 31 Conn. 412, 416 (pauper settlement; the pauper's statement when refusing to pay taxes to the plaintiff, that a selectman had told him they did not want him to pay, excluded, because the motive of refusal was immaterial and the fact that the selectman had not demanded in good faith was the real issue, of which the declaration was merely hearsay evidence); *Florida:* 1896, Hood *v.* French 37 Fla. 117, 19 So. 165 (statements when making a payment, admitted); *Illinois:* 1840, McFarland *v.* Lewis, 3 Ill. 344, 347 (debtor's application of a payment, admitted); 1847, Rigg *v.* Cook, 9 Ill. 336; 1872, Richerson *v.* Sternburg, 65 Ill. 272, 274 (like McFarland *v.* Lewis); *Indiana:* 1886, Brown *v.* Kenyon, 108 Ind. 283, 9 N. E. 283; 1917, Citizen's Bank *v.* Opperman, — Ind. —, 115 N. E. 55 (whether a wife pledged bank-stock as security for her husband's debt; her conversation and his, at the time of delivery, admitted); *Iowa:* 1901, Golden *v.* Vyse, 115 Ia. 726, 87 N. W. 691 (delivery of a note to plaintiff; deliverer's declaration admitted); *Louisiana:* 1920, Garlick *v.* Dalbey, 147 La. 18, 84 So. 441 (community property; letters written by the husband enclosing money for payments, admissible as verbal acts); *Pennsylvania:* 1917, Kvist's Estate, 256 Pa. 30, 100 Atl. 523 (husband's failure to support his wife; the deceased wife's statements as to the amount of money given him by her, etc., excluded); *Vermont:* 1853, Bank *v.* Clark, 25 Vt. 310; 1886, Barber *v.* Bennett, 58 Vt. 476, 484, 4 Atl. 231 (declarations as to the purpose of payment, admitted); 1895, Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35 (the remark of parties when paying money, "That makes up the $600," admitted as showing that a *bona fide* transaction was occurring).

of the act and determine *to whom credit was given* or by whom liability was undertaken:[2]

1831, SHAW, C. J., in *Allen* v. *Duncan*, 11 Pick. 310: "It became a material question whether the goods were procured from G. by A. in his individual or partnership capacity. . . . It is therefore left uncertain in which capacity he acted. . . . It was undoubtedly competent for A. to declare, at the time of making the contract, whether he did it on the one or the other account, and such declaration would have been conclusive."

1870, PAINE, J., in *Roebke* v. *Andrews*, 26 Wis. 311, 321: "[The evidence was properly admitted] that S. and S., in negotiating the purchase, professed to act as agents of the defendant. Such statements by them were not proof of the fact of agency. It would be necessary to prove that fact in some other way, or to connect the defendant with the consummation of the bargain. But it is still true that whatever bargain was made, if any, was negotiated by those parties. What that bargain was, with whom and by whom it was made, could only be proved by showing what was done and said in its actual nego-

[2] The rulings are not harmonious: *Federal:* 1872, Bank *v.* Kennedy, 17 Wall. 20, 25 (whether a loan was made to a bank or to the cashier personally; statements made when advancing the money, admitted); *Alabama:* 1849, Tomkies *v.* Reynolds, 17 Ala. 118 (declarations made by H., when handing notes of the plaintiff to the witness, showing that H. was merely agent for his partner in handing the notes over for collection; the issue being whether H. and his partner had originally received the note as a loan from the plaintiff, or merely as agents to collect; held inadmissible; but if the issue had involved the purpose of H. in handing the notes to the witness, apparently the declarations would have been admitted); 1862, Gordon *v.* Clapp, 38 Ala. 357 (labor performed; laborer's declaration that he would work for A. not for B. not admitted against A.); 1872, Marx *v.* Bell, 48 Ala. 497, 506 (money advanced by plaintiff to H., but on defendant's credit; plaintiff's entry, in his books at the time, that defendant was responsible, excluded); *California:* 1895, Lewis *v.* Burns, 106 Cal. 381, 39 Pac. 778 (declarations as to a purchase as agent, admitted); *Illinois:* 1843, Frink *v.* Phelps, 5 Ill. 556, 558 (daughters' declarations, when buying, whether they bought for the father, admitted); 1860, Hurd *v.* Haggerty, 24 Ill. 171, 174 (partnership note; declarations of the executing partner, as entries upon the books, admitted to show to whom credit was given); *Iowa:* 1916, Butler *v.* Farmers' Nat'l Bank, 173 Ia. 659, 155 N. W. 999 (whether a sum received for hogs and deposited by the wife was to be hers or the husband's; her conversation with the husband at the time of his direction to sell the hogs, admitted); *Massachusetts:* 1890, Jefferds *v.* Alvard, 151 Mass. 94, 23 N. E. 734 (husband's declarations when purchasing, admitted; "his state of mind at the moment of buying determined whether the purchase was made for his wife or not"); *Michigan:* 1891, Tolbert *v.* Burke, 89 Mich. 132, 141, 50 N. W. 803 (declarations as to whom credit was given on an order for goods, not admitted on the facts); *New Hampshire:* 1844, Simonds *v.* Clapp, 16 N. H. 222, 233 (action for a reward earned by the plaintiff in the capture of an escaped prisoner; the issue being whether his acts had been done on his own behalf or only as H.'s agent, his declarations while acting were received); *New York:* 1905, Gearty *v.* City of New York, 183 N. Y. 233, 76 N. E. 12 (contract; a certain letter from the defendant's agent, not admitted for the defendant); *North Carolina:* 1915, McKinnon Carrie & Co. *v.* Caulk, 170 N. C. 54, 86 S. E. 809 (declaration that "he had made the deed to Sarah," etc., excluded, as merely narrative of a past occurrence); *North Dakota:* 1909, Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830 (conveyance by insolvent parents to son; the parents' statement to the notary, at the time of drafting the deed, that the son had demanded pay for his labor and that this conveyance was made to satisfy him, excluded; Morgan, C. J., diss.); *Vermont:* 1848, Elkins *v.* Hamilton, 20 Vt. 630; *Wisconsin:* 1857, Eastman *v.* Bennett, 6 Wis. 237.

It would seem that declarations by the payor or vendor are here admissible no less than those of the alleged agent receiving the money or goods; because the act could not have effect as (for example) a sale to an agent unless the seller as well as the buyer willed to treat it so; the tenor of the seller's act in that respect must equally be made definite; and his declarations should be received for that purpose, though of course not as evidence of the existence of the agent's conduct nor of his authority from the alleged principal. Some Courts, in actions against the alleged principal, seem to suppose that the seller's declarations can only be considered as hearsay offered to prove the agent's authority; and therefore, ignoring the above considerations, improperly exclude such declarations.

Compare the cases on *agent's admissions* (*ante*, § 1078).

tiation. If they professed to act for the defendant, that fact entered into and formed a part of the negotiation itself, and gave it character. It was a part of the 'res gestæ,' and was admissible as such; though without something further it would have no binding effect upon the defendant."

(3) Declarations accompanying the *delivery of a chattel* or a *deed* may help to show whether it is an act of *gift, advancement*, or otherwise; here the Courts seem to interpret liberally the rule of contemporaneousness:[3]

[3] Accompanying declarations were admitted, except as otherwise noted: *Alabama:* 1845, Olds *v.* Powell, 7 Ala. 652; 1846, Powell *v.* Olds, 9 Ala. 864; 1856, Gillespie *v.* Burleson, 28 Ala. 551, 563 (whether a gift was to a wife during coverture only); 1861, Bragg *v.* Massie, 38 Ala. 89, 106 (whether a delivery was a gift); 1906, Napier *v.* Elliott, 146 Ala. 213, 40 So. 752 (grantor's declaration when signing and acknowledging a deed, admitted on the question of delivery); 1916, Bank of Phoenix City *v.* Taylor, 196 Ala. 665, 72 So. 264 (money left on deposit; M's statements when depositing it, excluded on the facts); *California:* 1916, Smith *v.* Smith, 173 Cal. 725, 161 Pac. 495; *Columbia (Dist.):* 1904, Dawson *v.* Waggaman, 23 D. C. App. 428 (donatio causa mortis); *Connecticut:* 1898, Guinan's Appeal, 70 Conn. 342, 39 Atl. 482 (declarations at the time of delivering bank-book, received to show intent of gift); *Georgia:* 1847, Carter *v.* Buchannon, 3 Kelly 513 (declarations made by B. as to a gift by him of a negro slave, excluded; the declarations not being made at the time of an act of gift so that they "would serve to characterize it, would be expressive of the motive or object of the donor"); *Illinois:* 1901, Scott *v.* Scott, 191 Ill. 628, 61 N. E. 415 (advancement to a son; testator's declarations, at the time of executing the will, that he had a note of the son, not admitted, no possession of the note appearing otherwise; nor could they be used to interpret the will-clause "whatever notes I may hold at the time of my death against my son W."); 1910, Elliott *v* Western Coal & M. Co., 243 Ill. 614, 90 N. E. 1104 (gift in 1889, not allowed to be qualified as an advancement by the testator's written statement in 1892); *Indiana:* 1868, Woolery *v.* Woolery, 29 Ind. 249, 254 (declarations by a father, a few days prior and twenty or thirty days subsequent to the conveyance, admitted); 1888, Durham *v.* Shannon, 116 Ind. 403, 407, 19 N. E. 190 (alleged gift to the plaintiff of a horse bought by S.; S.'s declarations of intent to buy for the plaintiff, made "a day or two before he purchased," admitted as contemporaneous); 1892, Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946 (whether sums were advancements; subsequent statements excluded); *Iowa:* 1870, Middleton *v.* Middleton, 31 Ia. 151, 153 (father's declarations at the time of a sale to the son, that the latter had paid in full, held receivable, either as admissions or as a deceased's statements against interest); 1903, Ellis *v.* Newell, 120 Ia. 71, 94 N. W. 463 (by a father, after a transfer to his son, that it was a gift and not an advancement, excluded); 1905, Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209 (delivery of a deed); *Kentucky:* 1901, Bailey *v.* Barclay, 109 Ky. 636, 60 S. W. 377 (subsequent declarations of the alleged donor, excluded); 1906, Hill's Guardian *v.* Hill, 122 Ky. 681, 92 S. W. 924 (advancements); *Massachusetts:* 1870, Kingsford *v.* Hood, 105 Mass. 495, 497 (declarations of a grantor, not at time of delivery, but at time of drafting, not admitted to show which person was meant by a grantee's name equally describing two persons); 1885, Scott *v.* Bank, 140 Mass. 165, 2 N. E. 925 (quoted *supra*); 1889, Brooks *v.* Duggan, 149 Mass. 306, 21 N. E. 381; *Mississippi:* 1866, Young *v.* Power, 41 Miss. 197, 204 (testatrix's declarations of intention to collect a claim against the defendant, alleged to have been forgiven to him by her, admitted as declarations of intent consummating the gift); *Missouri:* 1920, Peterman *v.* Crowley, — Mo. —, 226 S. W. 944 (deed deposited with a bank, to take effect after death; grantor's subsequent statements, admitted because made in the opponent's presence); 1915, Gill *v.* Newhouse, — Mo. —, 178 S. W. 495 (statements that a deed was in part payment of a debt, admitted); *New Jersey:* 1897, Parret *v.* Craig, 56 N. J. Eq. 280, 38 Atl. 305 (declarations accompanying a delivery, admitted); 1916, Veader *v.* Veader, 89 N. J. L. 399, 99 Atl. 133 (subsequent statements by a father as to intent in indorsing a pension-check to his son, excluded); *North Carolina:* 1827, Collier *v.* Poe, 1 Dev. Eq. 55 (declarations of a father, just before sending slaves to a married daughter, as to his intent to give or lend them, admitted); 1844, Moore *v.* Gwyn, 4 Ired. 275, 278 (similar; "the declaration was made with a view of qualifying the act . . . whenever it should be done"); *Tennessee:* 1832, Stewart *v.* Cheatham, 3 Yerg. 60 (owner's declaration preceding a delivery of negroes, admitted as negativing an intent to give); 1900, Garner *v.* Taylor, — Tenn. —, 58 S. W. 758 (note given by son to father for money; subsequent declarations, excluded); *Texas:* 1902, Lord *v.* Ins. Co., 95 Tex. 216, 66 S. W. 290 (gift of an insurance policy; declarations accompanying, admitted); *West Virginia:* 1921, De Pue *v.* Steber, 89 W. Va. 78, 108 S. E.

1885, W. ALLEN, J., in *Scott* v. *Bank*, 140 Mass. 165, 2 N. E. 925: "Mrs. F., the claimant's intestate, deposited her money in a savings bank in the names of the plaintiffs. . . . The intention of the donor to make a gift is open to inquiry. . . . Upon the question of Mrs. F.'s intention in holding the book before the gift was perfected — whether she held it as owner or as the agent or depositary for the plaintiff — her declarations and acts while holding it, showing the character of the act, are competent. . . . The declarations of the donor, in relation to making her will, were after the gift was completed, if it ever was completed, and were either incompetent or immaterial."

In the same way, declarations accompanying the delivery of money, notes, or chattels, may indicate whether it was *delivered as a consideration*.[4]

(4) Declarations accompanying the erection or removal of a fence, or the like, may disclose the total effect of the act as amounting to a *dedication of the land for highway* purposes:[5]

1883, SHELDON, C. J., in *Quinn* v. *Eagleston*, 108 Ill. 254: "The planting the hedge in from the line of the land was an equivocal act. It might be interpreted as a dedication to the public or as setting the hedge on the true line. The declarations of E. [as to his reason for doing it] when he was the owner and in possession of the land, explanatory of his intention in leaving the strip of land open, we think were properly admitted as a part of the 'res gestæ,' as accompanying the acts of throwing the land open and keeping it open."

(5) The act of *entering upon land* is open to a variety of legal effects, and the accompanying declarations will frequently serve to determine its significance; so also the declarations of a grantee may serve to indicate whether his conduct amounts to an *acceptance of the grant*.[6]

590 (certain declarations both of donor and donee, excluded).

When the declarations are *subsequent* to a deed, they may still be receivable, if made in possession, as affecting the *presumption of ownership* (*post*, § 1779).

Compare also the cases cited *post*, § 1782 (testator's declarations).

But for an alleged *advancement to a child* (in the usual case, on a note from the child to the parent), the parent's declarations, even though made *after* the delivery of the money, may be nevertheless receivable as *admissions* (*ante*, § 1081), offered against his estate; this distinction is emphasized in Missouri; 1904, Strode *v.* Beall, 105 Mo. App. 495, 79 S. W. 1019 (citing cases).

[4] 1847, Blood *v.* Rideout, 13 Metc. Mass. 241 (controversy as to the existence of a consideration; the fact was admitted of the giving of a note and of declarations accompanying it; Shaw, C. J.: "The occasion was the one at which the note was completed as the parties intended to have it, and the declarations . . . showing the purpose for which it was given, qualified the act of executing and delivering it"); 1838, Sessions *v.* Little, 9 N. H. 276.

[5] 1886, Tait *v.* Hall, 71 Cal. 152, 12 Pac. 391; 1892, Chicago *v.* Drexel, 141 Ill. 89, 105, 30 N. E. 774; 1900, Woodburn *v.* Sterling, 184 Ill. 208, 56 N. E. 378; 1897, Pittsburg C. C. & St. L. R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332 (words accompanying the removal of a fence, admitted to show a dedication); 1904, Quick *v.* Cotman, 124 Ia. 102, 99 N. W. 301.

[6] ENGLAND: 1628, Co. Litt. 45, b ("To a livery of seisin of land, words are necessary, as taking in his hand the deed and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land), and the feoffee laying his hand on it, the feoffer says to the feoffee, Here I deliver to you seisin of this house, or of this land").

UNITED STATES: *Illinois:* 1856, Croff *v.* Ballinger, 18 Ill. 201, 203 (forcible entry; the occupant B.'s declarations at the time of the entry, admitted to show "whether the entry was made against the will of B."); 1866, Rowley *v.* Hughes, 40 Ill. 316, 319 (forcible entry; declarations of defendant's predecessor, when entering, admitted to show the character of his occupation as constituting possession); *Kentucky:* 1824, Thompson *v.* Stewart, 5 Litt. 5 (forcible entry; on the issue of possession, the plaintiff's declarations, after temporary removal from the land, were admitted as indicating his continuing intent to possess it); *Massachusetts:* 1870, Kings-

(6) Whether a *taking of personalty* was made with such claim of title or intent to exercise dominion as amounted to a *conversion* may depend upon the accompanying declarations.[7] So, also, the declarations, while in possession, of one charged with *larceny* or the like, may indicate whether he exercised dominion by appropriation to himself, or dealt only as a borrower, in recognition of the true owner's title; for in the latter case the act would not be criminal. There should be no doubt as to the admissibility of such declarations; but they are often affected by the rule for *explanations* by one found in *possession of stolen goods*, and the distinction is examined elsewhere (*post*, § 1781).

(7) In *sundry other instances*, not calling for further generalizations, the Verbal Act doctrine finds frequent exemplification." [8]

ford *v.* Hood, 105 Mass. 495, 497 (grantee described by a name equally applicable to two persons; declarations of claim by one of them, admitted to show the nature of his occupation); 1886, Stevens *v.* Miles, 142 Mass. 572, 8 N. E. 426 (Gardner, J.: "It became material to determine whether the defendant accepted the lease. . . . This act of taking and reading the instrument . . . was relied on by the plaintiff in support of her case. What the defendant said may have given character to the act and given it a different meaning from that claimed by the plaintiff. . . . It was a part of the act of taking and reading it"); 1901, O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580 (declarations of a grantor while in occupation, admitted to show seisin); 1907, Goyette *v.* Keenan, 196 Mass. 416, 82 N. E. 427 (a deed described "land formerly belonging to H. B., now or lately of one W."; declarations of W., "to show the character of his occupation" etc., the dispute being whether the description covered the land in question, were held not improperly excluded because their tenor did not appear); *Pennsylvania:* 1864, Duffey *v.* Presbyterian Congregation, 48 Pa. 46, 51 (whether a wife went into possession under a certain deed or a certain will; her declarations in possession admitted).

For *adverse possession*, see *post*, § 1778.

[7] 1888, Dunbar *v.* McGill, 69 Mich. 297, 37 N. W. 285; 1883, Frome *v.* Dennis, 45 N. J. L. 520; 1888, Ross *v.* White, 60 Vt. 560.

[8] *California:* 1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant to adopt and support plaintiff; defendant's declarations that he was only guardian, excluded, the 'res gestæ' not including the whole time of living together); *Connecticut:* 1848, Russell *v.* Frisbie, 19 Conn. 209 (declarations made at the time of depositing ship's papers with the witness, indicating a revocation of the authority of F., then in possession of the ship, admitted); 1905, Engel *v.* Conti, 78 Conn. 351, 62 Atl. 210 (separation of wife and husband; their conversation while in the same room, admitted in explanation of his acts); *Illinois:* 1898, Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509 (unsigned license-paper wafered to a deed; declarations of the grantor in attaching it, received to show whether it was executed as a part of the deed); 1906, Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 (delay in performance of a contract; the contractor's agent's expressions of readiness to perform, admitted); *Massachusetts:* 1874, Nourse *v.* Nourse, 116 Mass. 101, 104 (declarations by a mortgagor, two months after making it, as to his purpose in doing so, excluded); *New Hampshire:* 1839, Buswell *v.* Davis, 10 N. H. 413, 422 (attachment in fraud of creditors; declarations of the attachor at the time of obtaining the writ, as to past facts forming his reason, excluded); *Philippine Isl.* 1919, Dusepee *v.* Torres, 39 P. I. 760, 771 (inheritance, sworn declaration of T., on bringing plaintiff to the Islands as immigrant, that plaintiff was his legitimate child, admitted); *Rhode Island:* 1905, Chapman *v.* Pendleton, 26 R. I. 573, 59 Atl. 928 (surety's agreement; subsequent declarations excluded); *South Dakota:* 1917, Schanzenbach *v.* Stoller, 38 S. D. 303, 161 N. W. 329 (purchase of land; statements made at the time of delivering the contract, held admissible; Whiting, J., diss.; both opinions citing the text above with approval); *Vermont:* 1848, Holbrook *v.* Murray, 20 Vt. 525, 528 (declarations as to notes, before taking possession under a mortgage, excluded); 1915, Comstock's Admr. *v.* Jacobs, 89 Vt. 133, 94 Atl. 497 (action against a foster son-in-law to recover the intestate's property; plea, that the intestate transferred it to defendant as consideration for a contract of support; replication, that the intestate lived with the defendant under a contract of boarding and had not transferred the property; declarations of the intestate, made while living with the defendant, that intestate had not given away the property but was living there under a contract for board, excluded).

§ 1778. **Possessor's Declarations on an Issue of Prescription by Adverse Possession.** Where a title is rested on a prescriptive possession for a period of years sufficient to extinguish former rights and create title in the possessor, it is essential, under the rule of substantive law, that the occupation thus relied upon shall have been "adverse" to other claimants, *i.e.* the occupation must have purported to be hostile to and exclusive of other claimants. This adverseness of occupation most commonly appears when the occupation is under a claim of title by the occupant himself, for this by implication denies and opposes other titles.

Accordingly, it has never been doubted that all declarations *by the occupant*, importing a *claim of title* in himself, are admissible as verbal parts of his act of occupation, serving to give it an adverse color; while his declarations of *disclaim*, conceding another's title, are equally receivable as giving it the contrary color. Such declarations of claim are in no sense testimony to the deed or other source of title that may be thus asserted; for in that aspect they would clearly violate the Hearsay rule. They are merely verbal parts going to make up the whole act of occupation, and are not given any testimonial force as credible assertions:

1845, Collier, C. J., in *McBride* v. *Thompson*, 8 Ala. 650, 653: "It is not to be understood that such declarations are admissible to every conceivable extent. True, the affirmation of the party in possession that he held in his own right or under another is proper evidence as part of the 'res gestæ,' which 'res gestæ' is his continuous possession. But his declarations beyond this are no part of the subject-matter, or 'thing done,' and cannot be received as such. While it is allowable to prove statements of one in possession and explanatory thereof, it is not permissible to show everything that may have been said by him in respect to the title, — as, that it was acquired by him 'bona fide' and for a valuable consideration, was paid for by the money of a third person or his own, etc. This, we have seen, instead of being a part of the 'res gestæ,' would be something beyond and independent of it."

1869, Peck, J., in *Webb* v. *Richardson*, 42 Vt. 465, 472: "The Court properly admitted proof of the declarations of Reuben Hawkins, made while working on lot sixty-four, to the effect that he called it his 'possession lot,' and that he was claiming and getting it by possession. But the Court was in error in excluding 'evidence to show that at other times, prior to 1822, the said Hawkins said the same things when not on lot sixty-four, but at his house and in sight of it, and pointing it out.' To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy, necessary to constitute a continuous possession, depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterwards be connected with a subsequent occupation so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbroken. This principle is tersely stated in the civil law, thus: a man may retain possession by intention alone, yet this is not sufficient for the acquisition of possession. . . . If the admissibility of such

declarations is put on the ground of declarations constituting part of the 'res gestæ,' they are admissible, as the 'res gestæ' is not confined to a particular act of occupancy done upon the premises, but is the continual possession, which includes the successive acts of occupancy. Since a party who has once commenced a possession of land, by actual entry and acts of occupancy upon it, may continue to possess it during intervals when not upon it, he may claim it during such intervals as well as when actually upon the land doing acts of possession; and the fact of his making such claim is provable by evidence of his declarations made at the time, in the same manner and to the same effect as if made while on the land, doing an act of possession. Such declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof."

1873, DAY, J., in *Stephens* v. *McCloy*, 36 Ia. 661: "It is the intent [to possess] with which the acts are done that gives them their character. . . . The question rejected seeks to elicit the declarations made by the plaintiffs, at the time of making the survey, respecting the object for which the survey was being made. . . . Such declarations are those made at the time of the act done and which are calculated to unfold its nature and quality."

The limitations of this doctrine must, however, be observed. It assumes that adverse possession is in some way *material* under the issues of the case [1] (forcible entry, prescriptive title, or otherwise), and that the declarations were made when *in possession*,[2] and that they are not offered except as *coloring the occupation*.[3] Subject to these limitations, the use of such declarations for this purpose is never disputed.[4] It is apparent, moreover, that they may be

§ 1778. [1] 1896, McCleod *v.* Bishop, 110 Ala. 640, 20 So. 130. For cases of *forcible entry*, see also *ante*, § 1777.

[2] 1851, Comins *v.* Comins, 21 Conn. 413, 418 (declarations "made while he was absent from the premises and which accompanied no act" were held inadmissible; this seems unsound; compare Webb *v.* Richardson, quoted *supra*); 1823, May *v.* Jones, 4 Litt. Ky. 21, 24 (declarations after possession ended, excluded); 1897, Ward *v.* Edge, 100 Ky. 757, 39 S. W. 440; 1869, Webb *v.* Richardson, 42 Vt. 465, 472 (quoted *supra*); 1897, High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

The practical distinction between this and other rules is more particularly examined later (*post*, § 1780). But note here that the present rule may be sometimes more, sometimes less favorable than the rule for a *party's admissions*. For example, the declarations, if made *after possession ended*, might be excluded under this rule, but still receivable against the claimant as a party's admissions: 1829, Church *v.* Burghardt, 8 Pick. 327. Conversely, the declarations made *during possession* might be receivable against him under the present rule, though not receivable under the rule for admissions: 1901, Todd *v.* Weed, 84 Minn. 4, 86 N. W. 756 (statements of disclaim, made after expiration of the statutory period, receivable as affecting the intent of occupation, but not as oral admissions divesting title).

[3] 1910, Makekau *v.* Kane, 20 Haw. 203, 209 (above requirement applied); 1847, Rigg *v.* Cook, 9 Ill. 336, 343, 350 (defendant claimed under R.; plaintiff claimed under a mortgage foreclosed against R.; for the defendant, R.'s statements when paying rent for the land, while in possession after foreclosure, admitted to color his claim of adverse possession; but not his statements as to having paid the mortgage and as to the former owners' title).

[4] In the following list, when not otherwise noted, the case is one of *prescriptive possession*; some of these declarations might have been excluded or admitted on other grounds (summarized *post*, § 1780); in particular, distinguish the rules for a party's *consistent claims in corroboration* (*ante*, § 1133), for a party's *admissions* (*ante*, § 1082), for a deceased's declarations *against proprietary interest* (*ante*, § 1458), and for a deceased's *boundary-declarations* (*ante*, § 1563); *Federal:* 1822, Ricard *v.* Williams, 7 Wheat. 59, 105; *Alabama:* 1842, Oden *v.* Stubblefield, 4 Ala. 40, 42 (slave); 1845, McBride *v.* Thompson, 8 Ala. 650, 652 (slave); 1843, Nelson *v.* Sverson, 24 Ala. 9, 16 (slave); 1855, Johnson *v.* Boyles, 26 Ala. 576, 581 (slave); 1856, Gillespie *v.* Burleson, 28 Ala. 551, 563 (slave); 1905, Henry *v.* Brown, 143 Ala. 446, 39 So. 325; *Arkansas:* 1905, Seawell *v.* Young, 77 Ark. 309, 91 S. W. 544 (ancestor's declarations of claim in possession, admitted, following Knight *v.* Knight, Ill., *infra*); 1912, Butler *v.* Hines, 101 Ark. 409, 142 S. W. 509 (declarations after seven years' occupation, admitted, as evidencing lack of adverseness in prior occupation); *California:* 1863, Draper *v.* Douglass, 23 Cal. 347 (location of a mining-claim; the miner's

used either *for or against* the prescriptive claimant, according as they give to the occupation one or the other purport, and irrespective of the rule for admis-

declarations, while working in the vicinity, admitted in his favor); 1866, Sneed *v.* Woodward, 30 Cal. 430, 434 (issue as to the plaintiff's acquiescence in an erroneous location so as to be estopped; their declarations at the time, received in their favor); 1871, Phelps *v.* McGloan, 42 Cal. 298, 302; *Connecticut:* 1828, Reading *v.* Weston, 7 Conn. 143, 148 (pauper settlement; on an issue whether D. occupied premises in her own right and as a whole, her declarations during occupancy were admitted); *Georgia:* 1896, Ogden *v.* Dodge Co., 97 Ga. 461, 25 S. E. 321 (the ordinary of the county, in official possession); 1903, Perkins *v.* Brinkley, — Ga. —, 45 S. E. 652 (declarations of an agent in possession, excluded; here, of a husband); 1909, Bowman *v.* Owens, 133 Ga. 49, 65 S. E. 156 (admitted, under Code 1895, § 5180); Rev. C. 1910, § 5767 (general principle; quoted *ante*, § 1082); *Hawaii:* 1915, Oahu R. & L. Co. *v.* Kaili, 22 Haw. 673 (adverse possession; declarations of defendant's ancestor as to having obtained the land by exchange from plaintiff's lessor, excluded as "narrative of past occurrences"); *Illinois:* 1879, James *v.* R. Co., 91 Ill. 554, 557 (operation of a railroad over land claimed); 1884, Grim *v.* Murphy, 110 Ill. 271, 277 (declarations as to a disputed boundary); 1888, Illinois C. R. Co. *v.* Houghton, 126 Ill. 233, 239, 18 N. E. 301 (disputed boundary); 1889, Shaw *v.* Schoonover, 130 Ill. 448, 453, 22 N. E. 589 (declarations by a married woman claiming her father's land by adverse possession); 1899, Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306 (declarations of ancestor during general time of possession); 1899, Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367 (similar); 1911, Rich *v.* Naffziger, 248 Ill. 455, 94 N. E. 1; *Kansas:* 1898, Rand *v.* Huff, 59 Kan. 777, 53 Pac. 483 (predecessor in claim); 1899, Crawford *v.* Crawford, 60 Kan. 126, 55 Pac. 842 (excluded on the facts); *Kentucky:* 1828, Smith *v.* Morrow, 7 T. B. Monr. 234, 237; *Maine:* 1905, Emmet *v.* Perry, 100 Me. 139, 60 Atl. 872 (defendant's grantor's declarations of claim, admitted); *Massachusetts:* 1859, Niles *v.* Patch, 13 Gray 254, 256; *Michigan:* 1869, Bower *v.* Earl, 18 Mich. 367, 378 (extent of possession); *Missouri:* 1876, Martin *v.* Bonsack, 61 Mo. 556, 559; 1890, Mississippi Co. *v.* Vowels, 101 Mo. 225, 228, 14 S. W. 282; 1891, Meier *v.* Meier, 105 Mo. 411, 422, 430, 16 S. W. 223; 1903, Whitaker *v.* Whitaker, 175 Mo. 1, 74 S.W. 1029; 1905, Swope *v.* Ward, 185 Mo. 316, 84 S. W. 895 (but declarations naming the source of an alleged title are excluded; this seems erroneous); 1906, Farmers' Bank *v.* Barbee, 198 Mo. 465, 95 S. W. 225 (Martin *v.* Bonsack followed); 1914, Heynbrock *v.* Hormann, 256 Mo. 21, 164 S. W. 547 (Bank *v.* Barbee followed); *New Hampshire:* 1821, Claremont *v.* Carlton, 2 N. H. 369, 372 (declarations to show the bounds of an occupation, held admissible; distinguishing the improper attempt to contradict a deed's description of boundaries, forbidden by the parol evidence rule, *post*, § 2442); 1826, Downs *v.* Lyman, 3 N. H. 486 (plaintiff claimed a *locus* M. under a grant to H., and to identify it showed an occupation of a certain *locus* by H.'s grantees; to rebut this, defendant was allowed to show declarations of H.'s grantees, when abandoning this *locus*, indicating that they did not claim it under H.'s grant); 1849, Cilley *v.* Bartlett, 19 N. H. 312, 322 (general principle applied); 1863, Hodgdon *v.* Shannon, 44 N. H. 572, 577 (same); 1882, Smith *v.* Putnam, 62 N. H. 369, 373 (same); *New Jersey:* 1887, Miller *v.* Feenane, 50 N. J. L. 32, 11 Atl. 136; *New York:* 1806, Jackson *v.* Vredenburgh, 1 John. 159 (plaintiff claimed as heir of C. Y.; defendant claimed by deed from the wife of D. Y., elder brother of C. Y.; the wife having been in possession, her declarations were admitted for the defendant to show the possession to be adverse and under claim of title, and not as guardian for her son); 1867, Abeel *v.* Van Gelder, 36 N. Y. 513, 515; 1872, Morss *v.* Salisbury, 48 N. Y. 636, 642; *North Carolina:* 1841, Davis *v.* Campbell, 1 Ired. 482; 1858, State *v.* Emory, 6 Jones L. 133 (forcible ouster; the tenant's declaration, after leaving, that he had consented, excluded); 1868, Hedrick *v.* Gobble, 63 N. C. 48 (issue as to boundary; plaintiff's ancestor's statements while in possession pointing out the boundary, excluded, as not explanatory of possession); *Oklahoma:* 1897, Meyers *v.* U. S., 5 Okl. 173, 48 Pac. 186 (a declaration of possession and claim, not admitted where the declarant was charged with perjury in falsely swearing to possession); *Pennsylvania:* 1845, Sailor *v.* Hertzogg, 2 Pa. St. 182 (plaintiff claimed under S.; defendant claimed under L.'s title by adverse possession; L.'s declarations in possession, conceding S.'s title and possession, admitted against defendant); *South Carolina:* 1825, Turpin *v.* Brannon, 3 McCord 261 (predecessor's declarations, apparently admitted on this principle); 1827, Martin *v.* Simpson, 4 id. 262 (predecessor's declarations of claim while in possession, admitted expressly on this principle); 1881, Ellen *v.* Ellen, 16 S. C. 132, 135 (similar; good opinion); s. c., 18 S. C. 489, 494 (prior rulings approved); 1887, Boozer *v.* Teague, 27 S. C. 348, 367, 3 S. E. 551 (similar); 1891, Wingo *v.* Caldwell, 36 S. C. 598, 15 S. E. 382 (similar); 1897, Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787 (received; but here the Court laboriously justified the use of declarations of claim by a predecessor as admissible in rebuttal of admissions, under the principle of § 1133, *ante;* the claim being by adverse possession, they were receivable in any case); 1915, Hol-

sions (*post*, § 1780). Finally, it does not matter whether the property be *real or personal*, provided only it is of a sort to which title may be gained by prescription.

Certain varieties in the application of the rule may now be noted:

(*a*) Suppose that the occupier of the land was not the present claimant, nor a predecessor under whose adverse possession he claims, but was a third person concededly only a *lessee;* may the declarations of this lessee-occupier, professing to hold as *tenant under the present claimant* or his predecessor, be received? It seems clear that they may. Such declarations signify that the declarant's acts of occupation were done on behalf of his alleged landlord, and such acts will therefore be acts of possession for that landlord, provided only that the latter adopted them, and his then claim of title would suffice as such an adoption. It is generally conceded that such declarations of a lessee are as admissible, *for the now claimant*, as his own would have been;[5]

den *v.* Cantrell, 100 S. C. 265, 84 S. E. 826; *Tennessee:* 1852, Carnahan *v.* Wood, 2 Swan 500, 502; *Texas:* 1921, Smith *v.* Robertson, — Tex. —, 235 S. W. 847 (letter of claimant prior to termination of statutory period, recognizing opponent's title, admitted on the issue of adverse possession); *Vermont:* 1863, Perkins *v.* Blood, 36 Vt. 273, 282 (on an issue of abandonment); 1869, Hollister *v.* Young, 42 Vt. 403, 407; 1869, Webb *v.* Richardson, 42 Vt. 465, 472 (quoted *supra*); 1870, Kimball *v.* Ladd, 42 Vt. 747, 755.

Contra: Mass. 1861, Osgood *v.* Coates, 1 All. 77, 79 (no authority cited); 1864, Morrill *v.* Titcomb, 8 All. 100 (evidently confusing the rule about boundary declarations, *ante*, § 1563).

[5] ENGLAND: 1772, Holloway *v.* Rakes, cited in 2 T. R. 55 (possession by a devisor being in issue, the "declarations of the tenant in possession at that time that he held as tenant to the devisor" were admitted); 1777, Doe *v.* Williams, Cowp. 621 (to prove the defendant's predecessor G. in possession at the time of levying a fine, a conversation was admitted in which the actual possessor-tenant P. stated the payment of rent to G. as landlord and the latter stated its receipt from P. as tenant; "the possession of the tenant was connected with that of the landlord, which was adverse"; here P. was living, but disqualified); 1787, Davies *v.* Pierce, 2 T. R. 53 (the issue being whether a *locus*, where cattle had been impounded, "had been immemorially part and parcel of a certain tenement of land called B.," as claimed by the defendant in replevin, evidence was admitted for the plaintiff of the declarations of various occupiers of the *locus* that they held under one E. and paid rent to him; E. being otherwise shown not to be owner of the tenement B.; the preceding two cases cited by Buller, J., as precedents; in the present case two of the declarants were deceased, but no mention of this was made in the opinion); 1811, Peaceable *v.* Watson, 4 Taunt. 16 (to prove seisin in the plaintiff's ancestor, the declarations of a deceased tenant in possession, as to holding under the ancestor, were held admissible for the plaintiff; but apparently not on the present principle); 1820, Doe *v.* Green, Gow 228 (similar ruling, but made on the authority of Davies *v.* Pierce); 1835, Carne *v.* Nicoll, 1 Bing. N. C. 430 (like Peaceable *v.* Watson).

CANADA: 1859, White *v.* Smita, 4 All. N. Br. 335 (Peaceable *v.* Watson cited; but here the declarations of claim of one not in possession were excluded).

UNITED STATES: *Fed.* 1920, Richmond Cedar Works *v.* Foreman B. L. Co., 4th C. C. A., 267 Fed. 363 (adverse possession by defendant's predecessor P.; M.'s statement about 1850, while in possession, that he was there under P., admitted); *Ala.* 1840, Bliss *v.* Winston, 1 Ala. 344, 348 (forcible entry; here the declarant was deceased); 1919, Fuller *v.* Fair, 202 Ala. 430, 80 So. 814 (line fence treated as boundary); *Ky.* 1829, West *v.* Price, 2 J. J. Marsh, 380, 383 (admitted, so far as they affected the nature and extent of possession); *N. H.* 1847, Spence *v.* Smith, 18 N. H. 587 (plaintiff in a writ of entry relief on a descent from T.; defendant disputed T.'s title; but plaintiff relied on T.'s possession claiming a fee; declarations of a former tenant admitting T.'s title were received for the plaintiff); *N. Car.* 1906, Bivings *v.* Gosnell, 141 N. C. 341, 53 S. E. 861 (declarations of M., at the time of renting, assented to by the tenant, that he was acting for the plaintiff, admitted); *Pa.* 1785, Andrew *v.* Fleming, 2 Dall. 93 (plaintiff allowed to show declarations by defendant's lessor of a tenancy under plaintiff's lessor, to prove the latter's possession); *S. Dak.* 1904, Murphy *v.* Dafoe, 18 S. D. 42, 99 N. W. 86 (declarations of an agent in possession for M., admitted); *W. Va.* 1906, Wade *v.* McDougle, 59 W. Va. 113, 52 S. E. 1026 (declarations of C. and L., while cutting, etc.,

but they would seem to be also receivable *against him*.[6] Some of the rulings, however, in admitting them for the former purpose, have mistakenly proceeded upon precedents dealing with a wholly distinct principle, namely, the Exception for Statements of Facts Against Interest (*ante*, § 1458). It is obvious that if the lessee were deceased, his statements of tenancy would be admissible under that Exception, and a few earlier English cases, which apparently proceed under the Exception,[7] have commonly been cited as precedents for the present doctrine; the practical distinctions between the two are elsewhere noted (*post*, § 1780).

(*b*) When an act of possession has been shown for the above purpose, the accompanying declarations of claim are also admissible to fix the *extent in area of the land constructively in possession*. Upon this principle the *deeds*, *tax-lists*, and other documents under which the occupier holds are admissible as representing the area and boundaries claimed.[8] It is merely the tenor of the document that is thus significant; and therefore it is unnecessary to prove their execution,[9] and it is immaterial that they are void as sources of title by grant.[10] The principle here involved is that of the substantive law which within certain limits allows the physical occupation of a small space of land to serve as constructive possession of a much larger area. For example, the cultivation of one acre in a group of six hundred and forty acres of farm-land might be treated as constructive possession of the whole; while

that they were doing so under N. the plaintiff, admitted).

Contra: 1821, Calvert *v.* Fitzgerald, Litt. Sel. Cas. 388; 1860, Currier *v.* Gale, 14 Gray Mass. 504.

[6] 1867, Meade *v.* Black, 22 Wis. 241 (plaintiff claimed by possession of O. as his tenant; O.'s answer, claiming title, in an action of ejectment by the plaintiff, admitted as tending "to illustrate and explain the character of O.'s possession").

Distinguish the rule about *disputing a landlord's title:* 1868, Hogsett *v.* Ellis, 17 Mich. 351, 372 (tenant's declarations of claim, not made to the landlord, excluded, because, having entered as lessee, his "mere words" could not make his occupation adverse).

[7] Notably the following: 1811, Peaceable *v.* Watson, 4 Taunt. 16 (to show seisin in the plaintiff's ancestor, declarations were held admissible of C., a deceased lessee of the premises, naming the ancestor as his lessor; Mansfield, C. J.: "Possession is 'prima facie' evidence of seisin in fee simple; the declaration of the possessor [*i. e.* the lessee], that he is tenant to another, makes most strongly therefore against his own interest, and consequently is admissible"); 1833, Doe *v.* Arkwright, 5 C. & P. 575, 577 (plaintiff claimed as tenant in tail under the will of S.; to prove S. seised, evidence was offered for the plaintiff of the declaration of B., now deceased, made while cutting timber on the land; Parke, J.: "He exercised an act of ownership, and he is therefore 'prima facie' owner; and what he says as to any one else being the owner is a declaration to cut down his title"; Counsel: "Your lordship will only hear what he said at the time"; Parke, J.: "Yes, what he said at any time").

Compare the rule for *presumption of ownership*, *post*, § 1779.

[8] The rule of evidence is not doubted; the controversies arise under the substantive law; and multiplication of citations is unnecessary: 1895, Postal Tel. Cable Co. *v.* Brantley, 107 Ala. 683, 18 So. 320 (deeds); 1863, Hardisty *v.* Glenn, 32 Ill. 62, 64; 1899, Burr *v.* Smith, 152 Ind. 469, 53 N. E. 468 (declarations as to boundaries); 1896, Pasley *v.* Richardson, 119 N. C. 449, 26 S. E. 32 (tax-lists of the land in the name of the possessor); 1811, Garwood *v.* Dennis, 4 Binn. Pa. 314, 329 (recitals in an old deed of another old deed, receivable to show "the 'quo animo' the land was held"); 1893, Dunn *v.* Eaton, 92 Tenn. 743, 751, 23 S. W. 163 (deeds); 1909, Hassam *v.* Safford Lumber Co., 82 Vt. 444, 74 Atl. 197; 1897, Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

[9] *Post*, § 2132 (authentication of documents); *ante*, §§ 1653, 1655 (record of deeds).

[10] 1828, Waldron *v.* Tuttle, 4 N. H. 371, 375 (deed void); 1872, Bounds *v.* Bounds, 11 Heisk. Tenn. 318, 324 (deed unrecorded). *Contra*, but erroneous: 1804, Gittings *v.* Hall, 1 H. & J. Md. 527, 533 (a will of 1737, excluded because not attested by three witnesses).

the occupation of a city block on one side of a street might not be allowed to serve as constructive possession of a block on the other side of the street. But within these limits set by the substantive law the occupation of a small part may serve as constructive possession of as much more as the occupant may by his acts express the will to control; and thus the deeds and other documents by which he has "color of title" may, as representing the extent of his claim, serve to fix the extent of his constructive possession.[11]

(*c*) It is also a necessary feature of the possession which establishes a prescriptive title that it shall have been *uninterrupted*. Hence, if another person has during the time been upon the land, the latter's presence may or may not constitute an interruption of the former's possession according as it has or has not been hostile to the former's. Accordingly, *declarations of the other claimant*, while on the land, may serve, as verbal parts of his act, to indicate his presence or occupation to be hostile to the former's claim, and not subordinate to it, and may thus constitute an interruption:[12]

1870, CARPENTER, J., in *Sears* v. *Hoyt*, 37 Conn. 406 (admitting declarations of the titular owner, when plowing up the place over which the defendant claimed a right of way, that the defendant had no right of way there): "The act of plowing and cultivating the ground over which the alleged way passed was an important fact in the case. Unexplained it constituted an interruption of the use, and was evidence tending to prevent the acquisition of a right [by the defendant]. It was . . . impliedly a denial of the right of the defendant. . . . The declaration as received only tended to give effect to that act, and to that extent only did it characterize or qualify it."

In the same way, such an interrupting occupation may be in turn negatived by the occupation of a third person; and thus the *third person's declarations in possession, repelling the opponent's claim* and acquiescing in the proponent's claim, may become admissible;[13] though this is usually merely another aspect of an application of the rule already noted (par. *a*, *supra*).

(*d*) By an analogous application of the same rule, the party engaged in repelling a claim of adverse possession (though himself not resting on such a title) may rely upon a possession *by his own lessee* as interrupting or negativing the claimant's possession; and for this purpose the declarations of

[11] 1920, Philbin *v.* Carr, — Ind. App. —, 129 N. E. 19 (lucid explanation of "color of title," by Dausman, P. J.).

From this doctrine, distinguish the principle of relevancy (*ante*, § 378) by which actual occupation of a *part* of a tract of land may be evidence of the *actual occupation* of the *whole* of it.

[12] 1866, Leport *v.* Todd, 32 N. J. L. 124, 128; 1867, Outcolt *v.* Ludlow, 32 N. J. L. 239, 244 (analogous); 1867, Meade *v.* Black, 22 Wis. 241, 243; 1887, Lamoreux *v.* Huntley, 68 Wis. 24, 33, 31 N. W. 331.

[13] *Eng.* 1811, Stanley *v.* White, 14 East, 332, 334, 339, 341 (adverse occupation of timber-land; declarations of the defendant's predecessor's tenant in possession, acquiescing in the plaintiff's claim to the timber-land in issue, admitted for the plaintiff, as "declarations accompanying acts of forbearance of the owners in not cutting trees within the belt"); 1821, Doe *v.* Pettett, 5 B. & Ald. 223 (defendant claimed through a widow's adverse possession, and plaintiff claimed as heir of the husband; the widow's declarations that she held as life-tenant only were received for the plaintiff, "not to show the quantum of her estate, but only to explain the nature of her possession"); *U. S* 1820, Betts *v.* Davenport, 3 Conn. 486 (defendant's predecessor's agreement negativing adverse possession, admitted for plaintiff); 1861, Hale *v.* Silloway, 1 All. Mass. 21.

a lessee in possession that he held as lessee for the proponent of the evidence are admissible against the claimant by prescription.[14]

§ 1779. **Possessor's Declarations as aiding the Presumption of Ownership from Possession.** One in possession of property is presumed to be the owner of it (*post*, § 2515). As making more definite and significant the nature of the person's custody or occupation, and as giving it the significance of an exclusive control and of a possession in the fullest sense, the *acts and declarations of claim of title by the occupant* may be decisive, and should therefore be considered for that purpose; without, however, conceding to them any force as hearsay assertions.

Such is the simple and plausible theory of a rule now firmly established in many jurisdictions. The result has often been reached, especially in some early rulings, without any apparent working-out of this theory, but merely by a loose and inaccurate reading of the precedents applying the doctrine of the foregoing section and that of the Exception for Statements Against Proprietary Interest (*ante*, § 1455). Of the opposing rulings, also, some have taken no notice of the present theory, and have merely pointed out that neither of the two doctrines just mentioned can serve to admit declarations of claim by a living person, especially a party, in his own interest, where the title is not founded upon adverse possession. In a few of the opposing rulings the present theory is distinctly faced, and is rejected as both incorrect in principle and dangerous in practice.

In the following passages the theory is well expounded:

1847, STORRS, J., in *Avery* v. *Clemons*, 18 Conn. 306, 309 (admitting declarations of S., in an action of trover between S.'s creditor and A., claiming as bailor of S.): "The possession of personal property is, unexplained, 'prima facie' evidence of ownership in the possessor; but, as it is consistent with ownership in another, it is not conclusive; and whether the person in possession is the owner, depends, not upon the mere fact that he is in possession of it, but upon the nature and character of that possession. These are properly evinced by his conduct with regard to it; and the nature of that conduct can only be understood by the declarations accompanying it. Declarations in such cases are not, as claimed by the plaintiff, obnoxious to the objection which ordinarily applies to hearsay testimony. They are not received as declarations of third persons, to prove the truth of what is asserted; but as being of themselves acts or things done by them, and which explain or characterize the acts which they accompany, and show their true character."

1870, PAINE, J., in *Roebke* v. *Andrews*, 26 Wis. 311, 317 (dealing with the trial Court's refusal to rule for the defendant that "mere statements of the plaintiff as to the owner-

[14] 1823, Williams v. Ensign, 4 Conn. 456 (plaintiff claimed by adverse possession, and defendant by record title; to disprove the adverse possession, defendant offered declarations of C. while in occupation, as to his holding under the record owner, C. being deceased; Hosmer, C. J., held them admissible as "part of the 'res gestæ,'" "to ascertain the character of an act or the intention with which it was done"; adding, "I have cautiously abstained from citing cases in which the declarations were against the interest of the person making them, or where the party to be affected by the testimony claimed title under the person who made the declarations"); 1867, Sheaffer v. Eakman, 56 Pa. 144, 151.

The following seems analogous, though the offer was for another purpose: 1885, Jacobs v. Callaghan, 57 Mich. 11, 23 N. W. 454 (use and occupation as tenant; defence, surrender and re-lease to M. as tenant; M.'s declarations in possession that he held under defendant were admitted for plaintiff).

ship of those cattle is no evidence of title"): "The law gives to the possession of either real or personal property under a claim of title the effect of being 'prima facie' evidence of title. It is sometimes briefly stated that 'expression is "prima facie" evidence of title.' But, when so stated, it is always implied that the possession is under a claim of title. It is that fact which gives to it its character and legal effect. . . . It is thus seen that, wherever title is sought to be proved by possession, the claim of title accompanying that possession is not only proper but material and necessary to be known. And inasmuch as every person whose title is in issue is permitted to make out a 'prima facie' case by proving what title he claimed in connection with it. The immediate point of inquiry is, what title was claimed, and not what really existed; and, that being so, inasmuch as what a man claims consists of what he asserts and declares in respect to his rights, his declarations are original evidence of the fact. And to allow him to prove them for that purpose is no more liable to the objection of allowing him to manufacture evidence for himself by his own statements than it would be, where it became material to prove a particular demand or notice, to allow him to prove his own declarations containing such notice or demand. The very nature and object of the inquiry establish the limit to the effect of his declarations as evidence. They are evidence only to show to what extent he claimed title; and, so far as they go beyond that and assert any facts in regard to the title, they are not evidence of any such facts. . . . It may be that, on proof of possession merely, the law in the absence of any further proof would presume that the party claimed a perfect title; . . . [but] if there is any such legal presumption, it would seem to furnish a sufficient answer to any apprehended danger from allowing a party to prove [expressly] that he claimed title; for such proof would show nothing more than the law would presume without it. . . . [The defendant was thus not entitled to the instruction that the plaintiff's] assertions of ownership were not 'evidence of title.' It is true they were not direct evidence. His statements that he had bought the cattle were not evidence of that fact. But it was in its nature explanatory of his possession and of the title which he claimed. It was equivalent to a direct assertion of ownership; and such assertion the law allows to be given in evidence accompanied with evidence of possession, and to both [together] it gives the effect of 'prima facie' evidence of title. I think, therefore, the Court were not bound to say that the plaintiff's assertions of ownership were no evidence of title. They were evidence to prove the fact of such assertion; which fact, in connection with another, warranted an inference of title. They had therefore an ultimate bearing upon that question; and were proper to be considered by the jury to prove the fact of a claim of title."

1873, BREESE, C. J., in *Amick* v. *Young*, 69 Ill. 542, 544: "It has always been held that one strong indication of ownership of personal property . . . is exercising acts of ownership over it, having it in actual possession, making and paying for repairs upon it, offering to sell it, etc., which furnish presumptive evidence of actual ownership; subject, however, to be rebutted by an adverse claimant. Acts and declarations of a party in actual possession are not admitted on the theory that any peculiar credit is due to such party, but because they give character to the facts to be investigated."

All that can be said in opposition to the theory is found in the following forceful dissenting opinion:

1870, DIXON, C. J., in *Roebke* v. *Andrews*, 26 Wis. 311, 324: "[In the first place,] it is something new to me in the law of Evidence, if a party can thus make title to property in himself by first declaring to third persons that he owns it and then bringing such third persons into court to testify to his declarations. . . . If I lend another my horse for a month or three months, and he takes him and keeps him, and in the meantime he tells his family and neighbors and acquaintances that the horse is his, that he has bought, paid for, and owns him, or that I have given him the horse, and if at the end of the time he

refuses to surrender the horse and I bring suit, as I am compelled to, all those declarations become evidence of title in his favor against me, and the jury may find that the horse is not mine after all, but is his. He and I, being the only witnesses to the transaction, may testify, I to the lending and he to the purchase; or the number of witnesses may be otherwise equally divided; and he brings in the declarations to turn the scale in his favor. He being in possession of the horse, his declarations that he bought and owned him are admitted; but, I not being in possession, my declarations to the contrary, and that I only lent the horse, though never so frequently made, are excluded. The advantage which he has over me is very manifest, and the great injustice of such advantage equally so. . . . [2] In saying this, I do not, of course, mean to say that there may not be circumstances under which the declarations of the party should be received. . . . Such are cases where the nature of the possession [as adverse] becomes a material point of inquiry and the declarations are admitted in explanation of it. . . . But the present is not a case of that kind, and not one falling within any of the exceptions. The nature of the plaintiff's possession . . . was wholly immaterial. There was no question under the statute of limitations and no legal right or proposition of law dependent upon it. The sole question in issue was the question of title, and that was a direct one, wholly disconnected with any collateral fact or circumstance growing out of the nature of the plaintiff's possession or what he may have said or claimed with respect to it. In such a case, the possession, or 'prima facie' evidence of title afforded by possession, is a circumstance of no weight; it signifies nothing at all as against the direct evidence of title by which the rights of the parties must be tested. . . . [3] As to the opinion intimated [by the majority of this Court] that possession is not 'prima facie' evidence of title, and that to become such a claim of title evidenced by the declarations of the party that the property is his [is needed,] . . . if this be so, then what is to become of the possession of the party who is so unfortunate as never to have made any such declarations? . . . It is something entirely new to me if the possession of such persons is to be regarded as less evidence of the title than the same kind of possession by the noisy, garrulous individual who can bring many witnesses to testify to his declarations. . . . [The rule is in truth] that upon bare possession being shown, with nothing to qualify or rebut its effect, the law presumes that the person having it holds under claim of title, and is the owner, until something to the contrary be shown. . . . [4] But it may be said, after all, that the difference between myself and my brethren is more imaginary than real, inasmuch as they hold that the declarations were admissible only to show that title was *claimed*. . . . [But,] in affirming the refusal to instruct, my brethren necessarily affirm this proposition, not merely that the statements of a person in possession of property are evidence of the claim of title made by him, but also some evidence of the title itself; and the question as to how much or what evidence of title they shall be, or what weight or influence they shall have in determining the fact of title, is also necessarily left to the uncontrolled discretion of the jury. It being determined that the statements are admissible and that they are *some* evidence of title in favor of the party making them, it will be found quite impossible, I think, by any instruction which can be given, to guard against the dangerous tendency of such testimony or to restrain or prevent the improper and injurious influence which it may have upon the minds of the jury. . . . The mischiefs which must result from this course of decision to my mind are manifest."

As to these opposing arguments, perhaps all that need be said is this: In the first place, the theoretical soundness of Mr. Justice Paine's exposition remains untouched. In the second place, the danger in practice of using such declarations is overestimated; it is not likely that a jury would allow an opposing claimant's direct evidence of title to be overthrown by the possessor's mere assertions; and, if there is no such direct evidence, then no

great harm is likely to be done in allowing the possessor to strengthen the conceded presumption in his favor by exhibiting the positiveness and completeness of his claim. Both in theory and in policy the admission of such declarations seems proper.

The state of the precedents is as follows:

(1) In miscellaneous instances, involving *sundry disputes of title*, the use of such declarations has by some Courts been sanctioned.[1] In others, such declarations have been excluded; some Courts (as usually in the earlier rulings) not noticing the present theory,[2] others distinctly repudiating

§ 1779. [1] *Alabama:* (cases cited *infra*, notes 5, 6, 8); *Ark.* 1859, Yarbrough *v.* Arnold, 20 Ark. 592, 597 (issue as to the identity of a slave claimed by plaintiff under a deed of trust; grantor's declarations, while in possession after the grant, identifying the slave, admitted for the plaintiff); *Georgia:* 1861, Gill *v.* Strozier, 32 Ga. 688, 693 (issue whether slaves in the plaintiff's intestate's possession were loaned or given to him by his father-in-law; the intestate's declarations of claim, admitted as assisting the "presumption of ownership arising from possession"); *Illinois:* 1898, Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691 (notes of testator in possession of defendant; defendant's claims of ownership, admissible to show the nature of the possession raising a presumption of ownership); *Indiana:* 1882, Bunnell *v.* Studebaker, 88 Ind. 338 (trover for a horse; issue as to H.'s ownership; H.'s declarations while in possession, admitted); 1883, Kuhns *v.* Gates, 92 Ind. 66 (replevin; declarations of claimant's grantor in possession, admitted); 1884, McConnell *v.* Hannah, 96 Ind. 102, 104 (admitted for possessor's administrator against his daughter, claiming under a purchase at a sheriff's sale); 1884, Creighton *v.* Hoppis, 99 Ind. 369 (whether a deed was intended as a mortgage only; the grantor's acts and declarations, while remaining in possession, admissible to strengthen the presumption of ownership); *Iowa:* 1872, Wilson *v.* Patrick, 34 Ia. 362, 371 (admissible only where the declarant was in possession); *Missouri:* 1866, Darrett *v.* Donnelly, 38 Mo. 492, 494 (declarations of a possessor "explanatory of his possession, as that he held in his own right or as a tenant or trustee of another," held admissible; but not declarations as to the terms of a contract of sale already made); 1878, Hannibal & St. J. R. Co. *v.* Clark, 68 Mo. 371, 374 (issue as to title between plaintiff and defendant's intestate; the intestate's claim of title while in possession, admitted, but not his statement as to having got a certificate, etc.); 1883, Lemmon *v.* Hartsook, 80 Mo. 13, 22 (similar, the issue being as to boundary; preceding case ignored; the opinion confuses this question and the rule as to boundary statements by deceased persons, *ante*, § 1563); 1906, Farmers' Bank *v.* Barbee, 198 Mo. 465, 95 S. W. 225 (plaintiff claiming under A. one of three children and heirs of B.; A.'s assertions of a grant to himself from the other children, not admitted in favor of plaintiff claiming under A.; following Turner *v.* Belden, Mo., *infra*); *Montana:* 1922, Williams *v.* Gray, — Mont. —, 203 Pac. 524 (conversion of wheat; Roebke *v.* Andrews, Wis. followed); *Pennsylvania:* 1818, Sampson *v.* Sampson, 4 S. & R. 329, 330 (whether a land-warrant, paid for by the father J. but taken in his son's name, was intended as an advancement; the father's declarations, accompanying acts of ownership, admitted); *Vermont:* 1827, Moon *v.* Hawks, 2 Aik. 390 (issue whether a mare was the property of plaintiff or of R., as his donee; R.'s long possession of the mare, and his acts and claim of ownership, held admissible; "with respect to personal chattels, possession alone is presumptive evidence of property"); 1827, Bullard *v.* Billings, 2 Vt. 309, 313 (similar ruling as to the ownership of a wagon, the issue being whether the delivery of it was by pledge or by sale); *Washington:* 1921, Percy *v.* Miller, 115 Wash. 440, 197 Pac. 638 (action by an administrator to recover personalty belonging to the testator; the testator's declarations of ownership, while in possession, admitted to show title); *Wisconsin:* 1870, Roebke *v.* Andrews, 26 Wis. 311 (action for price of cattle sold, the defendant alleging that the plaintiff's father was the owner; plaintiff's declarations of title while in possession, admitted, Dixon, C. J., diss.; quoted *supra*); 1900, Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103 (approving Roebke *v.* Andrews).

[2] *California:* 1874, Fischer *v.* Bergson, 49 Cal. 294, 297 (declarations by K. in possession, that a deed by him to B. was made as a mortgage only, not admitted for K.'s administrator); *Georgia:* 1903, Dozier *v.* McWhorter, 117 Ga. 786, 45 S. E. 61 (whether an execution-lien was the property of D. personally or as executor; his declarations of claim, not received on behalf of his estate, partly because he was not in possession of the *fi. fa.*); *Indiana:* 1853, Travis *v.* Barkhurst, 4 Ind. 171, 172; *Massachusetts:* 1856, Ware *v.* Brookhouse, 7 Gray 454, *semble*; *Missouri:* 1846, Turner *v.* Belden, 9 Mo. 787, 790 (T. sent a slave to his daughter;

it.[3] Wherever such declarations of claim are regarded as admissible, declarations of *disclaim* would also be admissible in favor of the opponent, as repelling the presumption; but as these would usually also be receivable as admissions (*ante*, § 1082) the question is not often a practical one.[4]

(2) A special situation arises where the parties opposed are, on the one side, *creditors levying upon property*, as that *of their debtor* Doe, and, on the other

P. married the daughter; plaintiff claimed under P., the issue being whether the gift to the daughter by T. was absolute or conditional; P.'s declarations of absolute title while in possession were not admitted for the plaintiff; Napton, J., found no authority for "the position that the squatter or trespasser can by his own declarations elevate his title into a fee simple, or that the bailee or trespasser of personal chattels can by his own declarations convert his bailment into an absolute interest"); 1905, Swope *v.* Ward, 185 Mo. 316, 84 S. W. 895 (Turner *v.* Belden approved; Darrett *v.* Donnelly, *supra*, n. 1, said not to be in conflict); *New York:* 1806, Waring *v.* Warren, 1 Johns. 340 (woman's declarations, after marriage to defendant, and while in possession, not admitted for defendant against a purchaser from the woman's first husband before present marriage); *North Carolina:* 1869, Devries *v.* Phillips, 63 N. C. 207 (the issue being as to J.'s title, J.'s claim of ownership while storing the goods was excluded).

[3] *Federal:* 1920, Dolbear *v.* Gulf Prod. Co., Penn *v.* Phoenix Devel. Co., 5th C. C. A., 268 Fed. 737 (title based on lost deeds, but without possession; declarations without possession or act of control, not admissible under the present principle); *Kansas:* 1921, Churches *v.* Western Union Tel. Co., 108 Kan. 431, 195 Pac. 610 (alleged trust agreement between predecessors of defendant and plaintiff to divide property between heirs of each on death of survivor of the two; declarations of defendant's predecessor, while in possession, in favor of defendant, held inadmissible); *Maine:* 1865, Holmes *v.* Sawtelle, 53 Me. 179 (plaintiff's testator's declarations of claim, while in possession, not admitted for the plaintiff against one claiming under a donee by an alleged prior gift from the testator); *Missouri:* 1855, Criddle *v.* Criddle, 21 Mo. 522 (similar ruling to Turner *v.* Belden, *supra;* Scott, J.: "When a person is in possession of property, whether real or personal, and nothing more appears, the law presumes that he is the owner of it; he cannot, whilst thus possessed, make a title for himself by his own declarations or assertions"); 1858, Watson *v.* Bissell, 27 Mo. 220, 233 (similar); 1866, Darrett *v.* Quimby, 38 Mo. 492, 494 (confused statements); 1918, Weller *v.* Collier, — Mo. —, 199 S. W. 974 (conveyance to a daughter in fraud of creditors; Criddle *v.* Criddle followed); *Ohio:* 1864, Kyle *v.* Kyle, 15 Oh. St. 15, 20 (issue as to K.'s being bailee or donee of a mare from the defendant; K.'s declarations of claim, while in possession, not admitted for his representative); *Wisconsin:* 1905, Vagts *v.* Utman, 125 Wis. 265, 104 N. W. 88 (title to a horse; rule held not applicable on the facts).

[4] *Fed.* 1909, State ex rel. Dykes *v.* Hencken, 8th C. C. A., 174 Fed. 624 (property seized by creditors of M., T. being in possession; T.'s declarations of disclaim, not admitted in M.'s favor because T., though plaintiff's agent, was not agent to make admissions; no authority cited); *Ark.* 1921, Jefferson *v.* Souter, — Ark. —, 233 S. W. 804 (husband's admissions that he was tenant only, received as against wife seeking to redeem from grantee holding under a deed absolute in form); *Ind.* 1862, Boone Co. Bank *v.* Wallace, 18 Ind. 82, 86 (declarations disclaiming title, offered by a robbed person against one claiming under a thief; not decided); 1888, Durham *v.* Shannon, 116 Ind. 403, 407, 19 N. E. 190 (admitted against purchaser under administrator's sale, in favor of declarant's prior donee); *Ia.* 1859, Taylor *v.* Lusk, 9 Ia. 440, *semble; Minn.* 1897, Elword *v.* Saterlie, 68 Minn. 173, 71 N. W. 13 (action by indorsee of note given to G. to pay for horses sold; defence, fraudulent representations, G. being not the owner of the horses, but agent for the plaintiff; G.'s declarations, while in possession, of plaintiff's ownership admitted); *Mo.* 1865, State *v.* Schneider, 35 Mo. 533, 536 (issue as to title to timber between B. and C.; B.'s declarations of title in C., while cutting the timber, admitted for C. to show that B. obtained possession as agent and not as vendee); 1866, Darrett *v.* Donnelly, 38 Mo. 492 (see citation *supra*, note 1); 1885, Anderson *v.* McPike, 86 Mo. 293, 299 (declarations, disclaiming title, by a stranger in possession, admitted; opinion confused, and no precedents cited); 1891, Meier *v.* Meier, 105 Mo. 411, 422, 430 (preceding case approved, in a confused opinion); *N. C.* 1903, Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111 (the plaintiff's daughter lived with her father, and a cow was kept in her father's pasture; the father's declarations, while the cow was there, that it was hers by gift from him, admitted, in an action against a purchaser from the father's administrator); *Or.* 1922, Tracy *v.* Juanto, — Or. —, 205 Pac. 822 (trespass by sheep; declarations by the herder that defendant was owner, admitted for the plaintiff).

side, a party claiming the property as belonging to him and not to Doe. Here the possessor making the offered declarations of claim may have been either the now claimant himself or the debtor Doe; and the two cases must be considered separately:

(*a*) When the possessor-declarant was *the now claimant* against Doe's creditor, his declarations of *claim*, under the present principle, ought to be admissible *for himself*.[5] His declarations of *disclaim* would equally be receivable *for the creditor* (as in par. 1, *supra*); but they would also always be usable to this end as admissions, and thus the question does not seem to have arisen.

(*b*) When the possessor-declarant was the *debtor* Doe, his declarations of *claim* will of course favor the creditor's case, as against the now claimant's, and upon the present principle ought to be admitted *for the creditor*. In the case where the claimant sets up a title *prior and superior* to that of the debtor Doe, the situation is simple; for on no other principle than the present could such declarations by Doe be receivable.[6] But where the now claim-

[5] *Ala.* 1850, Thompson *v.* Mawhinney, 17 Ala. 362, 366 (admissible; here excluding assertions as to the contract by which title was claimed); 1895, Larkin *v.* Baty, 111 Ala. 303, 18 So. 666 (wife's declarations while in possession of a cow, admitted for her against husband's creditor; in this case the doctrine is loosely dated back to McBride *v.* Thompson, cited *supra*, § 1778, note 4; but that case seems not to have proceeded on the present theory, though the facts would have admitted of it); *Ill.* 1867, Whitaker *v.* Wheeler, 44 Ill. 440, 442 (trover against a sheriff levying; possessor's declarations admitted for himself); *Mass.* 1831, Boyden *v.* Moore, 11 Pick. 362, 365 (vendee's declarations, directing the goods to be cared for at his expense, held admissible "to show that the possession and acts of the son [vendor] were those of an agent" and "to repel the suggestion of secrecy"); *Wis.* 1905, Griswold *v.* Nichols, 126 Wis. 401, 105 N.W. 815 (sale by a son to a father in fraud of creditors; the father's declarations in possession, admitted in his favor, following Roebke *v.* Andrews, *supra*, n. 1).

Contra: 1906, Samaha *v.* Mason, 27 D. C. App. 470, 477 (replevin for rugs claimed by the defendant by purchase from H. who purchased from plaintiff; the defendant's statements as to the ownership of the rugs at the time of their seizure by replevin writ, excluded, not being merely explanatory of possession); 1868, Murray *v.* Cone, 26 Ia. 276; 1860, Swindell *v.* Warden, 7 Jones L. N. C. 575 (possessor's declarations, not admitted against the vendor's creditors; Manly, J.: "If he claim in his own right, no declaration of his can rightfully be used to prove more than the presumption arising from possession; and if that be a party's position, it would seem that his declaration can not be used for any legitimate object; . . . [otherwise, it] would be introducing the party as a witness at large, under shelter of explaining a possession").

[6] The rulings are not harmonious: *Federal:* 1904, McKnight *v.* U. S., 130 Fed. 659, 667, 65 C. C. A. 37 (action for cattle of Josephine H., wife of John H., seized by defendant on attachment against John H.; the latter's declarations of claim in possession, not admitted for the defendant; reasons obscure); *Alabama:* 1842, Oden *v.* Stubblefield, 4 Ala. 40 (see citation *infra*, note 8); 1846, Gary *v.* Terrill, 9 Ala. 206 (see citation *infra*, note 8); 1906, Baker *v.* Drake, 148 Ala. 513, 41 So. 845, *semble* (excluded); 1909, Cohn & Goldberg L. Co. *v.* Robbins, 159 Ala. 289, 48 So. 853 (injury caused by defendant's wagon driven by H.; H.'s statement, after the accident, replying to the plaintiff's inquiry whose wagon it was, that it was the defendant's, not admitted as evidence of ownership; McClellan, J., diss.; the opinion leaves undissipated the confusion in the decisions of this State); *Arkansas:* 1905, Terry *v.* Clark, 76 Ark. 435, 88 S. W. 987 (creditor claiming furniture against the debtor's wife; the debtor's declarations of ownership, not admitted for the creditor); *Connecticut:* 1847, Avery *v.* Clemons, 18 Conn. 306, 309 (trover for a wagon attached by defendant as the property of S.; plaintiff claimed the wagon as bailor to S.; defendant alleged that S. had obtained it by exchange from B.; S.'s declarations in possession, claiming it as his own, were admitted for the defendant; quoted *supra*); *Georgia:* 1905, Smiley *v.* Padgett, 123 Ga. 39, 50 S. E. 927 (execution under a lien by P. on goods possessed by H., but now claimed by S.; H.'s declarations of ownership, in possession, admitted for P.); *Massachusetts:* 1862, McGough *v.* Wellington, 4 All. 502 (excluded); 1881, Fellows *v.* Smith, 130 Mass. 378 (same);

ant derives title by *purchase* (or *attachment*) *under the debtor* Doe, and Doe (by hypothesis) has retained possession after the sale, Doe is in the position of an assignor to the claimant; hence, although the present principle would suffice to admit Doe's declarations, yet the further question arises whether, as *admissions* of an assignor or grantor, Doe's declarations can be used to effect his assignee. His declarations, it must be remembered, are made in possession, after transfer; they claim title in himself, and are offered by the creditor; and they practically amount to a statement that the transfer was made in form only, without intent to pass title. Now as admissions, several possible theories may be invoked for these declarations: either they may be absolutely rejected as admissions made after formal divestment of title; or they may be received as declarations of intent, showing the debtor's fraudulent intent; or they may be received provided there appears a conspiracy to defraud creditors, so as to charge the purchaser with the admissions of his co-conspirators; the judicial conflict upon these theories has been already examined (*ante*, § 1086). The important thing to notice in this place is that, upon the present theory of *verbal acts corroborating the presumption from possession*, none of the above limitations stand in the way; by abandoning the use of these declarations as admissions, and by using them as verbal acts, we leave ourselves with only one restriction, namely, that the declarations must have been made by one in possession. Such is the important difference in practical effect between treating them as admissions and treating them as verbal acts to aid the presumption from possession.

This theory, in its present application, is well expounded in the following passage: [7]

1920, Koski *v.* Haskins, 236 Mass. 346, 128 N. E. 427 (trover against a deputy sheriff, attaching goods as those of P. but claimed by plaintiff; P.'s declarations that the goods were his, excluded); *Michigan:* 1913, Freda *v.* Tishbein, 174 Mich. 391, 140 N. W. 502 (creditor replevying goods in T.'s possession, as against T.'s widow; T.'s declarations not admitted for plaintiff, ownership and not possession being the sole issue); *Minnesota:* 1881, King *v.* Frost, 28 Minn. 417, 10 N. W. 423 (issue whether H. was owner or plaintiff's bailee; H.'s declarations of claim in possession, not admitted for H.'s creditor); 1890, Dailey *v.* Linnehan, 42 Minn. 277, 44 N. W. 59 (similar; declarations admitted; preceding case not cited); 1893, Olson *v.* Swenson, 53 Minn. 516, 519, 55 N. W. 596 (similar; King *v.* Frost followed); 1901, Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602 (creditor's suit to recover assets of S.; plea alleging them to be corporate assets; S.'s declarations, as agent of a corporation, as to his ownership of a note, held not receivable unless the note was in his individual possession); *Missouri:* 1904, Vermillion *v.* Parsons, 101 Mo. App. 602, 73 S. W. 994, 107 Mo. App. 192, 80 S. W. 916 (husband's declarations of claim, not admitted for the creditor against the wife claiming by prior title); *Montana:* 1905, Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657 (attachment on property of the husband, claimed by the plaintiff wife; the husband's declarations of claim in possession, admitted for the creditor); *North Dakota:* 1912, Wipperman Merc. Co. *v.* Robbins, 23 N. D. 208, 135 N. W. 785 (vendor suing for goods attached by the creditor of the vendee F.; declarations by B., assented to by F. in possession, admitted for the defendant; citing the above text); *Oregon:* 1902, Noblitt *v.* Durbin, 41 Or. 555, 69 Pac. 685 (whether N. or his wife was owner of personalty; his declarations of claim, in possession and while hiring out the property, held admissible for his creditor against the wife; but here the declarations in fact offered were not assertions of claim and were excluded); *Utah:* 1919, Androvitch *v.* Fowler, 54 Utah 506, 182 Pac. 222 (plaintiff claimed a popcorn stand leased to K., but attached by defendant under a judgment against K.; K.'s declarations of claim in possession, excluded).

[7] Another exposition will be found in Askew *v.* Reynolds, 1 Dev. & B. 367, quoted *ante*, § 1086.

1875, SHERWOOD, J., in *Burgert* v. *Borchert*, 59 Mo. 80, 86 (admitting a debtor's declarations, while in possession, against the vendee): "In investigations of the character involved in the case at bar, there are two prominent questions presented: First, were the parties to the transaction actuated by a motive to hinder, delay, or defraud the creditors of the vendor? Second, was possession of the goods alleged to have been sold, accompanied by delivery in a reasonable time (regard being had to situation of the property) and was the alleged sale followed by an actual and continued change of the possession of the things said to have been sold? Any evidence, therefore, tending to shed light, even remotely, on the subject of these inquiries, is admissible. And if the first question is answered in the affirmative, or the second in the negative, the result must be in favor of those attacking the sale. For this reason testimony must be elicited, as to the possession of the goods; as to the character of that possession; as to whether it and the delivery of the articles sold was open, notorious, and unequivocal; as to the declarations of the party in, or apparently in, possession, as to the quantity and value, or apparent quantity and value of the goods at or about the time the alleged sale was effected; as to whether the sale was secretly and knowingly made, or made in the usual and ordinary course of business upon an adequate consideration. . . . Testimony of the kind mentioned, or of a like nature, is always receivable to establish or to overthrow thereon the 'bona fides' or the validity of the given transaction. The rule is familiar, that the declarations of a party in possession of property are verbal acts, and are admitted as explanatory of the nature of that possession." [8]

[8] The extent to which the present principle is favored by the different Courts may be seen by comparing the cases below with those collected *ante*, § 1086 (fraudulent assignor's admissions); but for Alabama, Missouri, and North Carolina, all the rulings are placed here, because in the first State they are hopelessly confused, and in the other two there has been a shifting of theories; note also that the declarations may sometimes (as in Foster *v.* Nowlin, Wilson *v.* Woodruff, Mo.) come in as self-contradictions discrediting a party-witness:

ENGLAND: 1828, Willies *v.* Farley, 3 C. & P. 395 (plaintiff had bought W.'s goods on execution for his own claim; W. remained in possession; defendant seized the goods on another creditor's execution; W.'s statements in possession were offered by the defendant to prove "the plaintiff's execution was merely colorable"; Vaughan, B.: "What J. W. said as to whose the goods were, he being then in possession of the goods, is evidence"; no theory stated).

CANADA: 1896, Linton *v.* Sutherland, 40 N. Sc. 149 (judgment debtor's admissions, after date of a deed to defendant, that the deed was meant as a mortgage only, not admitted against defendant).

UNITED STATES: *Alabama*: 1842, Oden *v.* Stubblefield, 4 Ala. 40 (issue whether S. or his son was owner, the son's vendee claiming by gift from plaintiff to the son; the son's declarations of claim while in possession, admitted for the vendee); 1845, Borland *v.* Mayo, 8 Ala. 105, 112, 114 ("the declarations of the vendor were only admissible upon the hypothesis that he retained the possession, or himself and vendees were co-workers in the purpose to defraud," *i. e.* the theory of conspiracy); 1846, Gary *v.* Terrill, 9 Ala. 206 (issue as to the title of a slave in possession of T., claimed by defendant as T.'s bailor; T.'s claim of title while in possession, admitted for his vendee at a sheriff's sale); 1846, Webster *v.* Smith, 10 Ala. 429 ("while it is allowable to prove the statements of one in possession, in explanation of the possession, it is not permissible to show everything that may have been said by him in respect to the title, as, that it was acquired *bona fide* and for a valuable consideration"); 1846, Abney *v.* Kingsland, 10 Ala. 355, 360 (debtor's declarations of intent to defraud, after sale and during possession, held admissible for the creditor if there is other evidence of a combination to defraud; such declarations distinguished from mere declarations of claim "explanatory of possession"); 1848, Beall *v.* Ledlow, 14 Ala. 523, 526 (debtor's declarations in possession, admitting that his father was owner, received against the son's creditor); 1848, Degraffenreid *v.* Thomas, 14 Ala. 681, 684 (like Thomas *v.* Degraffenreid, *infra*, with other declarations; opinion not clear); 1849, Parker *v.* Goldsmith, 16 Ala. 526 (declarations of a defendant who had taken goods from the plaintiff's possession, claiming as his own when called upon for surrender, not admitted for himself); 1849, Darling *v.* Bryant, 17 Ala. 10 (issue as to the plaintiffs' joint ownership of a boat; the statement of B., the captain and joint owner, while in possession, that W. was also owner, admitted; "as they qualify the possession they constitute the 'res gestæ', and tend to establish the possession of both B. and W.; this being established, the legal pre-

(*bb*) Here also (on the same principle as in par. *a, supra*) the *debtor's declarations* of *disclaim* are receivable. Who will wish to use them? Where the

sumption of ownership arising from such joint possession attaches, and 'prima facie' entitles them to a joint action"); 1850, Nelson *v.* Iverson, 17 Ala. 216, 222 (declarations of plaintiff's donor, made after the date of the alleged gift, but while still in possession, admitted against the plaintiff so far as they merely claimed possession as owner, but not so far as they recited past occurrences); 1850, Thompson *v.* Mawhinney, 17 Ala. 362, 366 (issue as to the title to a cotton crop; the plaintiff's declarations while in possession of the land, admitted in their favor so far as they claimed an interest, but not so far as they recited the terms of the contract between the plaintiffs and the owner of the land); 1850, Thomas *v.* Degraffenreid, 17 Ala. 602, 608, 27 Ala. 651, 656, 659 (declarations of the claimant's vendor's donor, after the alleged gift and while still in possession, conceding the title to be in the donee, admitted for the claimant); 1850, Strong *v.* Brewer, 17 Ala. 706, 713 (debtor's declarations after title and possession gone, excluded); 1850, Mobley *v.* Bilberry, 17 Ala. 428 (debtor's declarations of ownership while in possession after the sale, admitted for the creditor "as explanatory of his possession"); 1851, Foote *v.* Cobb, 18 Ala. 585, 588 (declarations of a debtor, after title and possession gone, excluded); 1851, Perry *v.* Graham, 18 Ala. 822, 825 (declarations of the plaintiff's wife, the alleged donee, while in possession, claiming title, admitted for the plaintiff; but not her declaration of the past fact of the gift); 1850, Hadden *v.* Powell, 18 Ala. 314 (declarations of a debtor in possession that he had sold to the claimant, not admitted for the claimant, because reciting a past fact); 1851, Nelson *v.* Iverson, 19 Ala. 95, 99, 24 Ala. 9, 16 (declarations of a mother, said to be in possession as bailee for her infant son, admitted on the facts); 1851, Fontaine *v.* Beers, 19 Ala. 722, 728 (debtor's agent's declarations of claim, while in possession, admitted for the creditor against an alleged prior purchaser); 1855, Martin *v.* Hardesty, 27 Ala. 458 (like Mobley *v.* Bilberry); 1856, Upson *v.* Raiford, 29 Ala. 188, 194 (declarations by a debtor in possession that the property belonged to him, admitted on the authority of Darling *v.* Bryant and ensuing cases); 1880, Kirkland *v.* Trott, 66 Ala. 417, 420 (defendant's tenant's declaration, when taking possession, that he did so for defendant, admitted against defendant on an issue as to his wrongful possession); 1905, Ard *v.* Crittenden, — Ala. —, 39 So. 675 (mortgagor's statements to third persons, at unspecified times, not admitted); 1915, Murphy *v.* Pipkin, 191 Ala. 111, 67 So. 675 (deposition of grantor remaining in possession, received); 1915, Pelham Sitz & Co. *v.* Herzberg-Loveman D. G. Co., 194 Ala. 237, 69 So. 881 (rival claimants under husband and wife; the children's statements, while acting as agents to deposit the cotton, admitted to show father's title);

Florida: 1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704 (declarations of a husband-debtor in possession admitted for the creditors against the wife-mortgagee);

Illinois: 1873, Amick *v.* Young, 69 Ill. 542, 544 (debtor-possessor's declarations, admitted for the attaching creditor);

Indiana: 1889, Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345 (debtor-possessor's declarations, admitted for the attachment creditor against a creditor against a purchaser);

Iowa: admitted, except as otherwise noted: 1851, Ross *v.* Hayne, 3 G. Gr. 211, 214 (cattle); 1865, Blake *v.* Graves, 18 Ia. 312, 314 (horse); 1877, Stephens *v.* Williams, 46 Ia. 540, 543 (piano); 1881, Sweet *v.* Spencer, 57 Ia. 510, 512, 10 N. W. 870 (stock of goods; here narratives of the terms of a contract were excluded); 1883, Hardy *v.* Moore, 62 Ia. 65, 69, 17 N. W. 200 (stock of goods); 1899, Nodle *v.* Hawthorne, 107 Ia. 380, 77 N. W. 1062 (declarations by A. in possession of personalty, as to his ownership, admitted for a creditor of A. claiming against B.); 1899, Walkley *v.* Clarke, 107 Ia. 451, 78 N. W. 70 (obscure);

Kansas: 1921, St. John Nat'l Bank *v.* Leslie, — Kan. —, 199 Pac. 468 (creditor's bill for property conveyed by insolvent husband to wife; husband's declarations of ownership, made in possession, admitted for plaintiff);

Massachusetts: 1882, Roberts *v.* Medberry, 130 Mass. 100 (possession being presumptive evidence of title to a chattel, the declarations of a debtor, while in possession, even after the time of an alleged fraudulent sale, are receivable in favor of the creditor); 1896, Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124 (similar); 1900, Produce Exchange T. Co. *v.* Bieberbach, 176 Mass. 577, 586, 58 N. E. 162 (ownership of notes by a bank; entries in the bank's books admissible as "acts of ownership competent to prove title in the bank");

Minnesota: 1899, Rollofson *v.* Nash, 75 Minn. 237, 77 N. W. 954 (title to personalty; the predecessor's possession being shown to raise a presumption of title, his declarations, while in possession, as to its character were admitted; here for the father's creditors against sons claiming title);

Montana: 1899, Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961 (declarations of debtor in possession, admissible as "explaining the character of his possession");

Missouri: here compare the cases cited *ante*, §§ 1778, 1779; 1830, Foster *v.* Wallace, 2 Mo. 231, 238 (debtor's declaration of ownership, denying the alleged vendee's title, made after the date of the alleged conveyance and while

claimant alleges a title *prior* and *superior to* that of *the debtor*, the latter's declarations of disclaim will be useful to the claimant against the creditor; yet, since they could always be used against the creditor as admissions of his debtor, to whom he is privy in title, there is no necessity of resorting to the present theory. Where, on the other hand, the now claimant derives title *under the debtor*, the latter's declarations of disclaim would be desirable for neither party, if they disclosed some original defect of title (*e. g.* that he had stolen the property); while if they disclaimed merely by asserting the sale to

still in possession, held inadmissible "unless the privity of the F. [vendees] had been proved"); 1835, Foster *v.* Nowlin, 4 Mo. 18, 22 (same general litigation, debtor's declarations, now received, "as going to show the nature of the possession he had"; preceding ruling not referred to); 1837, Wilson *v.* Woodruff, 5 Mo. 40 (preceding case repudiated on that point; declarations held inadmissible); 1865, Langsdorf *v.* Field, 36 Mo. 440, 445 (declarations excluded; no authority cited); 1865, Howell *v.* Howell, 37 Mo. 125 (obscure as to the facts); 1871, Weinrich *v.* Porter, 47 Mo. 293, 294 (debtor's declarations after delivering possession to the vendee, excluded); 1875, Burgert *v.* Borchert, 59 Mo. 80, 86 (debtor's declarations held admissible as explanatory of possession; quoted *supra*); 1875, Boyd *v.* Jones, 60 Mo. 454, 470 (declarations held admissible on the theory of conspiracy only (*ante*, § 1086); "in such case, the common object and purpose having been clearly made out, the declarations of one while engaged in the prosecution of the common object may be received against another"; Burgert *v.* Borchert wholly ignored); 1898, Dunlap *v.* Griffith, 146 Mo. 283, 47 S. W. 917 (Burgert *v.* Borchert approved and followed, on an issue of title to realty); 1901, Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864 (admissible only on the theory of conspiracy);

North Carolina: 1796, Arnold *v.* Bell, 1 Hayw. 396, 397 (debtor's declarations, after the sale, tending to show it fraudulent, excluded; "a man's confession may be given in evidence to affect himself, but not to affect any other person"); 1801, Robinson *v.* Devone, 2 Hayw. 154 (declarations after an alleged gift, excluded; "after declarations of the party shall not be taken to explain his former transactions"); 1804, Gray *v.* Harrison, 2 Hayw. 292 (similar, for a sale); 1804, Eelbank *v.* Burt, 2 Hayw. 330 (similar, for a gift; but declarations at the time of the property being taken away would have been received); 1831, Den *v.* Pickett, 3 Dev. 6 (declarations excluded, because the declarant's possession was not shown); 1835, Askew *v.* Reynolds, 1 Dev. & B. 367 (declarations after the sale and during possession, claiming the goods as his own, admitted on the 'res gestæ' theory; quoted *ante*, § 1086); 1850, Patton *v.* Dyke, 11 Ired. 237, 239 (preceding case cited with approval); 1850, Foster *v.* Woodfin, 11 Ired. 339 (Askew *v.* Reynolds followed on similar facts); 1874, Kirby *v.* Masten, 70 N. C. 540 (debtor's declarations after assignment during possession with vendee's assent, received "to qualify the extent and purpose of the possession"; Askew *v.* Reynolds not cited); 1878, Gidney *v.* Logan, 79 N. C. 214 (like Askew *v.* Reynolds; Kirby *v.* Masten approved); 1895, Blair *v.* Brown, 116 N. C. 631, 638, 21 N. E. 434 (debtor's declarations after assignment, excluded, the conspiracy-theory being applied; the Court wholly ignores all its own foregoing precedents and culpably contents itself with citing a treatise on Assignments); 1901, City National Bank *v.* Bridgers, 128 N. C. 322, 38 S. E. 888 (preceding case followed); 1905, Piedmont Sav. Bank *v.* Levy, 138 N. C. 274, 50 S. E. 657 (trustee in bankruptcy, allowed to prove declarations of the debtor in possession but after assignment, to evidence the buyer's knowledge and the character of the debtor's possession; following Askew *v.* Reynolds, *supra*);

Pennsylvania: 1814, Johnson *v.* Kerr, 1 S. & R. 25 (admitted; but here the debtor-grantor was the nominal plaintiff, and thus the declarations were a party's admissions); 1823, Babb *v.* Clemson, 10 S. & R. 419, 426, 12 S. & R. 328 (declarations of debtor-grantor, as to a hiring of the custodian, and the custodian's declarations, admitted as affecting the "character of the possession" after transfer of title, no apparent change of custody having occurred);

Tennessee: 1895, Brooks *v.* Lowenstein, 95 Tenn. 262, 35 S. W. 89 (debtor in possession before and after the plaintiff's attachment, the defendant being a later attaching creditor, alleging that goods had been secretly removed before the first attachment; the debtor's declarations, admitted for defendant to prove the fact of removal; unsound, for here they had merely testimonial force; but they were admissible under § 1086, *ante*).

It may be added that in the present class of cases it would be possible to receive the declarations while rejecting them for the foregoing cases (pars. *a* and *b*, *supra*); since here the creditor may lay hold not only of the presumption of ownership from possession, but also of the presumption of fraud from continued possession by the assignor.

the claimant, they would of course be always receivable as admissions against the creditor; so that no occasion would arise for resorting to the present principle of verbal acts. Nevertheless, it is logically applicable, and has received some recognition for the present purpose.[9]

§ 1780. **Same: Distinction between the Foregoing and Other Declarations about Land-Title or Land-Possession.** Declarations about land-title or land-possession form the subject of numerous rules, resting on distinct principles. It is worth while, at this point, to compare them and to summarize the practical points of contrast:

(1) *Possessor's declarations as verbal acts of adverse possession* (*ante*, 1778). Here the question is whether they violate the Hearsay rule; it has been noticed that they do not. The conditions are merely that there shall be an issue of adverse possession, and that the declarant shall have been in occupation at the time. Thus it is immaterial whether he is deceased or not, whether he is a party or not, and whether the fact stated was at the time against interest or not.

(2) *Possessor's declarations to support the presumption of title from possession* (*ante*, § 1779). Here the question is also whether they violate the Hearsay rule; it has been seen that by the better opinion they do not. They differ from the foregoing sort in that no issue of adverse possession is necessary.

[9] *Ala.:* 1846, Webster *v.* Smith, 10 Ala. 429 (see citation *supra*); 1848, Beall *v.* Ledlow, 14 Ala. 523 (see citation *supra*); 1850, Thomas *v.* De Graffenreid, 17 Ala. 602 (see citation *supra*); 1906, Holman *v.* Clark, 148 Ala. 286, 41 So. 765 (defendant claiming under a mortgage prior to plaintiff's; debtor's declarations of claim in possession, admitted for defendant); *Ga.:* 1897, Myers *v.* Bernstein, 102 Ga. 579, 27 S. E. 681 (declarations on delivery of cotton to a warehouseman, that it was the declarant's wife's, admitted, in an issue between the wife and the declarant's creditors); *Mich.:* 1898, Coldwater N. Bank *v.* Buggie, 117 Mich. 416, 75 N. W. 1057 (declarations by the husband of the defendant as to her ownership of goods in his possession, excluded, the title or possession not being directly involved); *Minn.:* 1897, Lehmann *v.* Chapel, 70 Minn. 496, 73 N. W. 402 (wife claiming as owner of property bought by her and put in possession of husband as agent; the husband's declarations while in possession, received, on the theory of 'res gestæ', though the wife did not claim title through him; the two principles are confused in the opinion); *Mo.:* compare the cases *supra*, note 8: 1835, Foster *v.* Nowlin, 4 Mo. 18, 22 (declarations held admissible); 1837, Wilson *v.* Woodruff, 5 Mo. 40, 45 (declarations "in affirmance of the vendee's title," held inadmissible, "unless indeed" the possession by the debtor "forms a just reason"); 1871, Thomas *v.* Wheeler, 47 Mo. 363 (declarations of J., in possession, admitting the property to be held of C. as bailor, received for C. against J.'s creditor); *N. H.:* 1850, Walcott *v.* Keith, 22 N. H. 196, 212 (debtor's declarations, after a sale but during possession, held admissible for the buyer, as "calculated to characterize C.'s [the debtor's] possession and to rebut the presumption of ownership in him arising out of the fact of possession, and indirectly to show the right of the plaintiff [buyer]"); 1851, Bradley *v.* Spofford, 23 N. H. 444 (declarations of the debtor that he was only bailee for the plaintiff, admitted against the creditor, as rebutting the presumption from possession); *N. D.:* 1909, Johnston *v.* Spoonheim, 19 N. D. 191, 123 N. W. 830 (cited more fully *ante*, § 1777, n. 2); *Vt.:* 1903, Fletcher *v.* Wakefield, 75 Vt. 257, 54 Atl. 1012 (wife's action for a piano, acquired by gift from her husband, against her husband's creditors; the fact of its insurance in her name with his assent, admitted).

Contra: 1867, Earnshaw *v.* Tomlinson, 26 U. C. Q. B. 610 (a debtor's statement, while in possession, that property claimed by the plaintiff against the creditors belonged to a third person, not the plaintiff, excluded); 1803, Gruder *v.* Bowles, 1 Brev. 266 (debtor's declarations at the time of the transfer, not admitted for the donee).

Compare with the foregoing cases those cited *ante*, § 1086, n. 3.

(3) *Statements of facts against proprietary interest* (*ante*, § 1458). For these an Exception to the Hearsay rule is conceded. The marked limitations are that the declarant must be deceased or otherwise unavailable, and that the declaration must be in disparagement of title. On the other hand, whether the declarant was at the time in possession or not, and whether he is a party or privy or not, is immaterial.

(4) *Statements concerning private boundaries* (*ante*, §§ 1563–1570). In these is involved another Exception to the Hearsay rule, having two forms. By the one are received statements as to private boundaries by a deceased person having no interest to misrepresent. By the other are received similar statements made by a deceased owner in possession while on the land pointing out the boundaries. The marked differences between the foregoing Exception and this one are that in the latter the fact need not be against interest, but it must be solely a boundary-fact.

(5) *Admissions as to title-defects* (*ante*, §§ 1082–1087). Here there is no requirement of the decease of the declarant; nor need the fact stated have been against interest; nor is possession at the time a necessary circumstance. But the declarant must be a party-opponent or a predecessor of his in title, and the statement must have been made during the continuance of title. Whether this principle admits statements made after title divested but while keeping possession is a question; and whether a vendor is a predecessor whose admissions are usable is a question. Moreover, the rule about producing the original title-documents may apply (*ante*, §§ 1255–1257) to exclude these admissions of an opposing documentary title.

(6) *Recitals in old deeds* (*ante*, § 1573). An Exception to the Hearsay rule allows recitals in old deeds to be used as hearsay assertions for limited purposes. No limitations as to parties, possession, or disparagement of title, here obtain.

(7) *Old leases and deeds as circumstantial evidence of possession* (*ante*, § 157). Under the principle of verbal acts, a lease or a deed by one in possession is an act of claim showing the adverse character of his occupation. But suppose that such a lease is offered, by one claiming under the lessor, without direct testimony to the accompanying possession; may not the execution of such a document be itself sufficient circumstantial evidence of such possession by the maker? With certain limitations this is conceded, when the deed is ancient; the inference being one of circumstantial evidence.

(8) *Authentication of ancient deeds* (*post*, § 2137). Even without direct evidence of execution, the age and custody of a deed may suffice to authenticate it as genuine. But a main question is, whether possession of the land, by the grantee in the deed, is also an essential circumstance. This differs from the foregoing question, first, in that the objects of the proof are just the reverse of each other, and, secondly, in that the possession involved is in the one case that of the grantor, but in the other case that of the grantee.

All these principles are simple enough in themselves, and distinct enough

from each other as general principles; but it is easy to see, in a comparative survey of them, how it has happened that Courts in applying them to superficially similar pieces of evidence have sometimes interchanged and misapplied the respective limitations of principle.

§ 1781. **Declarations by Accused found with Stolen Goods.** On a charge of larceny or robbery, when the accused is found in possession of the stolen goods, and this circumstance is offered against him, the *accused's use of his own declarations* in exoneration, may be treated from the point of view of several principles. Some uncertainty in the precedents has thus naturally resulted.[1]

§ 1781. [1] The cases are as follows:

ENGLAND: 1848, R. *v.* Abraham, 3 Cox Cr. 430 (burglary; the defendant had said, before suspicion excited, that he had found them in a field; Alderson, B., said that if he "had given such an account of his possession of the stolen property to his neighbors, before suspicion existed or search made, he had not the slightest doubt" of its admissibility); 1844, R. *v.* Crowhurst, I. C. & K. 370 (larceny; statement, on being found in possession by a constable, as to buying the article, admitted without question); 1845, R. *v.* Smith, 2 id. 207 (same principle recognized); 1847, R. *v.* Evans, 2 Cox Cr. 270 (same); 1862, R. *v.* Wilson, 2 F. & F. 183 (an explanation volunteered by an accused on arrest for stealing, admitted); 1866, R. *v.* Exall, 4 F. & F. 922, 929 (same as R. *v.* Evans).

CANADA: 1876, R. *v.* Ferguson, 16 N. Br. 612 (defendant's statement, on the night of the larceny, before being charged with stealing, as to where he got the goods, admitted); 1902, R. *v.* Higgins, 35 N. Br. 18, 28 (R. *v.* Ferguson cited with approval).

UNITED STATES: *Federal:* 1827, U. S. *v.* Craig, 4 Wash. C. C. 729, 730 (declarations when found in a room with counterfeiting tools, explaining his presence, admitted "not to prove the truth of these declarations, but to repel any unfavorable conclusion from the silence of the prisoner and his declining to give some explanation of the situation in which he was found"); 1901, Kansas City Star Co. *v.* Carlisle, 113 C. C. A. 384, 108 Fed. 344, 360 (accused's explanations at the time of cattle being found in his possession, admitted);
Alabama: 1839, State *v.* Wisdom, 8 Port. 511 513, 517 (claim of title and production of bill of sale, when arrested with the goods, excluded, on "the general rule that one shall not be permitted to make evidence for himself"; "it must be asserted before or at the taking"); 1855, Spivey *v.* State, 26 Ala. 90, 93, 103 (larceny; defendant's open offers for sale, statements of his sources of title, and conversation with the supposed vendor's agent, excluded); 1868, Taylor *v.* State, 42 Ala. 529 (larceny; statement, when arrested, of purchase from V., excluded); 1870, Crawford *v.* State, 44 Ala. 45, 47 (burglary; statements of purchase, when found with the goods, admitted); 1871, Maynard *v.* State, 46 Ala. 85 (larceny; defendant's "explanation as to his possession," excluded); 1879, Atwell *v.* State, 63 Ala. 61, 65 (fraudulently removing mortgaged oxen; declarations at the time of removing and selling, that the mortgagee had permitted it, excluded); 1879, Cooper *v.* State, 63 Ala. 80 (larceny; allegations of gift from S., made some time after arrest, excluded); 1881, Henderson *v.* State, 70 Ala. 23, 25 (burglary; "if the party, at the time he is found in possession of the stolen property, and before he has had the opportunity to concoct evidence exculpatory of himself, give a reasonable and probable account" of his possession, it is admissible; some of the preceding cases, but not Crawford's and Cooper's, repudiated); 1881, Allen *v.* State, 72 Ala. 5 (larceny; defendant's statements as to title while openly possessing the goods, excluded); 1882, Allen *v.* State, 73 Ala. 23 (larceny; declarations "explanatory of possession," admissible, but not "respecting the source of title, or the contract under which he claims"); 1893, Smith *v.* State, 103 Ala. 40, 43, 16 So. 12 (larceny; statements while in possession, as to finding the article, admitted); 1898, Bryant *v.* State, 116 Ala. 445, 23 So. 40 (declarations, while in possession before arrest, as to the article being loaned to defendant by S., admitted as "explanatory of her possession");
Arkansas: 1858, Golden *v.* State, 19 Ark. 590, 600 (horse-stealing; declaration, when arrested, that "it was strange, for he had swapped a mule for a horse on the morning before," excluded; following State *v.* Wisdom, Ala.);
Georgia: 1906, Lanier *v.* State, 126 Ga. 586, 55 S. E. 496 (accused's explanatory statement while in possession, admitted);
Illinois: 1870, Comfort *v.* People, 54 Ill. 406 (remarks of the accused when pledging X's watch, admitted to indicate whether or not he was exercising ownership at the time); 1880, Bennett *v.* People, 96 Ill. 602, 607 ("what explanation a person makes while in possession of stolen property, at the time of the finding it in his possession, is admissible in evidence as explanatory of the character of his possession");

(1) The silence of the accused, or his failure to repel the charge and make explanation, when found with goods and charged, would be a circumstance of conduct available against him, either as an indication of consciousness of guilt (*ante*, § 273) or as an admission (*ante*, § 1071). Hence, this inference may properly be avoided in advance by showing that he was not silent but did repel the charge and claim his innocence. But, upon this principle, as

Indiana: 1908, Mason *v.* State, 171 Ind. 78, 85 N. E. 776 (accused's efforts to restore the missing property for identification by the owner, excluded);
Iowa: 1905, State *v.* Conroy, 126 Ia. 472, 102 N. W. 417 (statements explaining the possession of a stolen revolver, made before accusation, admitted);
Kentucky: 1858, Tipper *v.* Com., 2 Metc. 6, 11, *semble* (approving R. *v.* Abraham);
Louisiana: 1878, State *v.* Thomas, 30 La. An. 602 (in a charge of larceny, the defence being a taking under claim of ownership, previous claims of ownership were held admissible); 1915, State *v.* Lebleu, 137 La. 1007, 69 So. 808 (declarations of purchaser of stolen cattle that he had bought them from defendant, excluded on the facts);
Maine: 1873, State *v.* Pettis, 63 Me. 124 (larceny; declarations while in possession, that he had found the article in the street, not admitted; Appleton, C. J., and Barrows, J., diss., thought them admissible "as tending to disprove any felonious intent");
Massachusetts: 1870, Com. *v.* Rowe, 105 Mass. 590 (larceny; defendant's declarations to the shop-clerk, while holding the goods, that they had dropped out of a shawl which another woman had just given her to hold, admitted "to explain and qualify that possession and to disprove the inference of guilt");
Mississippi: 1879, Payne *v.* State, 57 Miss. 348 (larceny of a cow; defendant's statements, after selling it, to the buyer from him, that he had taken it by mistake for one of his own, and his warning not to slaughter it; "explanations offered by the party to account for his possession, if contemporaneous with it, or offered at a time when he is first called upon by the circumstances of the case to make such explanation," are admissible to rebut the presumption);
Missouri: 1897, State *v.* Waters, 139 Mo. 539, 41 S. W. 221 (declarations during possession disclaiming ownership and stating a borrowing only, excluded);
New Jersey: 1904, State *v.* Simon, 70 N. J. L. 407, 57 Atl. 1016 (knowing receipt of stolen goods; defendant's conversation with the seller, admitted);
North Carolina: 1838, State *v.* Jones, 3 Dev. & B. 122 (larceny of pigs; declarations as to losing pigs and going in search of them, made before the owner's claim advanced, admitted without dispute); 1870, State *v.* Worthington, 64 N. C. 594 (statement when charged with stealing, admitted; quoted *ante*, § 1144, note 2);
Ohio: 1846, Leggett *v.* State, 15 Oh. 283 (larceny of a horse; defendant's conversations when buying the horse from one D., admitted to "explain the inference of guilt the law raises from possession of the goods");
Oklahoma: 1898, Mitchell *v.* Terr., 7 Okl. 527, 54 Pac. 782 (explanations at the time of arrest, admissible); 1904, Smith *v.* Terr., 14 Okl. 518, 79 Pac. 214 (statements on arrest when not in possession, excluded);
Pennsylvania: 1864, Rhodes *v.* Com., 48 Pa. 396, 400 (murder and robbery; defendant's statements, when money was found upon him, as to its source, admitted; "had he refused to explain, it would have been evidence against him");
Texas: 1879, Hampton *v.* State, 5 Tex. App. 463, 467 (larceny; declarations when "his right to the ownership of said property is first questioned by some one else," admissible, but not declarations "before any adverse claim to the property is set up and before any suspicion rests upon him"; a singular confusion of rules; no authority cited); 1880, McPhail *v.* State, 9 Tex. 164 (larceny of cattle by shooting; declarations at the time, indicating an intent to prevent trespass, not an intent to appropriate, admitted); 1883, Sitterlee *v.* State, 13 Tex. 587, 592 ("any explanation which the party in whose possession the property is found may give at the time," admissible); 1893, Martin *v.* State, 32 Tex. Cr. 441, 443, 24 S. W. 512 (the explanation must be made when first called upon to explain); 1895, Goens *v.* State, 35 Tex. Cr. 73, 31 S. W. 656 (similar to Sitterlee's case);
Vermont: 1881, State *v.* Daley, 53 Vt. 442 (larceny of a heifer; defendant's declarations, when taking it, as to believing it to be one lost by him, admitted both as verbal acts and as rebutting the inference otherwise to be drawn from his failure to search for his own); 1905, State *v.* White, 77 Vt. 241, 59 Atl. 829 (larceny of a team; the defendant's declarations, before knowledge of suspicion or search that the team was not his own but hired, admitted);
West Virginia: 1919, State *v.* Goldstrohm, 84 W. Va. 129, 99 S. E. 248 (knowing receipt of stolen goods; defendant's conversation with a police officer on seeking the latter to hand him the property, admitted; citing the above text with approval).

in the case of rape (*ante*, § 1136), merely the *fact of making such a claim* would be receivable, for this would suffice to dispose of the argument that he was silent. The details of his statement would thus not be admissible.

(2) On the theory of using prior *consistent statements to corroborate a witness* by repelling the suggestion of recent contrivance (*ante*, § 1129), the accused's consistent explanations, made before or upon arrest or charge made or goods found in his possession, would be receivable, provided he were a witness. The foundation of this theory has already been examined (*ante*, § 1143). It is enough here to note that it satisfies most of the cases, though it does not seem to be explicitly employed by the Courts (*supra*, n. 1).

(3) The Hearsay Exception for Spontaneous Exclamations (*ante*, § 1747) might perhaps be sufficient to admit statements made *directly upon arrest*, but the Courts seem not to invoke it. The Hearsay Exception for Statements of Intent (*ante*, § 1732) may also be applicable.

(4) *Recent possession* of stolen goods raises a presumption (*post*, § 2513) that the possessor is the thief or robber or knowing receiver (as the charge may be). Even though the strict effect of this fact as raising a presumption and casting on the defendant the duty of producing evidence (*post*, § 2490) may be removed by his producing some evidence to the contrary, still the fact of possession remains for the jury's consideration as capable of the inference of guilt. Now the inference from the fact of possession will be stronger or weaker, according as the possession was not or was in good faith; if a possession in good faith can be made to appear, the inference that the possessor was himself the robber or the thief or the knowing receiver can hardly be strong. Thus, the total significance of the act of possession becomes material; and upon the principle of verbal acts (*ante*, § 1772), the *utterances of the person while in possession* may be received as *verbal acts* (or, in the common judicial phrase, as "explanatory of possession"); though not as hearsay assertions to evidence the fact asserted.

On this principle, it would be immaterial what the tenor of the utterance was, — whether a claim or a disclaimer of ownership, or an explanation of finding or of purchase or of borrowing, provided only it indicated the intent of the possession. It would also be immaterial that it was made before arrest, or discovery of the goods, or claim made, or suspicion raised, or that it was made after arrest or discovery or claim or suspicion, provided only that it was made during possession. On the latter point, this theory might seem to allow greater latitude of time than the second principle (par. 2, *supra*); but since possession is seldom retained after claim by the owner or after arrest, the rules would in practice coincide. Still, if the defendant does retain possession, repeating his own claim of ownership, after claim made by another, it seems proper enough to consider his utterances upon the issue of good faith. Most of the precedents proceed upon this Verbal Act theory, yet decline to receive declarations made more than a short time after arrest or discovery, on the theory that the opportunity to fabricate

had intervened; and they thus seem to proceed in part upon the other principle (par. 2, *supra*), in part upon this one (par. 4); yet, in the ordinary case, the practical result, as above noted, would not differ under either principle. Of these two theories, in general, it would seem that both are sound, and that declarations conforming to either the one or the other should be received.

(5) A narrow class of declarations of this sort are unquestionably receivable in another aspect of the same principle of verbal acts (*ante*, § 1777). When merely the *intent to appropriate* is in issue, and the defendant is said not to have exercised dominion at all over the goods (*i. e.* irrespective of his good faith in the possession), his utterances at the time of having them (for example, when taking a borrowed article to a pawnshop) will indicate the nature of his act. This use (which is rare enough) is a proper one, whatever the theory or the limitations may be in the ordinary case, where the act of appropriation is clear and the only question is as to good faith.[2]

Few Courts have laid down any principle with sufficient definiteness. All that can be said, as regards the state of the precedents, is that to-day in apparently all Courts declarations of the present sort are received on certain conditions, and that the rulings are altogether too strict for exclusion.[3]

§ 1782. **Declarations affecting a Revocation of a Will.** The equivocal act of tearing, burning, or cancelling a testamentary paper may or may not be in legal effect a revocation; just as the handing over of money may or may not be a loan, a payment, or a deposit for safe-keeping. The total effect of the act can be ascertained only by considering its intent as expressed in the accompanying words or other conduct. Such accompanying utterances are therefore plainly receivable (*ante*, § 1772) as verbal parts of the act:[1]

1866, WILDE, J., in *Powell* v. *Powell*, L. R. 1 P. & D. 212: "All acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances in which it occurred, and the declarations of the testator with which it may have been accompanied; for unless it be done 'animo revocandi' it is no revocation."

1825, WOODWORTH, J., in *Dan* v. *Brown*, 4 Cow. 490: "The declarations of the testator are in such cases [as where, by mistake, the will is torn or thrown into the fire] evidence, where they show the 'quo animo.' The act of cancelling is, in itself, equivocal, and will be governed by the intent."

1883, C. ALLEN, J., in *Pickens* v. *Davis*, 134 Mass. 257 (declarations being offered to show that a testatrix, by cancellation of a second will, did not intend to revive the first):

[2] Of this sort are the following cases in the above note: Comfort *v.* People, Ill.; State *v.* Waters, Mo.; McPhail *v.* State, Tex.

Distinguish (1) the use of *statements by a vendor* to the defendant, as evidence of the latter's good faith in purchasing stolen goods (*ante*, §§ 254, 259), and (2) the use of *exculpatory statements in general* by accused persons (*ante*, §§ 293, 1144, 1732, *post*, § 2115).

[3] As to this strictness, compare what is said *ante*, § 1732, par. 3.

§ 1782. [1] 1911, Blackett *v.* Ziegler, 153 Ia. 344, 133 N. W. 901; 1869, Thompson *v.* Updegraff, 3 W. Va. 629, 639.

The following ruling seems to fall under this principle: 1897, Smith *v.* Holden, 58 Kan. 535, 50 Pac. 447 (circumstances at the time of executing a paper not called a will, admitted, the question being whether it was to go into effect upon death or was a gift *inter vivos*).

"Such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive or not to revive the earlier will. Whether it had the one effect or the other depended upon what was in the mind of the testatrix."

It follows that declarations of intent made *after the act* of tearing or the like are not verbal parts of the act, and are mere hearsay assertions:

1854, SELDEN, J., in *Waterman* v. *Whitney*, 11 N. Y. 157: "[Statutes concerning revocation] require . . . some act amounting to a virtual destruction of the will. . . . Mere words alone will in no case amount to a revocation. Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given upon a question of revocation is to establish the 'animo revocandi,' in other words, to show the intent with which the act relied upon as a revocation was done. . . . The fact to be proved in such cases is the act claimed as a revocation, together with the intent with which it is done; and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay."

If, then, such declarations after the act are to be receivable at all, it cannot be under the present principle as verbal parts of the act, but under some other principle. By some Courts their admission is thus sanctioned.[2]

§ 1783. **Declarations of a Bankrupt.** Perhaps the earliest, and in England the chief field, for the application of the Verbal Act doctrine has been the declarations of a debtor in connection with an alleged act of bankruptcy. Whether or not such conduct as departure from the jurisdiction, refusal to appear when a creditor calls to demand payment, or the like, amounts to an attempt to evade creditors and thus to an act justifying the judicial pronouncement of bankruptcy, depends for its total significance more or less on all the circumstances of the debtor's behavior. His declarations, therefore, at the time of this other conduct may go to define the general nature of the conduct, and thus become verbal parts of the act. There is, to be sure, some ground for arguing that an essential ingredient of the act of bankruptcy, as defined by the statutes, is a fraudulent intent, an intent to evade creditors, and that therefore the declaration is of a state of mind (as in the case of criminal intent), and is admissible (*ante*, § 1728) as a genuine Exception to the Hearsay rule. The effect, however, would be practically the same; because this intent would always accompany some alleged act of bankruptcy, and hence the declaration of intent would equally accompany the act. But, apart from the wording of the statutes, it seems legitimate to treat the declarations as "elucidating" and giving significance to an otherwise equivocal act (*ante*, § 1774). This has been the attitude of the Courts, uniformly in England, generally in the United States.[1] The following classical cases illustrate the judicial mode of treatment:

[2] The cases are considered *ante*, §§ 1736–1737. Compare also the cases cited *ante*, § 1777 (declarations of gift), where a testator's declarations as to an advancement are sometimes involved.

§ 1783. [1] *Accord:* 1835, Smith *v.* Cramer, 1 Bing. N. C. 586; 1838, Thomas *v.* Connell, 4 M. & W. 267; 1881, Brady *v.* Parker, 67 Ga. 637.

1802, ELLENBOROUGH, L. C. J., in *Robson* v. *Kemp*, 4 Esp. 233: "Where the declaration of the bankrupt is part of the 'res gesta,' though it may show the intention of the act and thereby constitute an act of bankruptcy, it may be evidence."

1824, BEST, C. J., in *Rawson* v. *Haigh*, 9 Moore, 217 (letters of the bankrupt were offered, including some from Calais and Paris): "Wilkinson's going abroad was of itself an equivocal act, and requiring explanation, and, if so, we must endeavor to discover the motive with which it was accompanied, and this is generally, if not always, effected by the declarations of the party himself."

1832, TINDAL, C. J., in *Ridley* v. *Gyde*, 9 Bing. 349: "When a bankrupt has done an equivocal act, his declarations accompanying that act are admissible to explain his intentions; as where he has left his dwelling-house, which he may have done either in furtherance of his business or to avoid payment of a debt." BOSANQUET, J.: "The question here is whether the security in question was given by way of fraudulent preference. . . . To establish this, the declarations of the bankrupt must be admitted, not so much as declarations, but as a part of his conduct from which the inference is to be drawn that the security was given without pressure."

1841, DENMAN, L. C. J., in *Rouch* v. *R. Co.*, 1 Q. B. 51: "The act and the intention were both necessary to be proved. . . . The substantive act proved 'aliunde' is the departure from home; that is equivocal; the declaration made during the continuance of that act shows the intention with which it was done."

1829, PARKER, C. J., in *Carter* v. *Gregory*, 8 Pick. 168: "'The exception to this rule [of hearsay] is that when declarations accompany an act and have a tendency to show the motive and intention of the act, they are sometimes admissible. Such was the case cited of the bankrupt, who having committed an act equivocal in its nature, his declaration made at the time showing his intention was admitted."

Since the declaration is received as a verbal part of the act, it must of course be *contemporaneous with the alleged act of bankruptcy*. Anything said before or after that conduct could have a purely assertive force only and could not be receivable on the present principle. This limitation has caused some apparent judicial uncertainty, — for example, in cases where the declaration was made after the debtor had absconded and while he was staying in a foreign country. There is, however, no difficulty of principle in receiving such declarations; the difficulty is merely one of fact, in determining the duration of the conduct constituting the alleged act of bankruptcy. The limitation is strict and inflexible, that the declaration must be contemporaneous with the alleged act (*ante*, § 1776). But as the conduct constituting the alleged act of bankruptcy may extend over a considerable period of time — as where a debtor absconds and stays abroad and then returns — there may be a considerable interval between the mere beginning of the conduct, *i. e.* the original departure or closing of the house, and the actual time of the declaration. Thus, though the declarations, as always under the present principle, must be contemporaneous with the alleged act of bankruptcy, the conduct constituting that act may allow for them a wide range of time. This result, after some temporary misunderstanding, was finally reached and solidly established in the English cases, and may be taken as sound and accepted:

1812, Mr. *Christian*, Bankruptcy, I, 379, 380: "What a bankrupt declares at the time of committing an act of bankruptcy is always received in evidence, when proved by an-

other person. . . . But these declarations have been greatly, I conceive, misunderstood or misrepresented. They must accompany the act; for where words and actions are contemporaneous, they constitute one transaction, they are together one 'res gesta,' and the words are evidence of the reason of the act or the intention of the actor. . . . What Lord Kenyon and the Court said in the case of Bateman *v.* Bailey [2] has, I conceive, led many into error on this subject. . . . If the Court intended to say that what he declared after his return was complete, and when he was doing no act connected with it [is admissible], it is presumed the decision cannot be supported. Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, etc., what he says is part of the act of bankruptcy; but when he is only meditating a future act, or speaking of a past one completely finished, his words surely can have no more legal operation than those of any other man."

1824, BEST, C. J., in *Rawson* v. *Haigh*, 9 Moore, 327, 2 Bing. 99: "In order to render such declarations or letters admissible, they must be made or written at the time, or during the continuance of the act or urgency of the circumstances under which they are elicited, or sent; and here, as the act of bankruptcy was a continuous act from the time of Wilkinson's departure from this country for France, . . . they may be considered as forming part of one and the same continuing act." PARK, J.: "It is impossible to tie down to time the rule as to the declarations. . . . If, as in the present case, there are connecting circumstances, it may, even at that time [a month after] form part of the whole 'res gestæ.'"

1832, PARK, J., in *Ridley* v. *Gyde*, 9 Bing. 349: "I adhere therefore to what I said in Rawson *v.* Haigh. It is not necessary to lay down the precise time within which such declarations shall be admissible or excluded; but . . . it must always be considered whether there are any and what connecting circumstances between the declaration and the act. Here . . . those circumstances are all connected together as part of the same transaction."

§ 1784. **Declarations as to Domicil.** In Massachusetts, declarations of intention of residence, made by one removing to another place, were originally, and in a long line of decisions, regarded as governed by a principle representing in its main aspects the Verbal Act doctrine. That such declarations in the ordinary case (that is, when made not prior to removal, but during removal or resettling) cannot conceivably be governed by the Verbal Act doctrine, is more than ought to be asserted. But, having regard to the element of intent as treated in the law of domicil, it may better be regarded as a separate and independent element, material for its own sake and not merely as appurtenant to an act, and therefore may be shown by declarations admissible under the Exception for Statements of a Mental Condition (*ante*, § 1727). Certainly this is the only aspect in which declarations made prior to removal can legitimately be received; for they would be inadmissible as verbal parts of the act. In the case of Viles *v.* Waltham, in 1893,[1] the Supreme Judicial Court of Massachusetts apparently gave up its former view and transferred its adherence to the Exception for Statements of a Mental Condition, as being the true governing principle. Nevertheless, its former line of decisions has served to furnish precedents and phrasings for other Courts; and the fact that these declarations are often treated under the Verbal Act doctrine therefore cannot be ignored. There is of course a strictness more or less unsatisfactory in applying the limitation of contempo-

[2] 5 T. R. 512.

§ 1784. [1] Quoted *ante*, § 1727.

raneousness (*ante*, § 1776); and this contributes to show that the Verbal Act doctrine is here really out of place. Its application is exhibited in the following passages: [2]

1841, WILDE, J., in *Kilburn* v. *Bennett*, 3 Metc. 199 (admitting declarations as to a contemplated moving): "They were made in the ordinary course of business, and in relation to the defendant's removal; and they were made to the owner of the house in which he was at the time residing. This giving notice of his intended removal is to be considered an act which he might prove in any case in which it became material; and, if so, all that he said explanatory of his intention in relation to his removal, seems to us to be admissible in evidence."

1854, THOMAS, J., in *Cole* v. *Cheshire*, 1 Gray 444: "It was not difficult to prove that he was in Lanesborough before the first of May, that he came there with his horse and trunks, and made a contract for board and lodging. But the effect of these acts depended upon the intent and purpose with which they were done. . . . Qualified by such intent and purpose, they were perfectly consistent with the intention of retaining his domicil in Cheshire. . . . That intent is manifested by what he does and by what he says when doing, and sometimes as significantly by what he omits to do or to say."

§ 1785. **Declarations of Intent or Motive by an Accused.** Where in a criminal charge the intent with which the act was done becomes material, declarations accompanying the act may perhaps be thought of as admissible under the present principle. But, since the criminal intent is itself an independent ingredient of the crime, and is not merely a subordinate means of ascertaining the total complexion of the outward conduct, the present principle seems hardly to be applicable. It seems more correct in such cases to use declarations of intent or motive as receivable under the Hearsay Exception for Statements of a Mental Condition (*ante*, § 1732, par. 4). Practically

[2] The following cases in Massachusetts and Maine proceed on this principle:

Massachusetts: Thorndike *v.* Boston, 1 Metc. 242; 1847, Salem *v.* Lynn, 13 Metc. 544 (statements after a return, rejected); 1864, Wilson *v.* Terry, 11 All. 214; 1864, Monson *v.* Palmer, 8 All. 552; 1870, Reeder *v.* Holcomb, 105 Mass. 94; 1879, Wright *v.* Boston, 126 Mass. 164 (statements made during a steady residence, and not on removal, rejected); 1879, Weld *v.* Boston, 126 Mass. 166; 1880, Brookfield *v.* Warren, 128 Mass. 288; 1887, Pickering *v.* Cambridge, 144 Mass. 248, 10 N. E. 827 (directions for work to be done on the place removed to, rejected).

Maine: 1828, Gorham *v.* Canton, 5 Greenl. 267; 1854, Richmond *v.* Thomaston, 28 Me. 234 (made before moving; rejected); 1865, Cornville *v.* Brighton, 39 Me. 334; 1886, Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884; 1890, Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 9; 1904, Knox *v.* Montville, 98 Me. 493, 57 Atl. 792 (pauper settlement; declarations, while living in M., as to an intent to return to B., excluded; the declarations must "accompany acts which they explain"); 1913, Holyoke *v.* Holyoke's Estate, 110 Me. 469, 87 Atl. 40 (examining prior cases).

Rulings in other jurisdictions are as follows: 1896, Chambers *v.* Prince, 75 Fed. 176; 1908, Barnard *v.* U. S., 9th C. C. A., 162 Fed. 618 (perjury in homestead land entries; the issue being whether W. resided on the homestead from 1898 to 1904, W.'s declarations of intent while elsewhere in 1901 and 1903 were admitted); 1911, Madison *v.* Guilford, 85 Conn. 55, 81 Atl. 1046; 1888, Kreitz *v.* Behrensmeyer, 125 Ill. 141, 196, 17 N. E. 232 (admissible "although not accompanying acts"); 1902, Matzenbaugh *v.* People, 194 id. 108, 62 N. E. 546 (declarations of intent, "so connected with the act of going from Illinois to Texas that they should have been regarded as qualifying or characterizing the act," are receivable); 1902, Bigelow *v.* Bear, 64 Kan. 887, 68 Pac. 73; 1868, Baker *v.* Kelly, 41 Miss. 696, 702 (attachment against a debtor about to remove from the State; the debtor's declarations of intent before attachment sued out, admitted for the debtor); 1891, Chase *v.* Chase, 66 N. H. 588, 591, 29 Atl. 553; 1916, Wilbur *v.* Calais, 90 Vt. 335, 98 Atl. 913.

Compare the following statute: *N. Y.* Cons. L. 1909, Real Property § 12 (resident declarant alien's recorded deposition of intention to remain in U. S., admissible).

the result is the same under either principle, for declarations at the time of the act. But under the above Exception declarations after the act, asserting an existing state of mind, would also be receivable, and in that respect the two principles lead to different results.

§ 1786. **Complementary Utterances; Putting in the Whole of a Conversation, Correspondence, etc.** Upon the principle of Completeness (*post*, § 2094) a party for or against whom a statement, oral or written, has been properly introduced, is entitled to introduce complementary statements, *i. e.* the remainder of a conversation, letter, or other utterance, of which the former was but a part. This use of the remainder of the utterance is not prevented by the Hearsay rule, for the complementary utterance is received not as an assertion to prove a fact asserted in it, but is making plain the correct tenor of the first and fragmentary utterance. For example, where a statement by the opponent was received as an admission, "I have lied to you about this," the postal-card to which he referred when speaking was received, though written by a third person, because it formed a part of the defendant's admission;[1] *i. e.* not on the credit of the writer, but as complementing the defendant's oral statement. This class of cases is closely analogous to those already noticed (*ante*, § 1770) in which verbal parts of acts are received; here another part of the same entire utterance is received, solely in order to ascertain the exact tenor of another fragment. The application of this principle of Completeness is elsewhere examined in detail (*post*, §§ 2113–2124); here it is only to be noted that the employment of such complementary utterances does not violate the Hearsay rule.

3. Utterances used as Circumstantial Evidence

§ 1788. **General Principle.** The Hearsay rule forbids merely the use of an extrajudicial utterance as an assertion to evidence the fact asserted (*ante*, § 1766). Such a use would be testimonial, *i. e.* we should be asked to believe the fact because Doe asserted it to be true, precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the Hearsay rule forbids (*ante*, § 1361) is the use of testimonial evidence — *i. e.* assertions — uttered not under cross-examination. If, then, an utterance can be used as circumstantial evidence, *i. e.* without inferring from it as an assertion to the fact asserted (*ante*, §§ 25, 245), the Hearsay rule does not oppose any barrier, because it is not applicable. For example, when it is material to show that Doe knew of a sale by Roe, the letter of notification by Roe to Doe, "Take notice that I have this day sold a carload of wheat to J. S.," is receivable, not as a testimonial assertion by Roe to prove the fact of sale, but as indicating circumstantially (*i. e.* indirectly) that Doe obtained knowledge of the sale; the fact of sale being proved by other evidence.

It now remains to survey the various ways in which utterances may thus

§ 1786. [1] Amos v. State, 123 Ala. 50, 26 So. 524.

be indirectly evidential. As some definite principle of Relevancy usually governs their use as circumstantial evidence, the precedents for the various classes of utterances can in most instances best be collected under the appropriate heads of Relevancy; but it is proper here to examine the manner in which they escape the ban of the Hearsay rule, and to summarize the different varieties.

§ 1789. **Knowledge, Belief, Good Faith, Reasonableness, Diligence, Motive, Sanity, etc., as evidenced by Receipt of Information or by Reputation.** Wherever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned. In the following passages this distinction is expounded:

1773, *Fabrigas* v. *Mostyn*, 20 How. St. Tr. 137; action for false imprisonment by the Governor of Minorca; defence, that the plaintiff excited sedition and riot; the reasonableness of the governor's apprehension of riot came into issue; the aide-de-camp to the governor testified that a native magistrate came to him to report that "Fabrigas said he would come with a mob . . . and they would see better days to-morrow." Mr. *Peckham*, for the defence: "You need not mention what the mustastaph told you; that is not regular." Mr. J. GOULD: "I should be glad to know how the Governor can be apprised of any danger unless it is by one or other of his officers informing him there is likely to be such and such a thing happen?" Mr. *Peckham:* "Hearsay is no evidence." Mr. J. GOULD: "We do not take it for granted that it is really so; only that this gentleman, hearing of this, tells the Governor." Mr. *Lee*, for the defence: "It is no evidence of the fact: if you mean it only as a report, we do not object."

1836, ABINGER, L. C. B., in *Fraser* v. *Berkeley*, 7 C. & P. 625: "If a man called another a liar, and was knocked down, the plaintiff [suing for this battery] would not be allowed to prove, on the trial of the assault, that the defendant [as asserted by the plaintiff] was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of showing that the feelings of the party [thus charged] were excited, and a man is not stung the less by a libel because it happens to be true."

1849, ERLE, J., in *R.* v. *Wilkins*, 4 Cox Cr. 92 (the constable, who apprehended the accused, spoke of "tracing" them from place to place; it was objected that this involved the hearsay statements of others as to the accused's doings); "Half the transactions of life are done by means of words. There is a distinction, which it appears to me is not sufficiently attended to, between mere statements made by and to witnesses, that are not receivable in evidence, and directions given and acts done by words, which are evidence. The witness, in this case, may say that he made inquiries, and, in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them."

1870, MILLER, J., in *Friend* v. *Hamill*, 34 Md. 298, 308: "Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay."

1892, HARRISON, J., in *Smith* v. *Whittier*, 95 Cal. 293, 30 Pac. 529 (a witness who ran an elevator, which had caused the injury in issue, testified that he had been told that harm would come if he did not follow certain instructions, which he described): "Whenever the knowledge or information of the party charged to have been negligent is a factor in determining such question [of negligence], it is proper, for the purpose of showing such knowledge or information, to show that notice was given to him, and that he was informed

of the facts which would constitute negligence. . . . Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had not the opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but upon the theory that the information was correct, the plaintiff in the present instance had the right to show that the defendant had received such information. . . . Such evidence is admitted for the purpose of establishing merely the utterance of the words and not their truth." [1]

On this principle, the Hearsay rule interposes no obstacle to the use of letters, notices, oral informations, reputation, or any other form of verbal utterances by one person, as circumstantial evidence that another person had knowledge or belief as to the *violent character* or *intentions* of the *deceased* in a homicide case (*ante*, §§ 247, 248), the *incompetence of an employee* (§ 249), the *vicious nature of an animal* (§ 251), the *dangerous condition* of a place or a machine (§ 252), the *insolvency* or *lunacy* of a vendor (§ 253), the character of *stolen goods* bought (§§ 255, 259), the *falsity of representations* made (§ 256), the *guilt of an arrested person* or the *dangerous intentions of a mob* or *riotous assemblage* (§ 258). In the same way, when a person's *failure to complain* of a *robbery* (*ante*, § 1142) or of a *rape* (*ante*, § 1134) is taken as evidence of a false claim, the motives for the silence may serve to explain it away, and thus it may become proper to learn whatever direction or information was relied upon as inducing the silence. So also where *silence*, when a denial would be natural, is treated as equivalent to an *admission* (*ante*, § 1071), the reason for the silence may serve to explain away its import, and thus the information giving rise to the silence may become admissible. Departure after a charge made may evidence *consciousness of guilt*, but the prior receipt of a pressing telegram may repel this inference (*ante*, § 281). An emotion of *anger* or *malice* may be caused by information received (*ante*, § 389), and thus the communicated utterances may become admissible. *Insanity* may be indicated by the mode of conduct upon information received (*ante*, § 228), and the communication thus becomes admissible. *Good faith* and *diligence in a search*, either for a document said to be lost (*ante*, § 1196) or for a witness said to be absent (*ante*, §§ 1313, 1404, 1725), may be evidenced by the replies made to inquiries which thus appear to be fruitless; and the information thus given becomes admissible for its circumstantial value. So also *good faith in destroying a document* may excuse its non-production

§ 1789. [1] The following cases further illustrate the distinction: 1912, Hurst *v.* State, 101 Miss. 402, 58 So. 206 (threats as an excuse for carrying a concealed weapon; is the belief of defendant that M. had threatened defendant's life the material thing under the law? Or the fact that M. had so threatened? In the former solution, the report as made to defendant becomes admissible on the present principle; but not in the latter solution); 1858, State *v.* Wentworth, 37 N. H. 217 (the fact that on inquiry no one in a certain neighborhood knew of a man whose existence was material); 1919, State *v.* Perretta, 93 Conn. 328, 105 Atl. 690 (telephoning to the police; principle approved, per Gager, J.).

The present principle underlies the following statute: *Ga.* Rev. C. 1910, § 5763, P. C. § 1023 ("information, conversations, letters, and replies," when they "explain conduct and ascertain motives," are receivable as "original evidence").

(*ante*, § 1198), and the information which induced the destruction may thus be receivable. Whether the fact that a person alleged to be dead has or has *not been heard from*, as affecting the *presumption of death from absence* is a different question, so far as the principle of Relevancy is concerned (*ante*, § 158, *post*, § 2531); but the fact of receiving or not receiving a letter or other news is here also a circumstantial, not a testimonial use of the evidence, which thus becomes admissible.

There may be other instances of a similar use of one person's utterances to show another's mental condition; but all are left equally scathless so far as the Hearsay rule is concerned.

§ 1790. **Utterances as indicating Circumstantially the Speaker's Own State of Mind.** The condition of a speaker's mind, as to knowledge, belief, rationality, emotion, or the like, may be evidenced by his utterances, either used testimonially as assertions to be believed, or used circumstantially as affording indirect inferences. Utterances of the former sort may be received under the Exception for Statements of a Mental Condition (*ante*, § 1714). Yet such direct assertions of a mental condition as, "I know that Doe is insolvent," or "I dislike Roe," are relatively less common as a source of proof. The usual resort is to utterances which circumstantially indicate a specific state of mind causing them.

To such a use, then, the Hearsay rule makes no opposition, because the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded. This discrimination, though well accepted in the law, is easy to be ignored, and it needs perhaps to be emphasized.

Suppose, for example, a witness J. S. to have testified to seeing Doe in January in a house on Cedar Street, Doe's presence at the time being material. The opponent wishes to show that J. S. is mistaken and that the person seen was not Doe. He offers the testimony of one who in February met J. S. and asked him if he had seen Doe lately, J. S. then replying, "Yes, I talked with him this morning at the bank"; the opponent being ready to prove that the person whom J. S. talked with at the bank was Roe and not Doe. Now J. S.'s utterance is here not offered assertively, to prove that J. S. did talk with Doe; on the contrary, the opponent even desires it to be understood that the assertion is incorrect; and he offers the utterance for its indirect value as indicating that J. S. believed the person Roe to be the person Doe; in other words, as evidencing J. S.'s ignorance of Doe's personality. Here, then, J. S.'s utterance has two possible uses, — its testimonial and its circumstantial use; so far as the former is concerned, the Hearsay rule applies, but to the latter the Hearsay rule has no application. Again, in evidencing sanity or insanity, a testator's statement, "I am the King of Dahomey," or "I have a million dollars in the bank," may be treated either testimonially or circumstantially; so far as it is offered circumstantially, as indicating a delusion in the testator's mind, it is not obnoxious to the

Hearsay rule. It is immaterial whether or not, in the case in hand, the assertive or testimonial use might be improperly made by the jury; the judge's instructions are the corrective against this. On the principle of multiple admissibility (*ante*, § 13), if there is *any* relevant circumstantial use, the utterance is admissible for that purpose.

The discrimination between the two is pointed out in the following passages:

1854, SELDEN, J., in *Waterman* v. *Whitney*, 11 N. Y. 157: "The difference is certainly very obvious between receiving declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, . . . while in the latter it is the most direct and appropriate species of evidence, . . . and the same evidence is admissible in every such case as in cases where insanity or absolute incompetency of the testator is alleged. . . . The difference between the two cases consists in the different nature of the inquiries involved. One relates to a voluntary and conscious act of the mind; the other to its involuntary state or condition."

1868, COLT, J., in *Shailer* v. *Bumstead*, 99 Mass. 112: "The previous declarations of the testator, offered to prove the mental facts involved [competency to will], are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it."

It is worth while to emphasize the legitimacy of this circumstantial aspect of such evidence, because it incurs the risk of being ignored, through a judicial disposition in part to account for it by the unmeaning shibboleth of 'res gestæ' (*ante*, § 1767), or by the Exception for Statements of a Mental Condition (*ante*, § 1715). The evidence is circumstantial, not testimonial; and it is therefore not obnoxious to the Hearsay rule, nor needs for its admission any Exception to that rule. No doubt, in given instances, it may be difficult to distinguish a genuine circumstantial use of utterances for this purpose; and this difficulty has already been considered (*ante*, § 267); but isolated instances of difficulty need not prevent us from recognizing the plain principle in its ordinary unquestioned uses.

These various circumstantial uses have already been examined in dealing with the different kinds of circumstantial evidence; and the precedents are collected under those respective heads. It remains here merely to note briefly the chief kinds:

(1) Utterances are receivable as evidencing indirectly *insanity* or other organic mental condition (*ante*, § 228) or as evidencing physical condition as to *illness* or the like (*ante*, § 223).

(2) Utterances indirectly evidencing *knowledge*, *belief*, *consciousness*, and the like, are equally admissible (*ante*, § 266). Some difficulty may here arise when the fact of belief or consciousness is itself of doubtful relevancy.

The question of the propriety of such an inference arises for a parent's declarations of *legitimacy* (*ante*, § 269), a husband's or wife's declarations of *marriage* (*ante*, § 268), a testator's declarations as to the execution or contents of an existing *will* (*ante*, §§ 271, 1739), and a few other instances (*ante*, § 272).

(3) Utterances indirectly indicating *fear*, *ill-will*, *excitement*, or *other emotion* on the part of the speaker are also admissible, whether the person be one whose state of mind is in issue (*ante*, § 394), or be a witness whose bias is to be ascertained (*ante*, § 950). A peculiar case is that of a *testator's utterances* as indicating *undue influence* (*ante*, § 1738). Utterances connected with a *mob* or *riotous assemblage* have several aspects: (*a*) As indicating the reasonable apprehensions of the magistrate or other officer, defending himself on a charge of unlawful arrest or battery, the information given to him of the mob's doings is admissible (*ante*, § 248). (*b*) As indicating whether there was in fact an alarm and fear of danger in the community, this alarm being not only in a civil case a justification for the magistrate but also on a criminal charge a part of the notion of the crime of creating a riot, the expressions of alarm of various persons in the community are admissible to show their fear, either as circumstantial evidence (*ante*, § 394), or as hearsay assertions of a mental state (*ante*, § 1730). (*c*) As indicating the intent of the mob, whether seditious, violent, or otherwise, the expressions of intention by the persons composing it are clearly receivable, either as indirect evidence (*ante*, § 254), or as assertions of a mental state (*ante*, § 1729). But usually the only question of difficulty here is whether the accused may be made responsible for the doings of the mob as a joint actor with them (*ante*, § 1079).

§ 1791. **Utterances serving to Identify Time, Place, or Person.** Utterances serving to *identify* are admissible as any other circumstance of identification would be (*ante*, §§ 410–415). Utterances serving to mark a time or a place are the commonest instances of this sort, and are admissible so far as they have a real service for that purpose and are not used merely as a pretext for introducing a hearsay assertion (*ante*, § 416). Utterances by a person as to his name, birthplace, family, or the like, are available for this purpose; but their more common use is to furnish an inference that the person was born or related as he claimed to be (*ante*, §§ 270, 1494). Utterances that have served to *induce the observation* of a particular fact (*ante*, § 655), or to *fix the recollection* of it (*ante*, § 730), are also receivable, without regard to their assertive value, as not obnoxious to the Hearsay rule.

§ 1792. **Witness' Statements used in Impeachment.** The utterances of a witness indicating *bias* are receivable to impeach him (*ante*, § 950) on the principles noted in the preceding section. Statements offered as *self-contradictions* are admitted not as assertions to be credited, but merely as constituting an inconsistency which indicates the witness to be in error in one or the other statement; their use as hearsay assertions is uniformly prohibited by the Courts (*ante*, § 1018). Such an apparently inconsistent statement

may be explained away by other utterances (*ante*, § 1044). Consistent statements to *corroborate* a witness are admitted in certain cases only, but are never conceded to have any testimonial force (*ante*, § 1132). In all of the foregoing instances the utterance is used otherwise than as an assertion to be credited, and therefore the Hearsay rule is not applicable.

SUB-TITLE IV: HEARSAY RULE AS APPLICABLE TO COURT OFFICERS

(JUROR, JUDGE, COUNSEL, INTERPRETER)

CHAPTER LIX.

The Hearsay Rule's requirement is that no assertion used testimonially be admitted without prior subjection to the test of cross-examination; thus, it naturally applies to the various officers and agencies of the trial itself, as well as to other persons in general. But in its application to the court officers and agencies there has been a different history, and its application takes special forms. Here must be considered:

(1) The Juror;
(2) The Judge;
(3) The Counsel;
(4) The Interpreter.

1. Juror

§ 1800. **Juror having Previous Private Knowledge must testify as Witness.** The jury, in its original function, was a body of witnesses drawn from the vicinage. They were assumed to have knowledge of their own upon the subject of the cause, and were allowed and expected to apply it in reaching a verdict. This function persisted for centuries, and its scope is seen as late as the 1600s:

1670, VAUGHAN, V. J., in *Bushel's Case*, 6 How. St. Tr. 999, 1010, Vaughan 135: "It is true, if the jury were to have no other evidence for the fact but what is deposed in court, the judge might know their evidence. . . . But the evidence which the jury have of the fact is much other than that, for, 1, Being returned of the vicinage whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must), though no evidence were given on either side in court, but to this evidence the judge is a stranger; 2, They may have evidence from their own personal

knowledge, by which they may be assured and sometimes are that what is deposed in court is absolutely false; . . . 3, The jury may know the witnesses to be stigmatized and infamous."

In the meantime, however, the function of the jury as mere triers, upon evidence furnished by others, had become more and more emphasized, and ended by becoming the sole one. The course of this development has been once for all described in the following passage:

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 137, 168: "We have seen how the ways of adding to their knowledge were gradually increased, until at last witnesses called in by the parties were regularly admitted to testify publicly to these other witnesses, summoned by the sheriff, whom we call the jury. This mounting witnesses upon witnesses was a remarkable result and teemed with great consequences. The contrast between the functions of these two classes became always greater and more marked. The peculiar function of the jury — as being triers — grew to be their chief, and finally, as centuries passed, their only one; while that of the other witnesses was more and more defined, refined upon, and hedged about with rules. It is surprising to see how slowly these results came about. . . . Two things stand out prominently in Vaughan's opinion in Bushel's Case: 1. The jury are judges of evidence. 2. They act upon evidence of which the Court knows nothing ; and may rightfully decide a case without any evidence publicly given for or against either party. It was now two hundred years since Fortescue wrote his book and showed witnesses testifying in open court to the jury; and as we see, not yet has the jury lost its old character, as being in itself a body of witnesses. . . . As things stood after Bushel's Case, how should the jury be controlled? The attaint was obsolete, and fining and imprisonment were no longer possible. In no way could they be punished for giving verdicts against law or evidence. The Courts found a remedy by a simple extension of their very ancient jurisdiction of granting new trials in case of misconduct. . . . [This] was going beyond anything that had formerly been done. Moreover, how should the Court know that the jury's verdict was against evidence? And how should they know what the law was until they knew what the facts were, since the law, as applicable to the case, was inextricably bound up with some definite supposition of fact? . . . In order to make it effective it was necessary to accompany this practice by an endeavor to make the jury declare publicly their private knowledge about the cause. This effort prospered but slowly. The old function of the jury was too deeply ingrained to give way in any short time; the judges long contented themselves with advice, with laying it down as a moral duty that the jury should publicly declare what they knew. . . . In 1598, we see it recognized that a juryman may communicate to his associates privately any oral or written information that he has, if not induced thereto by either of the parties. But in 1650, in Bennett *v.* Hartford, it was laid down that a juror ought to state publicly in court on oath any such information, and not to give it in private to his companions. . . . Half a century later, in 1702, the same duty is reported to have been laid down in general terms for the whole jury: 'If a jury give a verdict on their own knowledge, they ought to tell the Court so, that they may be sworn as witnesses. And the fair way is to tell the Court before they are sworn that they have evidence to give.' And so our modern doctrine grew up."

This result seems to have become a settled maxim of the law not before the middle of the 1700s.[1] But since that time it has never been doubted.

§ 1800. [1] 1719, Lilly's Practical Register, I, 552; 1791, Smith *v.* Hollings, 6 How. St. Tr. 1012, note, per Buller, J. (a juror should not give his knowledge privily, but "be examined and subjected to cross-examination as a witness"); 1840, Manley *v.* Shaw, Car. & M. 361.

This comparative recency in its acceptance accounts perhaps for the frequent statutory declaration of the principle in the legislation of the 1800s in this country.[2]

The case of R. *v.* Sutton, 4 M. & S. 532 (1816), sometimes referred to as marking the recognition of this doctrine, seems not to concern it. Compare the history of the Hearsay rule in general (*ante*, § 1364).

[2] *Alabama:* Code 1907, § 7896 (substantially like Ia. Code 1897, § 5381); *Arizona:* Rev. St. 1913, P. C. § 1062 (like Cal. P. C. § 1120); *California:* P. C. 1872, § 1120 ("If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties"); *Georgia:* Rev. C. 1910, § 5932 (a juror is not to "act on private knowledge," "unless sworn and examined as a witness in the case"); *Idaho:* Comp. St. 1919, § 8965 (like Cal. P. C. § 1120); *Indiana:* Burns' Ann. St. 1914, § 2138 (criminal cases; like Cal. P. C. § 1120; "if the Court deem any such evidence material to the cause," a new jury may be summoned); *Iowa:* Code 1897, § 5381, Rev. Code, § 9439 ("If a juror have personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and if, during the retirement of the jury, a juror declares any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court, and the juror must be sworn as a witness and examined in the presence of the parties, if his evidence be admissible"); 1904, Douglass *v.* Agne, 125 Ia. 67, 99 N. W. 550; *Kansas:* Gen. St. 1915, § 8118 (in criminal cases, "if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court"); § 8155 ("if a juror has personal knowledge of any fact material to the cause, he must declare it to the court, and not to his fellow-jurors out of court"); *Kentucky:* Stats. 1915, § 2255 ("Jurors knowing any fact material to the issue shall disclose the same in open court, upon oath, as evidence"); *Massachusetts:* 1834, Parks *v.* Boston, 15 Pick. 198, 209; 1839, Murdock *v.* Sumner, 22 Mass. 156 (quoted *supra*); 1854, Schmidt *v.* Ins. Co., 1 Gray Mass. 529, 535; *Minnesota:* Gen. St. 1913, § 9204 (like Cal. P. C. § 1120); *Missouri:* Rev. St. 1919, § 4013 (in criminal cases, "if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court"); *Montana:* Rev. C. 1921, § 11997 (like Cal. P. C. § 1120); *Nebraska:* 1903, Falls City *v.* Sperry, 68 Nebr. 420, 94 N. W. 529; *Nevada:* Rev. L. 1912, § 7190 (like Cal. P. C. § 1120); *New Hampshire:* 1916, Curtis *v.* Boston & M. R. Co., 78 N. H. 116, 97 Atl. 743 (fire set by locomotive; whether the jury could use their knowledge that a barn could be seen from the postoffice, not decided); *New Jersey:* Comp. St. 1910, Practice § 158 (jurors who "know anything" relevant must be called as witnesses and disclose in open court); 1920, State *v.* Langhans, 95 N. J. L. 213, 110 Atl. 566 (juror's name challenged in the drawing, on the ground that he was under subpoena by the State in the case; objection held invalid, under St. 1797, § 19, now Practice Act, § 183, as to jurors' testifying in open court); *New York:* C. Cr. P. 1881, § 413 (substantially like Cal. P. C. § 1120); *North Dakota:* Comp. L. 1913, § 10856 (like Cal. P. C. § 1120); *Oklahoma:* Comp. St. 1921, § 2715, (criminal cases; like Cal. P. C. § 1120); *Oregon:* Comp. L. 1913, § 10856, Laws 1920, § 140 (a juror, if not examined, "shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow-jurors, nor be governed by the same in giving his verdict"); *Pennsylvania:* St. 1834, Apr. 14, § 160, Dig. 1920, § 12950, § 160 (a juror "who shall know anything relative to the matter in controversy" shall disclose the same in open court before retiring); *Porto Rico:* Rev. St. & C. 1911, § 6291 (like Cal. P. C. § 1120) *South Dakota:* Rev. C. 1919, § 4896 (like Cal. P. C. § 1120); *Tennessee:* 1833, Booby *v.* State, 4 Yerg. 111, 114 (receiving stolen goods; one of the jurors stated to the others, "which they regarded as evidence, that the defendant had stolen a hog in the county"); 1845, Douston *v.* State, 6 Humph. 275 (statements as to a witness); 1851, Sam *v.* State, 1 Swan 61, 62 (statement as to a county line); 1872, Wade *v.* Ordway, 1 Baxt. 229, 238; 1878, Morton *v.* State, 1 Lea 498; 1882, Whitmore *v.* Ball, 9 Lea 35; 1883, Nile *v.* State, 11 Lea 694; 1896, Ryan *v.* State, 97 Tenn. 206, 36 S. W. 930; 1897, Citizens' R. Co. *v.* Burke, 98 Tenn. 650, 40 S. W. 1085; *Utah:* Comp. L. 1917, § 8999 (like Cal. P. C. § 1120); *Virginia:* Code 1919, § 6014 (a juror "knowing anything relative to a fact in issue" must disclose it in open court); *Washington:* R. & B. Code 1909, § 348 (a juror, unless examined as a witness, "shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow-jurors, nor be governed by the same in giving his verdict"); *West Virginia:* Code 1914, c. 116, § 31 (a juror "knowing anything relative to a fact in issue shall disclose the same in open court, but not to the jury out of court").

Though historically the motives leading to this result in the 1600s rested on the necessity of controlling the jury in some further way under the changed conditions, yet, in theory and as a part of our system of evidential principles, the rule is sufficiently accounted for to-day as a necessary deduction from the Hearsay rule. To allow the juror to contribute his private knowledge to the other jurymen would be to allow testimony to go to them unsubjected to the searching analysis of cross-examination. This reason was early perceived, and has been repeatedly laid down:

1824, TILGHMAN, C. J., in *Allen* v. *Rostain*, 11 S. & R. 362, 374: "Although it was once held that a juror might determine upon facts within his own knowledge, not proved by his oath, yet that opinion has been long reprobated, in consequence of the confusion and injustice that would result from it. The parties have a right to hear the evidence, that they may have an opportunity of cross-examining the witness, and contradicting him, if necessary, by other evidence."

1839, SHAW, C. J., in *Murdock* v. *Sumner*, 22 Pick. 156: "If any juror knew any fact bearing upon the subject, such as the state and condition of the particular parcel of goods [here alleged to have been converted], especially if it differed from the facts testified, he should have stated it and testified to it in open court, that the Court may judge of the competency of the evidence, that the parties might fully examine the witness, and that the counsel and Court might have under their consideration the whole of the evidence upon which the verdict is formed."

1884, LYON, J., in *Washburn* v. *R. Co.*, 59 Wis. 364, 370, 18 N. W. 328: "To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefit of all the tests of credibility which the law affords."

The rule is now universally accepted, in statute and precedent; though its phrasings differ in minor details.

§ 1801. **Same: Other Principles Discriminated; (1) Judicial Notice; (2) Juror's Incompetency.** (1) Where a matter is too notorious to need evidence of it, the judge may "notice" it; and, upon this principle, certain things are assumed, for jurors also, to be so well known and undoubted that the jurors may take them into consideration without evidence of them. Thus a line has to be drawn between these matters of *judicial notice* as applied to jurors and the matters of mere private interest; for the latter there must be evidence, and if a juror can give evidence, he must (under the present principle) present it as a witness in court. This distinction between matters of private knowledge and public knowledge is dealt with under the head of *judicial notice* (*post*, § 2570). The relative bearing of the two principles is this: (a) By the doctrine of Judicial Notice, the jurors cannot assume to be true any matters of mere private interest, not publicly notorious and unquestioned; they must require evidence; (b) By the Hearsay rule, they cannot take that evidence from the lips of a fellow-juror informing them privately after retirement; they must listen to him only as a witness upon the stand.

(2) Is there a rule of *policy forbidding a juror publicly to testify* before

his own fellow-jurors, by reason of the danger of prejudicing him as a juror in his criticism of testimony? This involves a different principle, and is elsewhere considered (*post*, § 1910).

(3) Whether a juror may be an *interpreter* has already been considered (*ante*, § 811).

§ 1802. **Jurors not to receive Evidence out of Court; Witnesses at a View.** (1) If a juror listen to the statements of a person made to him *not in the open court-room* and not on the witness-stand, the Hearsay rule is clearly violated:

1680, HALE, L. C. J., Pleas of the Crown, II, 307: "If after the jury sworn and gone from the bar, they send for a witness to repeat his evidence that he gave openly in court, who doth it accordingly, this, appearing by examination in court and indorsed upon the record or 'postea,' will avoid the verdict; because not done openly in court nor in the presence of the parties concerned."

1845, TURLEY, J., in *Douston* v. *State*, 6 Humph. 275, 276: "It has always been held that testimony given to a jury after it had left the presence of the court vitiates a verdict, because it is not given on oath, and is given without the knowledge of those to be affected by it and who have therefore no opportunity of meeting and repelling it."

This application of the rule has never been doubted.[1] The only matter of controversy is whether a violation of the rule in this manner is sufficient ground for setting aside the verdict and granting a new trial — a subject not within the present purview.[2]

(2) Upon the same principle, the making of statements by a *witness at a view*, or even the pointing out of the places by a witness or other unauthorized person at a view (which amounts to giving testimony), is a violation of the rule. Here, also, the only question can be whether the impropriety is upon the circumstances sufficient ground for setting aside the verdict.[3]

§ 1802. [1] At least, since the Hearsay rule existed: *ante*, § 1364.

[2] The following cases may serve as a few illustrations: 1860, State *v.* Andrews, 29 Conn. 100, 104 (one juror listening to private statements, held improper); 1896, Conrad *v.* State, 144 Ind. 290, 43 N. E. 221 (the jurors went to a jail-chamber, where the defendant was said to have attempted suicide, examined it, tested the wire said to have been used, and talked with the witnesses; judgment reversed since "it was the privilege of the accused to meet the witnesses face to face"; cases cited); 1867, Heffron *v.* Gallupe, 55 Me. 563 (a juryman obtained from defendant a pamphlet containing the evidence at the former trial; held improper); 1873, Bowler *v.* Washington, 62 Me. 302 (one juror receiving private testimony, held improper).

But the testimony may be read over to the jurors in open court, on their request: 1900, State *v.* Hunt, 112 Ia. 509, 84 N. W. 525.

[3] The following cases may serve as illustrations: *Eng.* 1872, R. *v.* Martin, 12 Cox Cr. 204, L. R. 1 C. C. R. 378 (pointing out by a witness; undecided); *U. S.: Ind.* 1867, Erwin *v.* Bulla, 29 Ind. 95 (statute enforced forbidding testimony at a view); *Ia.* 1876, Stockwell *v.* R. Co., 43 Ia. 470, 473 (fire attributed to a locomotive; by consent a view of the place was taken; the plaintiff's counsel was absent, and a witness present spoke to a juror as to a fact undisputed in the testimony; held, no substantial prejudice); *Mich.* 1891, People *v.* Hull, 86 Mich. 449, 465, 49 N. W. 288; 1913, People *v.* Auerbach, 176 Mich. 23, 141 N. W. 869 (following People *v.* Hull; in the defendant's absence, no testimony can be given); *Minn.* 1875, Hayward *v.* Knapp, 22 Minn. 5 (new trial granted, for reception of testimony at the view); *Mont.* 1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (verdict set aside because certain spectators laughed and demonstrated their opinion of the success of an experiment; this is absurd); *Nev.* 1880, State *v.* Lopez, 15 Nev. 407, 411 (pointing out places by a person neither officer nor witness, held improper); *N. H.* 1863, Sanderson *v.* Nashua, 44 N. H. 492, 494; *N. Y.* 1888, People *v.* Johnson, 110 N. Y. 134, 143, 17 N. E.

(3) But the pointing out by *judicially appointed showers* is no violation of the rule. The theory of showers is that they are agents of each party, familiar with the issues of the case, and appointed by the Court (or by consent of parties) to identify provisionally beforehand the places to which the testimony will relate. They are sworn to do this properly, and to say nothing more.[4] Thus their position is analogous to that of a witness; their oath is the oath of a witness so far as their functions make them such; and by examination it can be ascertained in court whether they have truly fulfilled it. There is therefore that opportunity of testing by cross-examination which is required by the Hearsay rule. The presence at the view of a shower representing each side affords a further opportunity of ascertaining the propriety of each other's doings. The employment of duly appointed showers, therefore, is in no sense an exception to the ordinary rule of Evidence; and this has long been recognized:

1747, *Goodtille* v. *Clark*, Barnes 457; motion to set aside a verdict because "the plaintiff's shower at a view . . . had misbehaved himself by telling the viewers, 'This place is called Abraham's Yat, and this Conygree Hill,' which were not the places in question, and saying, 'These cottages pay Mr. Symons 5d. or 6d. a year rent;' defendant insisting that nothing more than the place in question, which was one single cottage, should have been shown to the viewers." "The Court discharged the rule, being of opinion, that on a view the showers may show marks, boundaries, etc., to enlighten the viewers, and may say to them, 'These are the places which on the trial we shall adapt our evidence to.' The

684 (trial Court's ruling refusing a new trial for alleged reception of testimony, sustained); 1896, People *v.* Gallo, 149 N. Y. 106, 115, 43 N. E. 529 (the jury visited the premises with two sworn officers and one person unsworn but appointed by the Court and a witness explained the premises; neither defendant nor his attorney was present; held improper); *N. Car.* 1897, State *v.* Perry, 121 N. C. 533, 27 S. E. 997 (a passer-by was interrogated by the jury as to the identity of a house, materially in question, held improper); *Okl.* 1898, Hays *v.* Terr., 7 Okl. 15, 54 Pac. 300 (no testimony to be taken at a view; under C. Cr. P. §§ 5222, 5269); *Wis.* 1887, Sasse *v.* State, 68 Wis. 530, 536, 32 N. W. 849 (that accompanying counsel should call attention to various spots by identifying them, held improper).

For the *statutes*, which sometimes expressly declare this rule, see the citations already given *ante*, § 1162.

But distinguish an *adjournment of trial* to an exterior place: 1902, Board *v.* Moore, — Ky. —, 66 S. W. 417 (jury allowed to see a horse and phaeton in the court-house yard, and to listen to testimony, not as if taking a view, but as if adjourning the place of trial); 1905, Underwood *v.* Com., 119 Ky. 384, 84 S. W. 310.

Of course the present principle does not apply where it is the *defendant* himself who voluntarily testifies and afterwards objects: Underwood *v.* Com., *supra*.

[4] The customary order for a view ran (1 Burr. 252, 258): "And that *R. R. on the part of the plaintiff and T. W. on the part of the defendant shall attend on the same day and show* the matters in question to the said, etc., . . . and no evidence shall be given on either side at the time of taking thereof." A modern case shows the traditional form of oath: 1847, R. *v.* Whalley, 2 Cox Cr. 231 (the sheriff, "having a knowledge of the locality," was appointed to show the places referred to by the witnesses, and took the plans produced for the prosecution and the defence, to assist in the view; the oath administered to the shower was: "You swear you will attend this jury and well and truly point out to them the place in which the offence for which the prisoner T. W. stands charged is alleged to have been committed; you shall not speak to them touching the supposed offence whereof the said T. W. is so charged, only so far as relates to describing the place aforesaid"; and to the bailiffs: "You shall [etc., as above . . .] committed; you shall not allow any one to speak to them touching the offence whereof the said T. W. is so charged, except the person sworn and appointed to show the said jury the place aforesaid; neither shall you speak to them yourselves [unless it be to request them to return with you into court], without leave of the Court").

For the *statutes* governing views, which usually mention expressly the appointment of showers, see *ante*, § 1162.

jury could have no light from looking at the cottage only; the question to be tried was, whether it stood within Mr. Symons's manor or not. Had an ancient man been produced to the viewers, and he had acquainted them that he had known the place many years, and had given an account of the boundary, etc., this would have been improper, because it is giving evidence before the trial."

It follows that the same practice is proper in criminal cases,[5] because the constitutional provision requiring confrontation of witnesses is nothing more than the common-law rule requiring an opportunity of cross-examination (*ante*, § 1398). It is, moreover, immaterial that the shower is a party or one who will be an ordinary witness; indeed his familiarity with the place is assumed to be a special qualification;[6] it is only the pointing out by an unauthorized witness that is improper (*supra*, par. 2).

(4) The obtaining by the jury of evidence of any other sort, out of court and without authority — either of the evidence furnished by an *unauthorized view* of premises[7] or of other objects in issue,[8] or of circumstantial evidence[9] — is also improper. The reason is partly that the procedure of jury trial is violated, partly that the juror thus becomes a witness having personal knowledge and should therefore (*ante*, § 1800) take the stand as a witness.

(5) Distinguish (a) the rules relating to the taking of *documents into the jury-room;* here it is assumed that the documents are relevant and have been admitted in evidence, and the question is whether their further perusal is to be allowed, — a question of the procedure of jury trial;[10] (b) the question whether it is a jury's duty *not to repudiate the testimony* given in court by allowing their knowledge obtained from a view to override it; this also is a question of the sworn duty of the jury, not of the law of Evidence;[11]

[5] 1887, People *v.* Bush, 71 Cal. 602, 606, 12 Pac. 781 (pointing out by the official shower, held proper); 1898, People *v.* Milner, 122 Cal. 171, 54 Pac. 833 (same); 1894, Garcia *v.* State, 34 Fla. 311, 332, 16 So. 223 (testimony is not to be taken, even by order of Court, at a view; but some person, agreed upon or appointed, may be sent to point out the premises); 1903, State *v.* Mortensen, 26 Utah 310, 73 Pac. 562, 633 (shower pointing out the places mentioned in the evidence; the dissenting opinion exhibits a morbid regard for petty technicalities irrespective of justice).

[6] 1614, Gage *v.* Smith, Godb. 209 ("Although the place wasted be showed to the jury by the plaintiff's servants, yet if it be by the commandment of the sheriffe, it is as sufficient as if the same had been showed unto them by the sheriffe himself"); *Accord:* 1904, Wilson *v.* Harnette, 32 Colo. 172, 175 Pac. 395 (good opinion by Steele, J.).

Contra, semble: 1878, People *v.* Green, 53 Cal. 60 (the sending of witness to a view, to point out places, held improper); 1904, O'Berry *v.* State, 47 Fla. 75, 36 So. 440 (larceny of cattle; a view of the cattle was ordered and witnesses allowed to identify them on the view as the cattle referred to in their testimony; the Court on appeal doubted the propriety of this; but the doubt is ill-founded, for the witnesses acted virtually as showers, and their pointing out was indispensable to the efficiency of the view).

The following rulings belong here; 1847, Doe *v.* Murray, 3 Kerr N. Br. 335, 339 (the shower should not read writings to the jury); 1901, Colorado F. & I. Co. *v.* R. Co., 29 Colo. 90, 66 Pac. 902 (eminent domain; statute enforced as to placing a sworn bailiff in charge).

[7] *Ante*, § 1160.

[8] *Ante*, § 1163.

[9] 1896, People *v.* Conkling, 111 Cal. 616, 44 Pac. 314 (two jurors had experimented with rifles, out of court and by themselves, to see how near powder-stains were produced; held improper); for analogous instances see *ante*, § 1160. But it was certainly a culpable scrupulosity which led the Court, in State *v.* Sanders, 68 Mo. 202, 206 (1878), to set aside a verdict for such experimentation by the jury (with shoe-tracks) where the defendant's counsel had himself in his address invited and urged the jury to do this and see for themselves, informing them that they had a right to do so.

[10] *Post*, § 1913.

[11] This is dealt with in some of the cases cited *ante*, § 1168.

(c) the question whether the jury may take into consideration the *knowledge derived from a view;* this involves the theory of Real Evidence; [12] (d) the reception of testimony by a *jury of inquest* for damages caused by taking under *eminent domain;* this involves the procedure of a special tribunal not within the present purview.

§ 1803. **Defendant's Presence at a View in a Criminal Case.** A view is allowable in criminal as well as in civil cases (*ante*, § 1163). But is it necessary, under the Hearsay rule and the constitutional provision sanctioning it for criminal cases (*ante*, § 1397), that the *accused be present at the view?*

This question has been answered by some Courts in the affirmative, chiefly on the theory that otherwise the accused is deprived of the right to be confronted by the witnesses against him:

1875, ENGLISH, C. J., in *Benton* v. *State*, 30 Ark. 329, 346: "[1] By the bill of rights the accused must be confronted with the witnesses against him; but the statute authorizing a view does not contemplate or permit the examination of witnesses at the view. . . . But, though no witnesses are examined at the view, yet the jurors, from their observation of the place and its surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused and are in their nature incapable of cross-examination. [2] But [furthermore] in prosecutions for felony the defendant must be present during the trial. . . . The view of the place where the crime is alleged to have been committed, by the jury, is part of the trial, and may be an important step in the trial; and the presence of the prisoner at the view, in a case involving life or liberty, that he may have an opportunity to observe the conduct of the jury and whatever occurs there, might be of the utmost consequence to him."

1893, WOODS, J., in *Foster* v. *State*, 70 Miss. 755, 765, 12 So. 822: "[1] Was it the right of the accused to be present when the jury visited and inspected the car? The answer to this inquiry will be found in ascertaining and determining what the purpose and object of this view was. . . . [The jury's visit] becomes proper in one of two views: the jury may be better able to understand and apply the evidence by examining the ground or scene of the offence, or the jury may receive from inanimate witnesses which otherwise it would not have. . . . The reported cases in which some Courts of last resort have held that the prisoner was not entitled to be present at a view of the premises on which the offence was alleged to have been committed, for the reason that in such inspection the jury is not taking or receiving evidence in the absence of the accused, but is during a suspension of the trial and while absent and separated from the court merely receiving impressions from silent inanimate objects that will enable it better to comprehend and apply the testimony in the case, are inconsistent and beg the question. They assume that the Court is composed of the judge, the clerk, the sheriff, and overlook the fact that the jury is the right arm of the law in the administration of law. They assert that the jury is not receiving evidence, because it is absent from the Court and cannot take testimony in the absence of the accused; overlooking the painful fact that illegal evidence may be taken and unlawful methods may be employed for its introduction. They declare that only impressions are received by jurors on such inspections which will enable them to understand and apply the testimony offered. But this concedes the proposition in dispute. Impressions are made on the mind of jurors by dumb witnesses. They do have evidence of inanimate things. They are receiving impressions, evidence, enlightenment, from voiceless things, call it by whatever name you will; and they are themselves being thus made silent witnesses for or against the accused. They return to the court-room with

[12] Treated *ante*, § 1168.

impressions formed by an examination of dumb inanimate witnesses; and if erroneous impressions and opinions have been made and formed, their hurt is beyond all cure; for the jurors may not speak out what may weigh on their minds, but are become themselves dumb passive witnesses. To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight. The juror on the view sees, and thinks he knows what he thus sees, with all the conclusions flowing therefrom. He sees, or may see, more than a mere railway car or a naked room or a piece of senseless earth; and no matter what he sees, or falsely sees, he cannot speak and have his mistaken conclusions corrected or removed. . . . The constitutional right guaranteed to every person charged with crime to be confronted by the witnesses against him will require the production of all evidence from all witnesses, animate and inanimate, in his presence. [2] But not alone must all evidence be had in the presence of the accused, but it must likewise be had and taken in the presence of the Court trying the case. . . . A trial conducted in part away from the place appointed for the holding of the Court, in the absence of the judge and of the accused, is not that trial to which every man accused is constitutionally entitled."

These arguments are specious, but unsound: (1) As to the argument that the jury are receiving evidence, it is in substance sound; to view the thing itself in issue — *i. e.* the premises — is undoubtedly to consult a source of proof (*ante*, § 1168). But it by no means follows that the right of cross-examination is infringed. That rule applies solely to testimonial evidence only (*ante*, §§ 1362, 1395), and no testimony is taken at a view. The premises themselves are not witnesses; to term them "dumb witnesses" (as in the passage above quoted) is merely to misuse words. The function of Cross-Examination, as a requirement for testimonial evidence, is to ascertain in detail the elements of weakness that detract from the trustworthiness of a person's statement. Where human credit is not involved, cross-examination has no place. The constitutional sanction of that principle applies solely to testimonial evidence, to "witnesses"; no one supposes that it applies to circumstantial evidence; and no one should suppose that it applies to that third source of proof, namely, autoptic proference, real evidence, or the tribunal's observation of the thing itself (*ante*, § 1150). How could the place viewed be cross-examined? What human credit does it have, that makes cross-examination necessary? The Hearsay rule simply has no application to that source of proof. (2) As to the argument that the jury's view is a part of the trial and that the accused is entitled to be present at every part of the trial, the answer is that the accused might equally well claim to be present at the jury's deliberations over their verdict, for that is equally a part of the trial; if there is no inherent and invariable necessity for that part, neither is there for this. As for the related suggestion that the holding of a view in the absence of the defendant is the holding of a part of the trial "away from the place appointed for the holding of the court," it would follow from this that the judge and other court officers should be present also; but no one has ever supposed this necessary. It would be, on the contrary, much easier to question the propriety of the Court's adjourning and travelling in a body to the place of a view, for such a proceeding would

be more open to the criticism that it took the trial "away from the place appointed for the holding of the Court." It is impossible to argue in the same moment both that the Court must be held at the place appointed and that it must be held in part somewhere else. (3) As to the suggestion, based on mere general considerations of fairness and policy, that the defendant's presence is necessary because "the jurors may receive erroneous impressions" which "cannot be corrected or removed" and therefore the defendant should have "an opportunity to observe the conduct of the jury and whatever occurs there," there are two answers. First, the defendant, though present, could not lawfully ask questions or make statements;[1] so that the sole value of his presence would lie in the opportunity to see that nothing irregular was done and to obtain such a knowledge of what was done as would assist him in the subsequent conduct of the trial. Secondly, this very opportunity he already fully possesses; for he is represented at the view by a shower, selected by himself and formally approved by the Court; this shower points out such parts as the accused has directed, and does so with reference to the forthcoming testimony for that party; and this shower is in a position not only to observe all that is done but to make all of his observations useful later to his party as may be needed. Every practical advantage to be gained from the accused's presence is already his, by virtue of the ordinary proceedings at a view; and if, in any Court's practice to-day, the defendant is not allowed to have one shower appointed as his representative, then the unfairness and disadvantage in such a Court arises from the improper procedure observed in the view, and not from inherent defects in the orthodox method of view. There is therefore no ground, either upon legal principle or upon practical fairness, for holding the presence of the accused himself to be essential. (4) There remains only, as a reason for allowing it, the natural desire which any accused person might have to attend the proceeding. Ordinarily, no judge (it must be supposed) could wish to disappoint such a desire, if duly expressed to him; but conceivably he might refuse to satisfy it for prudence' sake; perhaps because of the danger of escape or of mob violence. Certainly no legal rule granting the right of attendance can be founded on such a consideration.

In some jurisdictions, it is properly maintained that the defendant is not entitled to be present at the view; but the opposite rule has been accepted in other jurisdictions.[2]

§ 1803. [1] As pointed out by Baldwin, J., in People *v.* Bonney, cited *infra*.

[2] The cases on both sides are as follows:

CANADA: 1890, R. *v.* Petrie, 20 Ont. 317, 323 (view by the magistrate, sitting without a jury, in the absence of the accused or his representative, held improper).

UNITED STATES: *Federal:* 1900, Chicago *v.* Baker, 39 C. C. A. 318, 98 Fed. 830 (refusal to permit party's presence, proper in trial Court's discretion); 1917, Valdez *v.* U. S., 244 U. S. 432, 37 Sup. 725 (murder; not clear whether the opinion holds that the defendant is entitled to attend the view; here, his counsel attending but the defendant refraining, held that the right at any rate was waivable; Clarke, J., diss. in an opinion which he protests is "not idiosyncratic," though the protestation availeth nought); *Arkansas:* 1875, Benton *v.* State, 30 Ark. 328, 345 (defendant must be present; quoted *supra*); 1921, Shinn *v.* State, — Ark. — 234 S. W.

636 (murder; the jury were allowed at defendant's request to go to the spot and fire the gun at a target, as testified to, the Court order directing that the defendant be present; held now to be no error, the defendant having requested the experiment and having voluntarily absented himself; Hart, J., diss.; it is incredible that such a point could be even seriously considered); *Arizona:* 1904, Elias *v.* Terr., 9 Ariz. 1, 76 Pac. 605 (view had on motion of defendant, without a claim of his desire to be present, held proper); *California:* 1861, People *v.* Bonney, 19 Cal. 426, 445 ("We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations, or conclusions of the jury"; defendant's presence not necessary); 1886, People *v.* Bush, 68 Cal. 623, 630, 10 Pac. 169 (view without defendant's presence and against his consent, held improper; "it is often most important for the defendant and his counsel to be able to perceive exactly what impression is being made upon the jury by any portion of the evidence given in on his trial"; Myrick and McKee, JJ., diss.); 1903, People *v.* Mathews (Edwards), 139 Cal. 527, 73 Pac. 416 (defendant's voluntary absence is a waiver); *Columbia (Dist.):* 1899, Price *v.* U. S., 14 D. C. App. 391, 405 (not decided; but doubting); *Florida:* 1916, Haynes *v.* State, 71 Fla. 585, 72 So. 180 (defendant asked for the view and then stayed away, held not error); 1917, Kersey *v.* State, 73 Fla. 832, 74 So. 983 (defendant's absence for part of the time, not error); *Idaho:* 1894, State *v.* Reed, 3 Ida. 754, 35 Pac. 706 ("No such right as is contended for by defendant is guarantied by the constitution of Idaho"; though it is "advisable" to permit his presence on request; here it did not appear that he had made a request); 1885, Shular *v.* State, 105 Ind. 289, 293, 4 N. E. 870 (defendant need not be present at a view, because it is not the "taking of evidence"; a statute allowing views by consent of parties is constitutional); *Kansas:* 1878, State *v.* Adams, 29 Kan. 311, 323 (view without defendant's presence, defendant making no request to attend; not improper under either statute or constitution); 1880, Rutherford *v.* Com., 78 Ky. 639, 640 (defendant must be present; "the simple act of pointing out to the jury the place . . . is the giving of evidence in the absence of the accused"); *Kentucky:* C. Cr. P. 1900, § 236 (prisoner and both counsel are to accompany jury to view); *Louisiana:* 1872, State *v.* Bertin, 24 La. An. 46 (view at which a State witness was allowed to explain a diagram and the defendant not allowed to be present; held improper, since the defendant did not enjoy the right of confronting his witnesses); *Maine:* 1919, State *v.* Slorah, 118 Me. 203, 106 Atl. 768 (murder; ambiguous opinion; "we further hold that at a view there is no such confrontation of witnesses as requires the presence of the accused," "whatever his rights are, to attend if he demands it, and we think it should not be denied him in capital cases, he may in all cases waive them"; what authority has this opinion for confining the constitutional clause to "capital cases"; the opinion also takes the erroneous view of the principle of § 1168, *ante*); *Michigan:* 1891, People *v.* Hull, 86 Mich. 449, 465, 48 N. W. 869 (defendant's absence, held not fatal); *Minnesota:* 1920, State *v.* Rogers, 145 Minn. 303, 177 N. W. 358 (keeping a house of ill-fame, attorneys for both sides having been assigned to attend the view, the defendant was held not entitled as of right to attend); *Mississippi:* 1893, Foster *v.* State, 70 Miss. 755, 765, 12 So. 822 (defendant is entitled in a criminal case to be present at a view; see quotation *supra*); *Montana:* Rev. C. 1921, § 11996 (defendant is to be present); 1903, State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (view at defendant's request; "the defendant must be present"); *Nebraska:* 1876, Carroll *v.* State, 5 Nebr. 31, 35 (defendant should be present, "unless he decline the privilege"); *Nevada:* 1895, State *v.* Hartley, 22 Nev. 358, 40 Pac. 375 (the right if any, "is statutory, and not constitutional, and may be waived"); *New York:* 1898, People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947 (view is not the taking of evidence in the sense that the accused must be present or cannot waive attendance; compare People *v.* Gallo, cited *supra*, § 1802, which rests on another principle); *Ohio:* 1890, Blythe *v.* State, 47 Oh. St. 234, 24 N. E. 268 (defendant's voluntary refusal to attend, held a waiver); *Oklahoma:* 1898, Hays *v.* Terr., 7 Okl. 15, 54 Pac. 300 (defendant should accompany, on general principles, but by C. Cr. P. § 5222, Comp. St. 1921, § 2714, he is forbidden); 1911, Starr *v.* State, 5 Okl. Cr. 440, 115 Pac. 356 (defendant's request for a view is a waiver of the right to be present; whether he has such a right in other cases, not decided, but "the safe practice is to permit it"; the right may be waived); *Oregon:* 1880, State *v.* Ah Lee, 8 Or. 214, 217 ("The failure of the accused to be present" is no ground of error; here he failed to ask it); 1887, State *v.* Moran, 15 Or. 262, 276, 14 Pac. 419 (same; here the defendant consented to the view); 1889, State *v.* Chee Gong, 17 Or. 635, 636, 21 Pac. 882 (defendant has no right to be present); *Pennsylvania:* 1893, Com. *v.* Salyards, 158 Pa. 501, 507, 27 Atl. 993 (defendant's presence not necessary); 1898, Com. *v.* Van Horn, 188 Pa. 143, 41 Atl. 469 (same); *Utah:* 1903, State *v.* Mortensen, 26 Utah 312, 73 Pac. 562 (defendant need not be present; on the theory that a view does not involve the taking of testimony; careful opinion by Bartch, J.); 1903, State *v.* Mortensen, 27 Utah 16, 74 Pac. 120, 350 (supplementary opinions on motion for new trial); *Washington:* 1893, State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103, *semble* (it is not a "constitutional right" to be present; here there was no request); *West*

2. Judge

§ 1805. **Judge having Personal Knowledge must take the Stand.** It is equally clear for the case of the judge, as for that of the juryman (*ante*, § 1800), and upon the same principle, that the judge may not lawfully contribute any information for the jury's consideration unless he take the stand as a witness;[1] otherwise the opportunity of cross-examination is lost and the Hearsay rule is violated. This seems not to be questioned.

The chief doubt that arises for this case of personal knowledge by the judge involves usually other principles. On distinct grounds of policy noticed under another head (*post*, § 1909), it is generally held in modern times that a trial judge cannot properly become a witness without abandoning the bench for the remainder of the trial. Consequently, his testimony would ordinarily not be available for the jury, — not from his lips on the bench, because of the present rule, and not from the witness-stand, because of the other rule just mentioned.

It would remain, then, to ask whether he can *as judge* make use of it to direct an acquittal or in any other way. This involves the doctrine of judicial notice (*post*, § 2565).

3. Counsel

§ 1806. **Improper Statements of Fact in Argument to the Jury; in General.** A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. He re-states the evidence, and he reasons from the evidence. He is not a witness. He may have testified as a witness; but in his argument he has solely the functions and rights of counsel. Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit; it must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and to be a witness without being subjected to cross-examination is to violate the fundamental principle of the Hearsay rule.

This much is, then, never doubted. The difficulty arises in applying the

Virginia: Code 1914, c. 116, § 30 (in a "felony case," accused "shall be taken with the jury"); 1918, State *v.* McCausland, 82 W. Va. 525, 96 S. E. 938 (murder; the accused's premature departure from the view, held not a waiver; unsound; this is the kind of decision that coddles crime);[3] *Wisconsin:* 1887, Sasse *v.* State, 68 Wis. 530, 536, 538, 32 N. W. 849 (defendant absent, but his counsel present; held "questionable," unless he expressly waived).

§ 1805. [1] 1680, Anderson's Trial, 7 How. St. Tr. 811, 874 (Recorder: "It is not the business nor the duty of the Court to give any evidence of any fact that they know of their own knowledge, unless they will be sworn for the purpose; for, though they do know it in their own private consciences to be true, yet they are obliged to conceal their own knowledge, unless they will be sworn as witnesses"); 1876, Hurpurshad *v.* Sheo Dyal, L. R. 3 Ind. App. 259, 286 ("It ought to be known . . . that a judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts").

principle to various kinds of assertions. Before attempting to distinguish these, it is desirable to notice, in some of the most approved passages, the reason for the rule as enunciated by various judges and their different phrasings of the general principle, so difficult and elusive in its concrete application:

1851, LUMPKIN, J., in *Berry* v. *State*, 10 Ga. 511 (commenting on an assertion that the defendant's negro slave had confessed to his master's guilt): "That the practice complained of is highly reprehensible, no one can doubt. It ought in every instance to be promptly repressed. For counsel to undertake by a side wind to get that in as proof which is merely conjecture, and thus to work a prejudice in the mind of the jury cannot be tolerated.[1] . . . I would be the last man living to seek to abridge freedom of speech; and no one witnesses with more unfeigned pride and pleasure than myself the effusions of forensic eloquence daily exhibited in our courts of justice. For the display of intellectual power our bar's speeches are equalled by few, surpassed by none. Why, then, resort to such a subterfuge? Does not history, ancient and modern, nature, art, science, and philosophy, the moral, political, financial, commercial, and legal, — all open to counsel their rich and inexhaustible themes for illustration? Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions, in thoughts that breathe and words that burn. Nay more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time — 'extra flammantia mœnia mundi.' But let nothing tempt them to pervert the testimony, or surreptitiously array before the jury facts which, whether true or not, have not been proven."

1852, NISBET, J., in *Mitchum* v. *State*, 11 Ga. 615, 630: "It is contrary to law for counsel to comment upon facts not proven. He represents his client; he is the substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel may do. In relation to the liberty of speech, the largest and most liberal freedom is allowed, and the law protects him in it. The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is wide, very wide. . . . His illustrations may be as various as are the resources of his genius, his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wing to his imagination. To his freedom of speech, however, there are some limitations. . . . When counsel are permitted to state [unevidenced] facts in argument and to comment upon them, the usage of courts in regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the Court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force according to circumstances. . . . It is not reasonable to believe that the jury will disregard them. They may struggle to disregard them, they may think that they do disregard them, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less according to the character of counsel, his skill and adroitness in argument, and the naturalness with which the state-

§ 1806. [1] In the passage omitted here, the opinion points out that the judge must interfere, and cannot expect the opposing counsel to do so; because the latter's objection is likely enough to be met by the offending counsel with the sarcastic turn, "Yes, gentlemen, I have touched a tender spot, the galled jade will wince." It is a little odd that just forty years later, in California, in People *v.* Ah Len, cited *infra*, the interrupted counsel did use precisely this proverb in retort. That it was a mere coincidence is an explanation not more interesting than the only other possible explanation, namely, that the counsel, in planning his trick, had read Judge Lumpkin's opinion beforehand and had there received the hint.

ments stand connected with other facts and circumstances in the case. To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency is tested."

1877, VIRGIN, J., in *Rolfe* v. *Rumford*, 66 Me. 564, 566: "[The rules of evidence require,] among other things, that the facts shall be material and pertinent to the issue, and that, when not contained in documents, they shall be delivered under the sanctions of an oath and their truthfulness tested by cross-examination. Even a juror's own personal knowledge of pertinent facts cannot be considered by himself and his fellows in making up their verdict, unless it take on the form of testimony by being delivered from the stand by the juror under oath as a witness; otherwise testimony which might influence a verdict would escape the ordeal of cross-examination and discussion. . . . Statements [by counsel] of alleged facts not adduced in evidence, and comments thereon, are irrelevant, not pertinent, and are therefore clearly not within the privilege of counsel."

1878, RYAN, C. J., in *Brown* v. *Swineford*, 44 Wis. 283, 291 (commenting on counsel's allusion to the defendant's ability as an officer of a railroad company to pay liberally for the assault in issue): "Enough appears to show not only that the learned counsel commented on facts not in evidence, but in effect testified to the facts himself. It was in effect telling the jury that the appellant's position with the corporation gave him the ability to pay large damages. . . . Amongst other evidence of the appellant's ability to pay, it might undoubtedly have been shown that he received large emoluments from his position in the railroad company, and possibly that the railroad company had assumed the appellant's tort and the payment of the judgment. And it was not the duty or the right of counsel, was not within the proper scope of professional discussion, to assume the facts as proven or state them to the jury as existing, founding his argument 'pro tanto' upon them. . . . Doubtless the Circuit Court can, as it did in this case, charge the jury to disregard all statements of facts not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries; and, without notes of the evidence, it may often be difficult for juries to discriminate between the statements of fact by counsel following the evidence and outside of it. . . . Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside the principle and object of his profession when he travels out of his client's case and assumes to supply its deficiencies. . . . The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument; but, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. . . . For all that appears in this case, the appellant may be as poor as Job in his downfall. His wealth, if he had it, was legitimate subject of evidence, not legitimate subject of argument without evidence."

1881, STONE, J., in *Cross* v. *State*, 68 Ala. 476, 482: "Every fact the testimony tends to prove, every inference counsel may think arises out of the testimony, the credibility of the witnesses as shown by their manner, the reasonableness of their story, their intelligence, means of knowledge, and many other considerations, are legitimate subjects of criticism and discussion. So the conduct of the accused, his conversation (if in evidence), *demeanor* may be made the predicate of inferences favorable or unfavorable. Analogies and illustrations may also be drawn, based on the testimony, on public history, on science, or anything else, provided it does not invade the prohibited domain hereafter considered. The presiding judge, as a rule, will best determine when discussion is legitimate and when it

degenerates into abuse and undue license. . . . [What is improper is an assertion of facts not already in evidence.] The statement must be made as of fact; the fact stated must be unsupported by any evidence; must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury; or the case is not brought within the influence of this rule. . . . We would not embarrass free discussion, or regard the many hasty or exaggerated statements counsel often make in the heat of debate, which cannot and are not expected to become factors in the formation of the verdict. Such statements are usually valued at their true worth, and have no tendency to mislead. It is only when the statement is of a substantive, outside fact, stated as a fact, and which manifestly bears on a material inquiry before the jury, that the Court can interfere and arrest discussion."

1886, ARNOLD, J., in *Martin* v. *State*, 63 Miss. 505, 508: "Being counsel and witness in the same cause is not prohibited by law, if counsel chooses to testify; but such a union of offices is permissible and tolerable only where counsel is sworn and examined like other witnesses."

1893, MCGRATH, J., in *Rutter* v. *Collins*, 96 Mich. 510, 514, 56 N. W. 93: "The jury must get the evidence from the lips of sworn witnesses, and not from the unsworn statements of lawyers in the argument of the case."

§ 1807. **Same: Application of the Principle to Various Kinds of Assertions.** (1) For one class of matters of assertion, the application of the principle is comparatively simple; namely, counsel must not make assertions as to *facts of which evidence must have been introduced but has not been or will not be introduced.* This class includes the great mass of relevant facts; though its boundaries are best defined in considering the next class. The following celebrated passage-at-arms illustrates the procedure:

1875, *Tilton* v. *Beecher*, N. Y., Abbott's Rep. II, 902; criminal conversation; at an early stage of the controversy, before litigation, Mr. Benjamin F. Tracy had been called into consultation, as a friend, between the parties; in the plaintiff's case on the trial, some testimony had reflected on Mr. Tracy's share in the negotiations; and in his opening address for the defendant, Mr. Tracy at a certain point in his speech said: "My name has been dragged into this trial by the plaintiff and his counsel and his main witness, in a manner that leads me to make you a personal statement of my relations to this scandal;" and was proceeding to do so, when the following colloquy ensued: Mr. *Beach:* "Mr. Tracy, do you propose to be a witness to what you are about to state?" Mr. *Tracy:* "If necessary I do, sir." Mr. *Beach:* "I submit to your Honor, that the gentleman has no right to make a long written personal statement in his opening to the jury, which he does not propose to verify as a witness. It is not the office of an opening." Judge NEILSON: "I presume that the counsel proposes to prove what he states in his opening. . . . At the same time he would be at liberty to prove it otherwise." Mr. *Porter:* "We propose to prove it, sir, as we choose, and by what evidence we will. The counsel cannot call upon us to specify the particular witness by which we propose to prove it; nor can he interrogate the counsel who is engaged in the opening of this case as to whether he is the party by whom the proof is to be made. That will depend upon subsequent developments in the case." Mr. *Beach:* "My point, sir, cannot be evaded or changed. I have made no objection to the counsel stating any fact which they propose to prove in this case, whether that fact, when proved, will go to his exculpation from the grave imputation which has been cast upon him in the course of this trial or not; if it is announced as a fact that he expects to prove upon the trial, I have no more to say. . . . What I do say is, sir, that when this gentleman, thus situated in this case, departs from the ordinary course of an opening and commences a part of his address with the preface that he will now make a personal explanation to this jury, that it is not in sense or in purpose a statement of facts

which he expects to prove; it is the assumption of a right separate from the character of counsel to make a personal explanation and appeal to the jury, which, I submit to your Honor, is improper. That is all I object to, sir; and if this counsel, or any other counsel, will avow that Mr. Tracy or this defence intends to prove the facts or the circumstances which he now proposes to state, of course my voice is silenced, sir." Judge NEILSON: "If it is a personal explanation, not to be followed up by proof — perhaps not in its nature susceptible of proof — then it should be omitted. I think we agree about that; the rule is very clear. . . ." Mr. *Porter:* "I evidently misunderstood my friend, from his last explanation. I unhesitatingly avow that the facts which Gen. Tracy proposes to present are facts which we do propose to prove." Mr. *Tracy:* "I shall endeavor, gentlemen, to state no fact in what I am about to say which will not be made plain to you by evidence which we shall introduce, or which will not be made sufficiently plain to you without further evidence, by the comments I may make upon the facts already in evidence."

Upon any matter, then, which ought to be evidenced in order to be properly considered at all by the jury, no honorable counsel will knowingly make an assertion in his argument, unless evidence about it has already been introduced or is pledged for future introduction.[1]

§ 1807. [1] In the following list will be found instances of the application of the principle. Most of the rulings depend so much upon the issues and the detailed evidence in each case that they are useless as precedents:

ENGLAND: 1683, Mr. Williams' Instructions to his Client, Sidney's Trial, 9 How. St. Tr. 817, 826 ("Watch the king's counsel in summing or argueing the evidence against you, that they do not offer anything that was not proved, and stop them if they do"); 1835, Stevens *v.* Webb, 7 C. & P. 60; 1837, Duncombe *v.* Daniell, 8 C. & P. 222, 227; 1837, R. *v.* Beard, 8 C. & P. 142.

UNITED STATES: *Uniform Acts:* Canons of Professional Ethics, American Bar Association, 1908, No. 22 ("It is not candid or fair for the lawyer . . in argument to assert as a fact that which has not been proved"); *Federal:* 1860, Wightman *v.* Providence, 1 Cliff. 524, 531; 1905, Union Pacific R. Co. *v.* Field, 137 Fed. 14, 69 C. C. A. 536 (here the rule is pushed to a ludicrous extreme of technicality); 1915, Latham *v.* U. S., 5th C. C. A., 226 Fed. 420 (an over-rigorous enforcement of the rule);
Alabama: 1878, McAdory *v.* State, 62 Ala. 154, 157, 162; 1880, Sullivan *v.* State, 66 Ala. 51; 1883, Wolffe *v.* Minnis, 74 Ala. 386, 389; 1897, Dunmore *v.* State, 115 Ala. 69, 22 So. 541; 1903, Dennis *v.* State, 139 Ala. 109, 35 So. 651;
Arkansas: 1910, Gaston *v.* State, 95 Ark. 233, 128 S. W. 1033; 1920, Brown *v.* State, 143 Ark. 523, 222 S. W. 377 (witness' character);
California: 1889, People *v.* Bowers, 79 Cal. 415, 21 Pac. 752, 1891; People *v.* Ah Len, 92 Cal. 282, 28 Pac. 286; 1899, People *v.* Valliere, 127 Cal. 65, 59 Pac. 295;
Colorado: 1884, Denver S. P. & P. R. Co. *v.* Moynahan, 8 Colo. 56, 59, 5 Pac. 81;
Florida: 1884, Newton *v.* State, 21 Fla. 53, 94;
Georgia: 1858, Dickerson *v.* Burke, 25 Ga. 225, 227; 1878, Forsyth *v.* Cothran, 61 Ga. 278; 1890, Augusta & S. R. Co. *v.* Randall, 85 Ga. 297, 317, 11 S. E. 706; 1897, Bell *v.* State, 100 Ga. 78, 27 S. E. 669; 1902, Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74; 1912, Pelham & H. R. Co. *v.* Elliott, 11 Ga. App. 621, 75 S. E. 1062 (quoting and emphasizing the opinion of Nisbet, J., in Mitchum *v.* State, quoted *supra*, § 1806);
Illinois: 1868, Yoe *v.* People, 49 Ill. 410, 412; 1910, People *v.* McMahon, 224 Ill. 45, 91 N. E. 104 (explanation of the lack of certain testimony); 1913, Appel *v.* Chicago City R. Co., 259 Ill. 561, 102 N. E. 1021;
Indiana: 1871, Cluck *v.* State, 40 Ind. 263, 271 (assertions about the defendant's good character); 1888, Nelson *v.* Welch, 115 Ind. 270, 272, 16 N. E. 634, 17 N. E. 569; 1888, Troyer *v.* State, 115 Ind. 331, 17 N. E. 569; 1890, Schlotter *v.* State, 127 Ind. 493, 496, 27 N. E. 149; 1905, Smith *v.* State, 165 Ind. 180, 74 N. E. 983;
Iowa: 1867, Martin *v.* Orndorff, 22 Ia. 504, 505; 1913, State *v.* Wilson, 157 Ia. 698, 141 N. W. 337, 347; 1916, State *v.* Pierce, 178 Ia. 417, 159 N. W. 1050;
Kentucky: 1896, Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534 (the reason why suit had been brought sooner); 1899, Rhodes *v.* Com., 107 Ky. 354, 54 S. W. 170; 1901, Strutton *v.* Com., — Ky. —, 62 S. W. 875; 1910, Turpin *v.* Com., 140 Ky. 294, 130 S. W. 1086 (counsel's statement that "one man on this jury has been fixed," held improper); 1920, Johnson *v.* Com., 188 Ky. 391, 222 S. W. 106 (murder; counsel argued that defendant was a "bootlegger");
Louisiana: 1901, State *v.* Thompson, 106 La. 362, 30 So. 895; 1920, State *v.* Guagliardo, 146 La. 949, 84 So. 216 (announcement of evidence, not made good);
Michigan: 1885, Hollywood *v.* Reed, 57 Mich. 234, 238, 23 N. W. 792; 1886, Donovan *v.*

Yet, since misunderstandings constantly arise as to the tenor and effect of evidence, and since in the strain and fervor of argument honest errors

Richmond, 61 Mich. 467, 470, 28 N. W. 516; 1887, Amperse *v.* Fleckenstein, 67 Mich. 247, 34 N. W. 564; 1888, Hitchcock *v.* Moore, 70 Mich. 112, 116, 37 N. W. 914; 1894, Rutter *v.* Collins, 103 Mich. 143, 149, 61 N. W. 267; 1897, Pringle *v.* Miller, 111 Mich. 663, 70 N. W. 345 (stating what he could have proved by a witness not called); 1898, Britton *v.* R. Co., 118 Mich. 491, 76 N. W. 1043; 1909, People *v.* Nichols, 159 Mich. 355, 124 N.W. 25;
Mississippi: 1877, Perkins *v.* Guy, 55 Miss. 153, 183; 1879, Cavanah *v.* State, 56 Miss. 299, 309;
Missouri: 1892, Evans *v.* Trenton, 112 Mo. 390, 20 S. W. 614; 1895, State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; 1906, State *v.* Wigger, 196 Mo. 90, 93 S. W. 390; 1922, State *v.* Burns, — Mo. —, 237 S. W. 505 (larceny);
Nebraska: 1883, Cleveland Paper Co. *v.* Banks, 15 Nebr. 20, 22, 16 N. W. 833;
New Hampshire: 1860, Tucker *v.* Henniker, 41 N. H. 317, 322 (reproducing without quotation-marks the language of Nisbet, J., quoted *supra*); 1886, Bullard *v.* R. Co., 64 N. H. 27, 31, 5 Atl. 838 (in an opinion by Smith, J., the doctrine is well expounded and the opinion in Brown *v.* Swineford, Wis., is approved); 1899, Heald *v.* R. Co., 68 N. H. 49, 44 Atl. 77; 1899, Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233; 1900, Concord L. & W. P. Co. *v.* Clough, 70 N. H. 627, 47 Atl. 704 (assertion as to the reason for not producing evidence); 1900, Story *v.* R. Co., 70 N. H. 364, 48 Atl. 288; 1902, Walker *v.* R. Co., 71 N. H. 271, 51 Atl. 918; 1902, State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38; 1913, Kambour *v.* Boston & Maine R. Co., 77 N. H. 34, 86 Atl. 624; 1918, Knapp *v.* Stone, 79 N. H. 32, 103 Atl. 1005 ("The unsworn statement to the jury of a material fact as within the personal knowledge of counsel vitiates the verdict"); 1922, Tuttle *v.* Dodge, — N. H. —, 116 Atl. 627 (habit of automobile drivers);
New Jersey: 1902, Blackman *v.* West Jersey & S. R. Co., 68 N. J. L. 1, 52 Atl. 370; 1918, State *v.* Terry, 91 N. J. L. 539, 103 Atl. 238 (where counsel makes statements unsupported by testimony, the opponent must take advantage by a motion to strike out);
New York: 1899, People *v.* Fielding, 158 N. Y. 542, 53 N. E. 497 (fraudulent claim against the city; that it cost $10,000 a year to live as the defendant did, etc., held improper; good opinions for the majority by Vann, J., and for the minority by Haight, J.; the dissent being only as to the materiality of the error);
North Carolina: 1847, State *v.* O'Neal, 7 Ired. 251, 252; 1858, State *v.* Whit, 5 Jones 224, 230; 1871, State *v.* Williams, 65 N. C. 505; Jenkins *v.* N. C. O. Dressing Co., 65 N. C. 563; 1876, State *v.* Smith, 75 N. C. 306; 1878, Coble *v.* Coble, 79 N. C. 589 (assertions as to the defendant's character, which had not been impeached, that "he was like the upas tree, shedding pestilence and corruption all around him," held improper); 1902, State *v.* Tuten, 131 N. C. 701, 42 S. E. 442; 1903, State *v.* Goode, 132 N. C. 982, 43 S. E. 502 (that witnesses had been summoned and were present); 1903, Hopkins *v.* Hopkins, 132 N. C. 25, 43 S. E. 506 (that witnesses had been bribed);
North Dakota: 1893, State *v.* McGahey, 3 N. D. 293, 306, 55 N. W. 753; 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052;
Ohio: 1880, Union Central L. I. Co. *v.* Cheever, 36 Oh. St. 201, 208; 1900, Hayes *v.* Smith, 62 Oh. St. 161, 56 N. E. 879; 1907, Burns *v.* State, 75 Oh. 407, 79 N. E. 929;
Oklahoma: 1909, O'Barr *v.* U. S., 3 Okl. Cr. 319, 105 Pac. 988; 1921, Jones *v.* State, — Okl. Cr. —, 201 Pac. 665 (statements in opening the case);
Pennsylvania: 1897, Mullen *v.* Ins. Co., 182 Pa. 150, 37 Atl. 988 (reading an affidavit of the opponent not offered in evidence);
South Carolina: 1886, State *v.* Robertson, 26 S.C. 117, 118, 1 S. E. 443 (discretion of trial court);
Texas: 1891, Missouri P. R. Co. *v.* White, 80 Tex. 202, 15 S. W. 808; 1904, Robbins *v.* State, 47 Tex. Cr. 312, 83 S. W. 690; 1916, Marshall *v.* State, 78 Tex. Cr. 451, 182 I. W. 1106 (rehearsal in the closing argument of evidence excluded when offered; elaborate examination of the topic in separate opinions by Prendergast, P. J., and Harper, J.);
Vermont: 1897, Cutler *v.* Skeels, 69 Vt. 154, 37 Atl. 228; 1898, *Re* McCabe, 70 Vt. 155, 40 Atl. 52; 1914, Fadden *v.* McKinney, 87 Vt. 316, 89 Atl. 351;
Washington: 1896, State *v.* Bokien, 14 Wash. 403, 44 Pac. 889;
Wisconsin: 1901, McCarthy *v.* Whitcomb, 110 Wis. 113, 85 N. W. 707.

One or two situations only need to be specially noted as not infringing the rule. Where the testimony of an *absent witness* has been admitted *by affidavit* to *prevent a continuance* (*post*, § 2596), it is of course in evidence and may be referred to. Where the existence of a material document or witness has appeared in the course of the testimony and yet the *opponent* has *not produced* the *witness* or *document*, the failure to produce is in evidence from the very nature of the situation, and therefore, when relevant (*ante*, §§ 285–291, *post*, § 2272), may be referred to. When *other pleadings* are used as *admissions*, they must be formally offered, like other evidence, if counsel desire to comment on them in argument (*ante*, §§ 1064, 1067). *Scientific treatises* are usually held inadmissible, but a few courts anomalously allow them to be read in argument (*ante*, § 1700).

As to the *opening statement* by counsel, see further *post*, § 1808, n. 1.

of memory may easily occur, improper assertions may come to be made unwittingly. For such contingencies, on the one hand, judicial charity should be shown in excusing the counsel from the guilt of knowing misconduct; and due judicial caution should be exercised in interrupting an argument where the supposed error might be the result of no more than a mere difference of honest opinion between judge and counsel; because the opposing counsel may be trusted to set forth the opposite contention when the time comes for his own argument. But, on the other hand, such charity and caution should not induce the judge to refrain from correcting, as soon as made, a clear and unmistakable error of the present sort, or from duly rebuking it if made palpably with knowledge of its lack of foundation. The occasions for interfering may best be left, as all agree, to the discretion of the trial judge. Moreover (as Mr. J. Lumpkin has pointed out), in a clear case of this sort, the judge is bound himself to interfere; for to leave the burden upon the opposing counsel not only exposes his action to misconstruction, but also tends to unseemly and distracting altercations between counsel.

(2) Where the *matter* is one *of which no evidence need ever be introduced* because of its notoriety as a subject open to judicial notice (*post*, § 2572), there is obviously no impropriety in a reference to it in argument. The matter is assumed to be known to Court and jury, and hence the assertion of it is not the giving of testimonial evidence but only a reference to that which is already known without testimony.

The difficulty lies in discriminating between this and the preceding class of assertions. General and accepted data of morality, history, and natural science may thus be assumed and referred to. But a general truth is sometimes best illustrated and enforced by a concrete instance; and thus the allowable resort to concrete facts for this purpose tends to degenerate into the improper assertion of specific facts which are put forward as indirectly bearing on the case and therefore ought to have been evidenced before being referred to. For example, a reference to celebrated cases of erroneous conviction for murder, where the supposed murdered person has afterwards appeared in life, may properly be made to illustrate the general truth of the possibility of convicting an innocent person where the body of the deceased has not been found; yet a reference to the recent conviction of one of a band of ruffians with whom the defendant has associated, intended to inspire the jury to reach the same result in the present instance, would in effect be urging them to consider the defendant's prior misconduct and bad character, and therefore would be improper unless there had been evidence on this point, which presumably there could not have been. Again, the counsel might refer to the fictitious case of Robinson Crusoe's discovery of the footprint, to illustrate the general truth that circumstantial evidence may produce absolute persuasion in the mind; but a reference to the discovery, near the scene of a homicide charged, of a hat bearing the defendant's initials, no evidence of this having been offered, would be obviously improper.

It seems difficult to frame a definition which will accurately draw the line of distinction for such cases. One suggestion, however, may be useful; namely, that a test may often be made by asking *if it is immaterial for the case in hand whether the specific fact asserted be true or not;* if its truth is thus immaterial, then its force will lie merely in symbolizing or illustrating a general truth, and its employment will be proper.[2] Courts have tried in various phrasings to express the necessary distinction, though not with the clearest success.[3] In the following passages are useful attempts at its exposition:

[2] Or, to reach the result in another way, place the word "suppose" before the assertion of the fact stated, and notice whether it equally serves the purpose. For example, counsel asserts, in arguing about the convincing force of circumstantial evidence, that when Robinson Crusoe saw the footprint on the sand he was justly sure that some one else had been there. Alter this by merely prefixing a word, and let it read: "Suppose a man on a desert island found a human footprint, not his own, on the sand; he would be justified in believing that another human being had been there." Here it is seen that the force of the fact as merely an illustration is in no way diminished by making the assertion hypothetical.

[3] The rulings of the various Courts are often too dependent upon the particular facts to serve as precedents; and no generally accepted canon of definition seems to be discernible in them:

ENGLAND: 1846, Smith *v.* Earl Ferrers, Cherer's Rep. 300 (breach of marriage-promise; the plaintiff relied on a long series of letters clearly professing the promise; the defendant claimed that the letters were forged by the plaintiff herself; in arguing for this hypothesis — which the evidence fully substantiated — the defendant's counsel, Sir F. Thesiger, cited the notorious cases of Elizabeth Canning and Maria Glenn to illustrate the possibility of a woman plausibly maintaining a serious charge by persisting in a story purely the fabric of her own imagination).

UNITED STATES: *Alabama:* 1881, Cross *v.* State, 68 Ala. 476, 482 (sanctioning a statement that juries are frequently too apt to be merciful but disapproving a statement of a recent case in the neighborhood in which the defendant had as here shown sympathy for the victim, but had after conviction confessed his guilt); 1888, Childress *v.* State, 86 Ala. 77, 87, 5 So. 778; *Connecticut:* 1899, Cunningham *v.* R. Co., 72 Conn. 244, 43 Atl. 1047 (reading reports of similar cases, forbidden); 1902, State *v.* Gannon, 75 Conn. 206, 52 Atl. 727; *Florida:* 1884, Newton *v.* State, 21 Fla. 53, 91; *Illinois:* 1888, McDonald *v.* People, 126 Ill. 150, 155, 18 N. E. 817 ("They say there is a fabled tree, which grows in some torrid clime; that the birds of the air which fly near its branches, influenced by the aroma of it, fall beneath it and die. That is the influence of M. C. McDonald in this and all matters connected with the administration of justice," the person named not being concerned in the case; this passage was held improper; compare Coble *v.* Coble, N. C., cited *supra*, note 1); *Georgia:* 1914, Frank *v.* State, 141 Ga. 243, 80 S. E. 1016 (a curious case, in which the question arose over the citation in argument of the Durrant and the Oscar Wilde cases); *Indiana:* 1874, Ferguson *v.* State, 49 Ind. 33 (references to the formation of local vigilance committees, etc., held improper); *Iowa:* 1900, Mackrall *v.* R. Co., 111 Ia. 547, 82 N. W. 975 (assertion that railroad employers discharged employees who did not testify as desired, held improper); *Kansas:* 1893, State *v.* O'Neil, 51 Kan. 651, 657, 674, 33 Pac. 287 ("newspaper items," "to be used as argument in exhibiting processes of reasoning," not admitted on the facts); *Massachusetts:* 1913, *In re* Boston Elevated R. Co., — Mass. —, 101 N. E. 365 (counsel allowed to argue as to possible explanations of a conviction of crime used to discredit a witness); *Mississippi:* 1900, Oden *v.* State, — Miss. —, 27 So. 992 (reference to other prosecutions); *Missouri:* 1895, State *v.* Lingle, 128 Mo. 528, 31 S. W. 20 ("a scientific fact, known and recognized by the consent of all nations and the experience of common life," "facts within the daily experience and cognizance of all men," may be referred to in argument); 1900, State *v.* Jones, 153 Mo. 457, 55 S. W. 80 (limits stated of resort to a book's authority for illustrative instances); *New York:* 1872, Fanny Hyde's Trial, N. Y., Hemstreet's Rep. 108 ff. (murder of George Watson; Mr. Samuel D. Morris, for the defence, stated the details of many cases of homicidal insanity to illustrate its subtle phases); 1875, Tilton *v.* Beecher, N. Y., Official Report, III, 932, 934, 944, 1017 (Mr. Beach, for the plaintiff, quoted from Hawthorne's "Scarlet Letter," to illustrate his argument as to the defendant's meaning of the interviews between the defendant and Mrs. Moulton; from Byron's "Giaour," and David's Psalms and the story of Uriah, to illustrate his argument as to the meaning of the remorseful letters of the defendant; from Burns' "Epistle to a Young Friend," to illustrate his

1881, ELLIOTT, J., in *Combs* v. *State*, 49 Ind. 215, 219: "One of the attorneys for the prosecution, in addressing the jury, said: 'Three or four men have been recently executed at Indianapolis, most of whom set up the plea of insanity;' and of this statement appellant earnestly and bitterly complains. We do not regard such a statement as of sufficient materiality to warrant a reversal. Courts ought not to reverse cases because counsel, in the heat of argument, sometimes make extravagant statements, or wander a little way outside of the record. If a matter of great materiality is brought into the record as a matter of extended comment, then there would be reason for setting aside the verdict. If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, Courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that Courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel during the argument may have made some general statements not supported by evidence. . . . It is the duty of the judge who presides at the trial to restrict the argument upon the facts to such as are established by or inferable from the evidence; but, in doing this, it is not his duty to ab idge the freedom of debate by preventing counsel from enforcing his argument by illustration or example. It is not always easy to correctly draw the line between what is proper and what is improper. Matters of common, general public information may sometimes be properly referred to, and matters of known and settled history may often be commented upon with entire propriety; but matters of a local nature, or matters not of common and public notoriety, are not properly the subject of comment. To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and the appellate Courts; and it is far better to commit something to the discretion of the trial Court than to attempt to lay down or enforce a gene[illegible] defining the precise limits of argument. If counsel make material statements o[illegible] the evidence which are likely to do the accused injury, it should be deemed a[illegible] discretion and a cause for reversal; but where the statement is a general one, and[illegible] character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the Court to check counsel should not be deemed such an abuse of discretion as to require a reversal."

1892, MCGOWAN, J., in *State* v. *Turner*, 36 S. C. 534, 540, 15 S. E. 602: "It is plain that upon a trial there are certain general rules and regulations which should be observed; as, for instance, that in argument counsel should keep themselves within the record, and in commenting upon the testimony, which they have a right to do, they should scrupulously avoid anything like giving testimony themselves. But beyond such general rules, cases are so different and varying in character that each must depend somewhat upon its own circumstances; and in the conduct of the cause, some freedom in argument, as

argument as to the moral effect of adultery in impairing the veracity; from Whittier's "Ichabod," to illustrate his argument as to the defendant's fall from greatness); ib. 844 (to answer the argument from the defendant's character and clerical standing, he cited a dozen instances of the licentious misdeeds of eminent divines); 1891, Williams *v.* B. E. R. Co., 126 N. Y. 96, 102, 26 N. E. 1048 (damage by an elevated road; the reading of a newspaper account of a poor boy killed by an electric wire, held improper; good opinion by Andrews, J.); *Oregon:* 1907, State *v.* Blodgett, 50 Or. 329, 92 Pac. 820 (allusions to other recent murders); *South Carolina:* 1910, State *v.* Duncan, 86 S. C. 370, 68 S. E. 684 (prevalence of homicide in the neighborhood); *South Dakota:* 1908, State *v.* Pirkey, 22 S. D. 550, 118 N. W. 1042; *Tennessee:* 1871, Saunders *v.* Baxter, 6 Heisk. 369, 377; 1879, Turner *v.* State, 4 Lea 206, 208; 1884, Northington *v.* State, 14 Lea 424, 428 (these three cases are good illustrations; in the last, it was held not improper to cite the supposed facts of Guiteau's case, since they were "only matters of current history, used by way of enforcing an argument").

For the use of *dictionaries* and *literature* as authorities, see *ante*, § 1699. For the use of other *political utterances* as evidence of a standard of conduct, see *ante*, § 465.

For instances of the legitimate use of published works of other authors, in the citation of passages illustrating by comparison the *non-libellous* nature of a defendant's *utterance*, see the speeches of Brougham, in his Works, vol. IX, p. 18 (trial of Hunt), p. 230 (trial of Williams).

in suggesting inferences, analogies, probabilities, illustrations, and so forth, must be allowed. As no rigid rule can be fixed in advance as to such matters, it would seem that they have been left largely to the sense of propriety and justice of an honorable profession, under the absolute direction and control of the trial judge."

Some notion of the proper limits of illustration and explanation by this mode of argument may be gathered from the models to be found in the addresses of counsel eminent in their place and generation; their methods may show us both what they were allowed to do and what they thought themselves professionally entitled to do; and in the following passages will be found a few such useful examples:

1875, Mr. *Benjamin F. Tracy*, for the defendant, in *Tilton* v. *Beecher*, Abbott's Rep. II, 945 (arguing for the defendant, the Rev. Henry Ward Beecher, sued for criminal conversation with the plaintiff's wife): "Gentlemen, the charge of incontinence which is brought against this defendant is not a new or unfamiliar charge against clergymen. It is the common method of warfare. There is no accusation to which a clergyman is so much exposed; an enemy that desires to do him a deadly injury has no point from which to strike with such deadly effect as the charge of infidelity in marital relations. That charge, whether there is guilt or not, is almost sufficient to blast the usefulness of any clergyman, however respected and however beloved. But Mr. Beecher is not the first eminent clergyman that has been called upon to face such a persecution as this. It was by means of such an accusation that the enemies of St. Athanasius sought to destroy the great champion of the orthodox faith. It was by such means that the name of St. Francis de Sales was kept under a cloud for four years, during which he maintained the same silence for which my client is so sharply criticised. It was upon such a charge that the ruin of the illustrious Fénelon, Archbishop of Cambray, was attempted. It was under such an imputation that the 'judicious Hooker,' one of the brightest lights in the English Church, remained 'dumb as the dead,' though innocent as a babe, for six years of bitter anguish. It was such a charge, spread broadcast over England, that John Wesley, the man who of all Protestants most nearly approached to the spirit and labors of the Apostle Paul, suffered to pass without any public reply for twenty years."

1889, Sir *Charles Russell*, arguing for the defence in the *Parnell Commission's Proceedings*, Macmillan's ed. of the Opening Speech, 215 (the charge against the Irish Land League was of conspiring to encourage agrarian outrage; the League admitted that it had encouraged boycotting in the simple sense; and claimed a distinction between lawful boycotting and unlawful violence): "My lords, in this matter of boycotting, may I be forgiven for using the celebrated exclamation of Dr. Johnson, and say: 'Let us clear our minds of cant.' Boycotting has existed from the earliest times that human society existed. It is only a question of degree. Up to a certain point, boycotting is not only not criminal, but I say is justifiable and is right. For what does boycotting mean? It means the focussing of the opinion of the community in condemnation of the conduct of an individual of that community who offends the general sense of propriety, or offends against its general interests. Is there no boycotting at the bar? Is there no boycotting in the other professions? Is there no boycotting in the Church? Is there no boycotting in politics? Is there no boycotting of tradesmen in election times? What is the meaning of 'Sending a man to Coventry?' I say that boycotting, — I am not justifying intimidation, I am not justifying force, I am not justifying violence in connection with it; those are different things — I am talking of an act of moral reprehension called boycotting, and I say it always has existed and always will exist. My lords, if I were to search ancient records, historical, sacred records, I could point to many instances of boycotting;

but I need not go far back. We have had in our days very remarkable instances, not only of boycotting, but of effective and useful boycotting. What was the action of our great colonies when the ill-judged policy of this country sent them the criminal population, the offscouring of the old world, as the rotten seed from which their fresh population was to spring? What did they do? Why, they simply boycotted the Government officials in Australia. The most notable instance of all was in the Cape Colony, where they boycotted the governor, declined to serve him, declined to serve him with horses, declined to supply him with provisions until the objectionable ship which was importing and seeking to land the offscouring of this nation, took its wretched burthen to another place."

1893, Mr. (later Justice) *H. M. Knowlton*, arguing for the prosecution, in *Commonwealth* v. *Borden*, Mass., 27 American Law Review, 837: "What is sometimes called circumstantial evidence is nothing in the world but a presumption of circumstances. It may be one or fifty. There is no chain about it. The word 'chain' is a misnomer, as applied to it. Talk about a chain of circumstances! When that solitary man had lived on this island for twenty years, and believed that he was the only human being there, and that the cannibals and savages that lived around him had not found him and had not come to his island, he walked out one day on the beach, and there he saw the fresh print of a naked foot on the sand. *He* had no lawyer, to tell him that was nothing but a circumstance! *He* had no distinguished counsel, to urge upon his fears that there was no chain about that thing which led him to a conclusion! His heart beat fast; his knees shook beneath him; he fell to the ground in fright, — because Robinson Crusoe *knew*, when he saw *that* circumstance, that a man had been there that was not himself! It was circumstantial evidence. It was nothing but circumstantial evidence! But it satisfied *him!*"

(3) The mere maintenance of the *propriety of a logical inference* from facts in evidence is not the offering of evidence, and is therefore always proper. When proposition A is to be proved, and fact B is introduced as evidence thereof, what remains is the mental process of inference, *i. e.* persuasion of fact A as following from fact B (*ante*, § 1). Whether that persuasion should follow is the question for the jury, and it is the counsel's function in argument to ask the jury to make or (if opposing) not to make the inference. But the act of producing evidence ends when fact A is introduced; what remains is a mere logical process of belief. Consequently, nothing that the counsel may say as to the desired inference can be the giving of evidence by him; for the evidence is by hypothesis already there. His suggestions are logical, not evidential. Now in this domain of logic, it is conceded, the counsel is free from restraint during argument. His desired inferences may be forced, unnatural, and untenable; but as to this the jury are to judge: that is precisely their function. To declare the desired inference irrational is to beg the question, by prejudging what the jury may believe. If the evidence was irrelevant, in the eye of the law of Evidence (*i.e.* if it was totally destitute of probative value for the purpose in hand), this would have been determined by the judge's ruling when it was offered; the very admission of it at all signifies that it has at least some probative value (*ante*, §§ 9, 28). Hence, the counsel's exposition of its probative potency must be left free for the jury's consideration; subject, no doubt, to judicial correction in case of

palpable bad faith or in case of the misuse for one purpose of evidence admissible only for another purpose:[4]

1881, ELLIOTT, J., in *Combs* v. *State*, 75 Ind. 216, 218 (commenting on counsel's request to the jury to infer from the defendant's going to the town of residence of a witness that therefore the defendant had hired the witness): "The counsel for the State asked the jury to draw their own inferences from certain facts disclosed by the evidence; and, in so doing, the counsel may have asked the jury to violate all logical rules and do violence to all the laws of legitimate inference. But we cannot undertake to correct their logic. If there were any facts at all before the jury, the question as to what conclusions should be drawn was one for argument; and it was not for the Court to determine whether the inference of counsel was a correct or an erroneous one."

1897, MOORE, C. J., in *State* v. *Moore*, 32 Or. 65, 48 Pac. 468: "A Court cannot well supervise the reasoning powers of an attorney in the argument of a cause before it in which he is interested; for to do so would require it constantly to interrupt counsel, and be tantamount to instructing the jury by piecemeal, thereby destroying the force of the argument, and rendering it of but little use in aiding the jury to reach a proper conclusion. An attorney may comment on the testimony given in evidence, and has the right to draw such inferences and conclusions therefrom as his reason may dictate that the facts warrant; but, if he make a wrong deduction, the Court will, upon request therefor, correct it by giving a proper instruction."

(4) The firm and healthy tradition of our Bar which forbids counsel in argument to *express his personal belief of the innocence of his client* involves an application of the present principle. But it also rests on wider considerations of the advocate's function, and is beyond the present purview.[5]

§ 1808. **Improper Statements in Offering Evidence to the Judge or Putting Questions to a Witness.** The general principle that a counsel may not make

[4] *Accord: Ala.* 1880, Sullivan *v.* State, 66 Ala. 51 ("Presiding officers should not be severe in arresting such argument on the ground that to their minds the analogy or inference is forced or unnatural or that the argument employed is illogical"); 1902, Lide *v.* State, 133 Ala. 43, 31 So. 953; 1916, Fulton *v.* U. S., 45 D. C. App. 27 (a good example of drawing the line between counsel's insistence upon an inference and his assertion of a certainty based on his own knowledge); *Fla.* 1901, Mitchell *v.* State, 43 Fla. 584, 31 So. 242; 1903, Sylvester *v.* State, 35 Fla. 142, 35 So. 142; *Ill.* 1902, Henry *v.* People, 198 Ill. 162, 65 N. E. 120; 1905, Chicago Union T. Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341; *Ind.* 1882, Proctor *v.* DeCamp, 83 Ind. 559; 1890, Sage *v.* State, 127 Ind. 15, 29, 26 N. E. 667; 1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601; 1911, Wilson *v.* State, 175 Ind. 458, 93 N. E. 609; *Ia.* 1890, State *v.* Toombs, 79 Ia. 741, 45 N. W. 300; *N. H.* 1905, Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 585, 587.

Distinguish from this the question how far counsel may by *emotional language excite the prejudices* of the jury; this may, no doubt, be restrained, but only in extreme cases: 1903, Weaver, J., in State *v.* Burns, 119 Ia. 663, 94 N. W. 238: "It is his time-honored privilege to

"'Drown the stage in tears,
Make mad the guilty and appal the free,
Confound the ignorant, and amaze, indeed
The very faculties of eyes and ears.'

"Stored away in the property room of the profession are moving pictures in infinite variety, from which every lawyer is expected to freely draw on all proper occasions. They give zest and point to the declamation, relieve the tediousness of the juror's duties, and please the audience, but are not often effective in securing unjust verdicts. The 'sorrowing, gray-haired parents,' upon the one hand, and the 'broken-hearted victim of man's duplicity,' upon the other, have adorned the climax and peroration of legal oratory from a time 'whence the memory of man runneth not to the contrary,' and for us at this late day to brand their use as misconduct would expose us to just censure for interference with ancient landmarks."

[5] Canons of Professional Ethics, American Bar Association, 1908, No. 15; Professor Geo. P. Costigan's Cases on Legal Ethics, 1917; 1921, Parroccini *v.* State, — Tex. Cr. —, 234 S. W. 671 ("I believe this defendant is guilty," commented on). Compare the citations *post*, § 1911 (counsel as witness).

assertions of fact concerning matters not otherwise properly put in evidence (*ante*, § 1806) may be sought to be violated by indirection; but the prohibition applies with equal strictness. There are two chief ways in which this may occur: first, in a preliminary statement to the judge as to the tenor of evidence which the counsel desires to offer; and, secondly, in the putting of questions to witnesses.

(1) *Stating an offer of evidence.* Where a certain class of evidence is desired to be offered, and the offering counsel knows (either from the very nature of the evidence or from objection made by the opponent at the inception of the offer or upon a previous analogous offer) that its admission will be disputed, and therefore that a judicial ruling will be necessary, a sense of professional honor will tell him that in the ordinary case the details of the offer should not be stated in the jury's hearing; because of the possibility that the statement may be taken by them as true and relevant, even though it be excluded by the judge. In this respect the rule of law enforces the standard of honor, and requires the offering counsel either to present the offer in writing, without reading it aloud, to the Court and the opposing counsel, or, if argument is expected, to afford an opportunity for the jury's retirement before orally stating the offer:

1776, Mr. *Sylvester Douglas*, Election Cases, 2d ed., III, 232: "In truth, almost all the inconvenience which may be apprehended from an improper impression and prejudice occasioned by illegal evidence is in such case already incurred by its being stated as what is to be proved, before it is actually produced and sworn to in the regular form. . . . It has often occurred to me that in trials at 'nisi prius,' when evidence is objected to, there is an impropriety in allowing the counsel who offers it to state what he means to prove in the hearing of the jury, and this for the reason already mentioned; especially as jurymen are too apt to infer that evidence so offered must be both true, and fatal to the party who objects to it, merely because it is objected to. Perhaps it would be an improvement, when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw till the point was argued and determined."

1878, MARSTON, J., in *Scripps* v. *Reilly*, 38 Mich. 10, 15: "In this case, after counsel had obtained a clear and distinct ruling of the Court as to the inadmissibility of a certain class of [newspaper] articles, a large number of the same class were offered, and in making each separate offer counsel stated the purport of the article or read the headings. This course was objected to, but permitted by the Court, and the articles offered were all excluded, the objection to their admissibility having been sustained. We think the course adopted was not correct. . . . Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be so far as possible kept from coming to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliberate upon the verdict to be given; and no matter how honest or conscientious he may be, or how carefully he may have been instructed by the Court not to permit such incompetent matters to influence him or have any bearing in the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. . . . [Rules of exclusion] would be but slight protection if counsel or witnesses could be permitted to make a statement, but not under oath, of incompetent testimony,

or counsel state the same fully to the jury in their argument or otherwise. . . . Where the offer is likely to be of such a character that it would have a tendency to prejudice or influence the jury, the correct practice would be to present the article, if in writing, to the Court and counsel for examination, without stating either the purport or substance of it. The cases are but few where such objectionable articles are likely to come up on the trial; and, when such a case arises, the good sense of Court and counsel will not only see the necessity, but will readily discover and adopt the means requisite to keep them from the reach of the jury."

No doubt much must depend upon the circumstances of each case; and the discretion of the trial Court should control. But it is clear that the judge should interfere 'ex mero motu,' and that, so far as feasible, no statement of proposed evidence should be allowed to be made in such a way as to allow the jury to obtain an impression of its truth and relevancy and to place the opposing counsel at the disadvantage of objecting to proposals whose known tenor may be misused against his party.[1]

(2) The same general principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believing that it will be excluded for illegality or will be negatived, and also having no reason to believe that there is a foundation of truth for it, he violates professional honor. It is generally agreed that where the counsel has been warned, by a prior successful objection of the opponent to similar evidence, that it is illegal, he will be prevented from again putting questions dealing with the class of facts affected by the same illegality:[2]

§ 1808. [1] The following cases illustrate the application of this principle: *Uniform Acts:* Canons of Professional Ethics, American Bar Association, 1908, No. 22 ("A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility"); *Ala.* 1860, Mose *v.* State, 36 Ala. 211, 221 (trial Court may remove the jury during evidence as to the admissibility of a confession; compare the citations *ante*, § 861, n. 6); *Ga.* 1906, Holland *v.* Williams, 126 Ga. 617, 55 S. E. 1023; 1909, Gossett *v.* State, 6 Ga. App. 439, 65 S. E. 162 (opening address). *Ill.:* 1899, Illinois C. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290; 1904, Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 (the jury's withdrawal is in the trial Court's discretion); 1906, Chicago & S. L. R. Co. *v.* Mines, 221 Ill. 448, 77 N. E. 898; 1906 Chicago C. R. Co. *v.* Gregory, 221 Ill. 591, 77 N. E. 1112; *Mass.* 1910, Com. *v.* Howard, 205 Mass. 128, 91 N. E. 397; *Mich.* 1878, Scripps *v.* Reilly, 38 Mich. 10 (quoted *supra*; 1882, Porter *v.* Throop, 47 Mich. 313, 320, 11 N. W. 174 (approving the principle of Scripps *v.* Reilly; good opinion by Cooley, J.); 1897, People *v.* Abell, 113 Mich. 80, 71 N. W. 509; *Mo.* 1903, State *v.* Rose, 178 Mo. 25, 76 S. W. 1003 (offering a prior conviction of crime); *Nebr.* 1891, Leahy *v.* State, 31 Nebr. 566, 569, 48 N. W. 390; *N. Car.* 1889, State *v.* Moore, 104 N. C. 744, 745, 10 S. E. 183 (trial Court has discretion to send the jury out while a proffer of evidence is being stated).

For the proper limits as to detailed rehearsals of evidence in an *opening statement of the case*, with reference to the contingency of not evidencing it afterwards, see the remarks of Mr. J. Graves, in Scripps *v.* Reilly, *supra;* and compare the rule of *conditional relevancy* (*post*, § 1871).

In this part of a counsel's address, the rule of § 1807, *ante*, has little application; the situation should rather be treated from the point of view of the rule for conditional relevancy (*post*, § 1871).

In the following case the dissenting opinion of Haight, J., expresses a just indignation at the over-strict application of the present rule to such a case, and exposes the abuses to which it leads: 1906, People *v.* Wolf, 183 N. Y. 464, 76 N. E. 592.

[2] *Fed.* 1908, New York Life Ins. Co. *v.* Rankin, 8th C. C. A., 162 Fed. 103, 109; *Ala.* 1895, Birmingham Nat'l Bank *v.* Bradley, 108 Ala. 205, 208, 19 So. 791; *Ark.* 1904,

1872, COOLEY, J., in *Gale* v. *People*, 26 Mich. 157, 161 (commenting on the repeated putting of questions as to the defendant's past misconduct): "[Had the defendant declined to answer them,] an unfavorable influence upon the minds of the jury must inevitably have been produced, which in this case would have been increased by the exhibition of letters, brought out before the jury for no purpose that we can conceive, unless to convey an impression that they contained damaging disclosures regarding the prisoner, which he must either admit or falsify the facts. If therefore the questions were improper in themselves, the error was a serious one; and we have no doubt of their impropriety. . . . A review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it and there is no other evidence."

1893, MCFARLAND, J., in *People* v. *Wells*, 100 Cal. 459, 462, 34 Pac. 1078 (commenting on repeated questions asked of the defendant as a witness and concerning prior misconduct of various sorts): "It would be an impeachment of the legal learning of the counsel for the People to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury; and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: 'As, "Well we know"; or "We could, an if we would"; or "If we list to speak"; or "There be, an if there might."' This was an entirely unfair way to try the case; and the mischief was not averted because the Court properly sustained the objection (though we think it should have warned counsel against the course which he was taking) and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases, questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when Courts sus-

Burks *v.* State, 72 Ark. 461, 82 S. W. 490; *Cal.* 1890, People *v.* Mullings, 83 Cal. 138, 139, 143, 23 Pac. 229 (repeated questions to defendant as to inadmissible conversations with his wife); 1904, People *v.* Wright, 144 Cal. 161, 77 Pac. 877; 1904, People *v.* Perry, 144 Cal. 748, 78 Pac. 284; *Ia.* 1904, Streeter *v.* Marshalltown, 123 Ia. 449, 99 N. W. 114; *Ky.* 1909, Louisville & N. R. Co. *v.* Payne, 133 Ky. 539, 118 S. W. 352; *Mass.* 1920, Com. *v.* Homer, 235 Mass. 526, 127 N. E. 517; *Mich.* 1912, Thomas *v.* Byron Tp., 168 Mich. 593, 134 N. W. 1021; *Minn.* 1920, State *v.* Morgan, 146 Minn. 197, 178 N. W. 489 (larceny-questions to a witness about other misdeeds); 1921, State *v.* Nelson, 148 Minn. 285, 181 N. W. 850 (cross-examination to character by "sneers and innuendo," disapproved); *Mont.* 1909, State *v.* Rhys, 40 Mont. 131, 105 Pac. 494; *Neb.* 1905, Nickoliznck *v.* State, 75 Nebr. 27, 105 N. W. 895; *N. H.* 1903, Batchelder *v.* Manchester R. Co., 72 N. H. 329, 56 Atl. 752 (good opinion, by Chase, J.); 1909, Connecticut Power Co. *v.* Dickinson, 75 N. H. 353, 74 Atl. 585 (careful opinion, by Walker, J., drawing the line); *N. Y.* 1904, People *v.* Davey, 179 N. Y. 345, 72 N. E. 244; 1921, People *v.* Slover, 232 N. Y. 264, 133 N. E. 633 (murder; repeated questions to prior criminal acts of accused, denied by him, held improper; quoted *supra*); *Okl.* 1922, Freeman *v.* State, — Okl. Cr. —, 203 Pac. 1052 (inadmissible evidence offered and argued about in the jury's presence, known as "badgering in" evidence; held improper); *Wis.* 1908, Dungan *v.* State, 135 Wis. 151, 115 N. W. 350 (good opinion by Dodge, J.).

Compare the cases cited *ante*, §§ 983, 987, 988, where an indirect effect of this principle is seen in the rule of some jurisdictions that all *cross-examination* of a witness to *specific acts of misconduct* is forbidden; see also § 780 (misleading questions on cross-examination).

Distinguish the rule *ante*, § 782, as to the propriety of *repeating the same lawful question* in order to compel a dishonest witness to retract.

tain their objections. But where the prosecuting attorney asks a defendant questions which he knows and every judge and lawyer knows to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict."

1920, RAILEY, J., in *State* v. *Burns*, 286 Mo. 665, 228 S. W. 766: "We are driven to the unevitable conclusion, from reading the record herein, that the prosecuting attorney proceeded, in respect to above matter, in utter disregard and contempt of our former ruling; that he deliberately and intentionally sought to get before the jury the improper evidence aforesaid, in order to create in the minds of the jurors the unwarranted impression that defendant had sustained improper relations with the wife of deceased, and that he had desecrated the home of the latter, etc. It is true that the prosecuting attorney did not receive any answer to the questions propounded. It is manifest that he did not expect the court to permit the witness to answer these questions. He knew, however, that such an inquiry was improper, and condemned by this Court. He evidently knew, regardless of the mild rulings of the [trial] Court, the questions propounded would indicate to the jury that defendant and the wife of deceased sustained some sort of improper relations with each other, even if overruled. This conclusion is irresistible, when we come to consider the astounding speech, afterwards delivered along the same line by Judge Gossom, in the closing argument for the state, where he dwelt at great length upon the alleged conduct of defendant in destroying the sanctity of deceased's home, without any evidence to support said contention, and without any such issue being lodged in the case. The trial Court has a good deal of latitude in dealing with this subject. But in cases like the one before us, where the attorneys for the State deliberately overstep the rules of propriety, ignore the positive rulings of this Court, and attempt to get before the jury matters which they know are improper, for the undoubted purpose of creating in the minds of the jurors an unwarranted prejudice against defendant, in a close case like this the ends of justice require that a new trial should be granted defendant, although the Court below may have formally sustained an objection to the proffered evidence."

1921, Per CURIAM, in *People* v. *Slover*, 232 N. Y. 264, 133 N. E. 633 (murder): "Defendant on cross-examination was interrogated, solely for the purpose of discrediting him as a witness, as to many particular criminal acts. His record was not flawless, but for the most part he denied that he had done the things as to which he was interrogated, and no attempt was made to show that he had been convicted of other crimes. Within proper bounds, such a cross-examination is not objectionable. But a limit must be placed on the range of such questions. They may not be asked for the improper purpose of planting in the minds of the jury suspicion and distrust by insinuations that the defendant has falsely denied his guilt as to collateral matters. Although his denials may not be contradicted by extrinsic testimony, the jury is not bound to take as true the word of any witness on such matters; and the district attorney may not in fairness multiply questions as to acts of collateral misconduct when no purpose is served, except to prejudice the jurors. The discretion which Courts possess to permit questions as to collateral acts to be put to a defendant in a criminal case for the purpose of impairing his credibility should be exercised with caution. The discretion of the Court was strained to the utmost in this regard."

4. Interpreter

§ 1810. **Hearsay Rule applicable to Interpreter.** The necessity for resorting to an interpreter, and the *mode of interpretation*, for witnesses who speak in a foreign language, or speak inaudibly, or are dumb, have been already

considered (*ante*, § 811). It has also been noticed that the right to cross-examination implies a *right to have an interpretation of the testimony* for the purpose of intelligent cross-examination (*ante*, § 1393). It remains here to examine the applicability of the Hearsay rule to this process.

(1) Where the testimony is that of a witness now speaking through an interpreter in court, the Hearsay rule is satisfied as to both, because there is an opportunity for the cross-examination of both (*ante*, § 1393). But where the testimony is that of a *witness at a former trial*, there given through an interpreter, then, though there has been for both an opportunity of cross-examination, the rule of confrontation applies, and before the witness' testimony may be received, he must be shown to be deceased, out of the jurisdiction, or otherwise unavailable (*ante*, § 1402). The same requirement, however, applies to the interpreter, for he is also a witness, *i. e.* to the words of the principal witness; and hence, either the interpreter must be called to repeat the former witness' words or he must be accounted for as deceased or otherwise unavailable.[1]

§ 1810. [1] *California:* 1880, People *v.* Lee Fat, 54 Cal. 529 (where neither the official reporter nor the interpreter was called, but the former's notes were offered; under the statute — *ante*, § 1669 — sanctioning their use, the reporter's presence was apparently not necessary, but the Court held that the interpreter's absence was fatal; implying that if accounted for it would have been enough); 1880, People *v.* Ah Yute, 56 Cal. 120 (the same facts, except that the reporter read his notes; the Court declared the absence of the interpreter fatal); 1897, People *v.* Sierp, 116 Cal. 249, 48 Pac. 88 (approving the preceding cases); 1902, People *v.* John, 137 Cal. 220, 69 Pac. 1063 (both interpreter and stenographer being called to prove former testimony, the one swearing to his correct translation and the other to his correct transcription, the Court nevertheless excluded the testimony as "hearsay"; unsound, because ignoring the direct applicability to such a case of the principle of § 751, *ante*); 1904, People *v.* Lewandowski, 143 Cal. 574, 77 Pac. 467 (official certified transcript of testimony delivered through an interpreter, and taken according to P. C. § 686, cited *ante*, § 1411, admitted); 1904, People *v.* Jan John, 144 Cal. 284, 77 Pac. 950 (former ruling *supra* in this case affirmed); *Georgia:* Rev. C. 1910, § 5778 ("statements of an interpreter, where from any cause he cannot be sworn," are admissible); *Hawaii:* 1909, Ching Lum *v.* Lam Man Ben, 19 Haw. 363 (interpreter out of the jurisdiction; held not admissible without a showing that no other person qualified to report the testimony was available; is the learned Court correct in stating that there is at the first trial no opportunity to cross-examine the interpreter as to the correctness of his translation? In Terr. *v.* Kawano, 20 Haw. 469, cited *ante*, § 1393, the same Court declared that the right is equally applicable to the interpreter when on the stand); 1911, Terr. *v.* Kawano, 20 Haw. 469 (transcript of former interpreted testimony, excluded, the interpreter being available); *Indiana:* 1871, Schearer *v.* Harber, 36 Ind. 541 (the interpreter must be accounted for as "dead or insane, or out of the jurisdiction, or unable to testify, or, having been summoned, appears to have been kept away by the adverse party"); *Massachusetts:* 1809, Amory *v.* Fellowes, 5 Mass. 219, 225 (deposition through an interpreter rejected, because the interpreter was not sworn as such by the commissioners ignorant of the witness' language); 1901, Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021 (interpreter translated a confession orally, and stenographer wrote down the translation, both testifying on the trial; held sufficient); *Nevada:* 1905, State *v.* Williams, 28 Nev. 395, 82 Pac. 353; *New Jersey:* 1906, State *v.* Banusik, — N. J. L. —, 64 Atl. 994 (interpreter called to state the correctness of his interpretation of a confession written out and signed before a magistrate: held sufficient); 1918, State *v.* Agnesi, 92 N. J. L. 53, 104 Atl. 299 (murder; the magistrate wrote out a dying declaration, part of which was given to him through an interpreter; the magistrate testified but not the interpreter; admitted); *Rhode Island:* 1902, State *v.* Terline, 23 R. I. 530, 51 Atl. 204 (witnesses to the translation by an official interpreter, of a former witness' testimony, excluded, the interpreter not being called; following People *v.* Ah Yute, Cal.); 1903, State *v.* Epstein, 25 R. I. 131, 55 Atl. 204 (police officers' testimony to a Russian injured person's statements, translated to them by an interpreter, excluded).

By statute in a few jurisdictions an official translation of testimony or documents is receivable as an official statement (*ante*, § 1672).

(2) Where a witness on the stand is asked to testify to the *words* of A *uttered out of court*, as translated to him by M interpreting between them, the witness is not qualified by personal knowledge of A's utterances (*ante*, § 668), and may not testify; the interpreter M is the only qualified witness. But if A, whose utterances are to be testified to, is a party opponent, then he may be regarded as having made M his agent to translate, and thus M's translations are admissions (*ante*, § 1078), usable against A.[2]

[2] *Conn.* 1869, State *v.* Noyes, 36 Conn. 80 (witness not allowed to be contradicted by L., who had had a conversation with him through an interpreter, without calling the interpreter, who was here the agent of L. only); *Ida.* 1916, State *v.* Fong Loon, 29 Ida. 248, 158 Pac. 233 (dying declaration recorded through an interpreter not called, excluded); *Ky.* 1908, Spencer *v.* Com., — Ky. —, 107 S. W. 342; *Mass.* 1892, Com. *v.* Vose, 157 Mass. 394, 32 N. E. 355; *Mich.* 1919, In re Coburn, 207 Mich. 350, 174 N. W. 134 (disbarment, conversation between respondent and two clients, conducted through an interpreter, on the proposal of respondent; the clients allowed to testify to the interpreted conversation, on the theory that the interpreter had been made the agent to translate); *Mont.* 1904, State *v.* Rogers, 31 Mont. 1, 77 Pac. 293; *Pa.* 1920, Com. *v.* Pava, 268 Pa. 520, 112 Atl. 103 (witness' testimony to accused's statements made through an interpreter, the interpreter also testifying to them, held erroneously received, but the error not harmful; unsound); *P. I.* 1907, U. S. *v.* Chu Chio, 8 P. I. 269 (confession made to an officer through an interpreter not called; the officer's testimony rejected); *Wis.* 1856, Diener *v.* Dicer, 5 Wis. 483, 496, 521, 527 ("The circumstances may be such as to make the interpreter an agent so as to bind the parties; but we think he is not necessarily an agent," *i. e.* to *bind* them).

On the same principle, an interpreted statement may be used against a *witness* (not a party-opponent) as a self-contradiction, without calling the interpreter, where the *witness, by selecting his interpreter*, virtually made him his agent to speak, or otherwise adopted the interpreter's statement: 1905, Davis *v.* First Nat'l Bank, 6 Ind. T. 124, 89 S. W. 1015 (affidavit made though an interpreter out of court, used to contradict the witness without calling the interpreter).

Conversely, if the *interpreter himself testifies* on the stand, it is immaterial whether the party made him agent to interpret: 1909, People *v.* Randazzio, 194 N. Y. 147, 87 N. E. 112.

Whether an interpreter is sufficiently *expert* to testify involves a different principle (*ante*, § 571).

TITLE III: PROPHYLACTIC RULES

CHAPTER LX.

SUB-TITLE I: OATH

SUB-TITLE II: PERJURY-PENALTY

SUB-TITLE III: PUBLICITY

§ 1813. **General Nature of these Rules.** Among the different sorts of rules of Auxiliary Probative Policy (*ante*, § 1171), this second class is marked out by the special feature that it operates by applying to the evidence, in advance of its admission, *some expedient calculated to supply an antidote or prophylactic for the supposed weakness or danger inherent in the evidence.*

The several rules of this sort thus are united by this common feature, in contrast with the four other classes of auxiliary rules. This common feature furnishes a just ground for grouping them together, because the proper basis of classification for all these auxiliary rules, as noted already (*ante*, § 1171), is their practical operation or form of application, *i. e.* the thing actually done

by the Court in using them, and not the motive or reason which makes it desirable to do so.

These Prophylactic Rules operate in one or both of two slightly different ways. The expedient which they apply serves either to *remove* the supposed danger by counteracting its influence in advance, or to furnish a means by which it can be *discovered* and other measures can be taken to counteract it at the trial. The Oath (*post*, § 1816) operates in the first way only, by setting against the witness' motives to falsify his fear of divine punishment and thus nullifying in advance the influence of the former. The Perjury-Penalty (*post*, 1831) operates in the same way, substituting the fear of temporal punishment for the fear of divine punishment. The Publicity rule (*post*, 1834) operates in both of the above ways; first, by subjecting the witness to the fear of the later consequences of public opinion and of a present exposure by interested bystanders, and, next, by providing the means of counteracting his possible falsities through the presence of those who can contradict him. The Sequestration of Witnesses (*post*, § 1838) operates partly in the first way, by preventing collusion, but chiefly in the second way, by furnishing a means of exposing that collusion if it has already taken place. The Notice of Evidence to the Opponent (*post*, § 1845) operates mainly in the second way, by furnishing the opponent, in advance of the trial, with knowledge of the proposed evidence, and by thus enabling him to prepare to expose false evidence; and there is also involved an effect of the first sort, in subjectively deterring the opponent from offering that which he knows can be shown false.

Sub-title I: OATH

§ 1815. **History.** The employment of oaths takes our history back to the origins of Germanic law and custom, where, as in all primitive civilizations, the appeal to the supernatural plays an important part in the administration of justice. But the use of oaths for witnesses appears as only a single and subordinate phase of the general resort to oaths. The early Germanic modes of trial consisted largely in a reference, in one form or another, to the 'judicium Dei.' By oaths formally taken one might even establish his claim or his plea beyond attack. It was not a matter of weighing the credibility of a sworn statement; the thought was rather that such an appeal could not be falsely made with impunity. To such an invocation a judicial and determinative effect was attributed by the religious notions of the time.[1]

The progress from this notion of the oath at large (which left its traces as

§ 1815. [1] Its history and practice in this earliest stage may be studied in the following works: 1892, Brunner, Deutsche Rechtsgeschichte, II, §§ 103 ff.; 1898, Thayer, Preliminary Treatise on Evidence, 24, and The Development of Trial by Jury, Harv. Law Rev., V, 45, 245, 295, 357; 1897, Pollock and Maitland, History of English Law, II, 598, 631; 1903, T. R. White, Oaths in Judicial Proceedings, American Law Register, New Series, XLII, 372; Bateson, Borough Customs, II, Introduction, pp. 32–34 (Selden Society's Pub., XXI, 1908); 1878, Lea, Superstition and Force, cc. 2 ff. In Tyler on Oaths (1834) the treatment is not modern. Junkin on Oaths has not been accessible.

late as the 1800s in some of the common modes of procedure) to the second stage of a test or security for credibility was slow and gradual.[2]

In the 1700s came the beginning of a third stage of development, in which legislation sanctioned what the community had come finally to believe, namely, that the inexorable requirement of an oath worked injustice, and that theological belief should not obstruct the admission of competent witnesses. In this stage the tendency has been either to make the application of the oath optional with the witness, or to abandon its essential feature by rendering theological belief unnecessary.[3]

It is with the second stage that the common law had to deal; the ideas of the first stage having practically disappeared entirely from the common law of the last three centuries. The changes constituting the third stage of abandonment or election have everywhere been made by legislation, and will be later considered (*post*, §§ 1827–1829).

The common-law questions are: (1) What was the *nature* and what the *form* of a testimonial oath? (2) What was the *capacity* necessary in order to be able to take the oath? (3) What testimony is required to be *subjected* to it?

A. The Oath at Common Law

1. Nature, Form, and Mode of Administration

§ 1816. **Theory of the Oath.** The theory of the oath, in modern common law, may be termed a subjective one, in contrast to the earlier one, which may be termed objective. The oath is not a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller.[1] But it is a method of reminding the witness strongly of the

[2] Remnants of the compurgatory oath of the party were found in the 1800s in the statutes of some Southern States dealing with proof of accounts (*ante*, § 1519). On the Continent, the 'serment décisoire' is still recognized in France and in Germany: 1899, Garsonnet, Traité de Procédure, III, § 878; 1901, Sydow v. Busch, Deutsche Civilprozessordnung, §§ 670, 1035; E. Bonnier, Traité théorique et pratique des preuves, 5th ed. by Larnaude, 1888, §§ 409–431; A. Esmein, History of Continental Criminal Procedure, pp. 57–61, 251–271 (1913, vol. V of the Modern Continental Legal History Series); Engelmann, History of Continental Civil Procedure, *passim* (1923, vol. VII of the above series, translated by Robert W. Millar); Pertile, Storia del diritto italiano (1902, Book III, Part II, Sect. I, ch. I, § 1; ch. II, § 2); Green's Encyclopedia of Scots Law (tit. "Oaths on Reference"). The decisory oath is also in force in Porto Rico: Rev. St. & C. 1911, §§ 4311, 4312.

An example of the survival of this conclusive purgatorial oath of the party is probably seen in the traditional rule, observed still by some Courts, for making the respondent's sworn answers *conclusive in contempt proceedings;* this rule has been repudiated by the Federal Supreme Court: 1906, U. S. *v.* Shipp, 203 U. S. 563, 27 Sup. 165 (interesting opinion by Holmes, J.); 1906, Municipal Court of Chicago, Memorandum of Cottrell, J. (privately printed; collecting the authorities); Editorial note in Harvard Law Rev., XXII, 379.

Wager of law had an influence in the history of parties' disqualification as witnesses (*ante*, § 575).

[3] A full examination of this period is made in Professor White's learned article, cited *supra*, note 1.

§ 1816. [1] 1628–1634, Coke, 1 Inst. 16, 4 Inst. 79; 1680, Hale, Pl. Cr., II, 279; Anon., 1684, 1 Vern. 263.

Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it. This essentially subjective nature of the security had by the 1800s come to be thoroughly appreciated and established. It would have been undoubted, had it not been for an occasional expression [2] which tended to obscure the real nature of the security.

This modern theory of the oath is set forth in the following passages:

1809, Per Curiam, in *Curtiss* v. *Strong*, 4 Day 56: "There can be no doubt but that the law intended that the fear of offending God should have its influence upon a witness to induce him to speak the truth. But no such influence can be expected from the man who disregards an oath. He is therefore excluded from being a witness."

1825, *Christopher North*, Noctes Ambrosianæ, XXII: *English Opium-Eater:* "Mr. Hogg, I never could see any sufficient reason why, in a civilized and Christian country, an oath should be administered even to a witness in a court of justice. Without any formula, Truth is felt to be sacred; nor will any words weigh." *The Ettrick Shepherd:* "You 're for upsettin' the haill frame o' ceevil society, sir, and bringing back on this kintra a' the horrors o' the French Revolution. The power o' an oath lies, no in the Reason, but in the Imagination. Reason tells that simple affirmation or denial should be eneuch atween man and man. But Reason canna bind; or, if she do, Passion snaps the chain. But Imagination can bind; for she calls on her Flamin' Ministers — the Fears; — they palsy-strike the arm that would disobey the pledged lips; — and thus oaths are as dreadfu' as Erebus and the gates o' hell."

1849, Mr. *W. M. Best*, Evidence, §§ 58, 161: "Some eminent authorities in our own law have used language calculated to convey the notion that oaths are necessarily imprecatory. . . . Imprecation is however no part of the essence of an oath, but is a mere adjunct of questionable propriety. . . . The object of the law in requiring an oath is to get at the truth by obtaining a hold on the conscience of the witness."

1877, Ashburn, J., in *Clinton* v. *State*, 33 Oh. St. 33: "The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that He will surely do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best insures the utterance of truth."

1882, Somerville, J., in *Blackburn* v. *State*, 71 Ala. 319: "[The object is] to purge the conscience, and impress the witness with a due sense of religious obligation, so as to secure the purity and truth of his testimony under the influence of its sanctity."

This being the function of the oath, it must, to fulfil its function, involve the calling to mind of some superhuman moral retribution which according to the witness' belief is calculated to induce him to refrain from false statements and thus to avoid the retribution. This fundamental idea determines logically the rules of law to be observed as to the nature of the belief, the form of the oath, and the capacity to take it. The sanction acts preventively by holding out the fear of certain retribution; its efficacy presupposes a belief in this retribution, and therefore a capacity to be influenced thereby; and the influence is to be exerted at the time when the witness is about to testify.

The supposed mental process may be concretely seen in the following

[2] 1786, R. v. White, 1 Leach Cr. L., 4th ed., 430 ("He has imprecated the divine vengeance upon his head if what he shall afterwards say is false"); 1820, Abbott, C. J., in The Queen's Case, 2 B. & B. 285 ("A person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth").

exhortation, by a judge whose reputation for brutality need not induce us to doubt the soundness of his law:

1685, JEFFERIES, C. J., in *Lady Lisle's Trial*, 11 How. St. Tr. 325 (threatening a refractory witness): "Now mark what I say to you, friend. . . . Thou hast a precious immortal soul, and there is nothing in the world equal to it in value. . . . Consider that the Great God of Heaven and Earth, before whose tribunal thou and we and all persons are to stand at the last day, will call thee to an account for the rescinding his truth, and take vengeance of thee for every falsehood thou tellest. I charge thee, therefore, as thou will answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth."

§ 1817. **Nature of the Belief.** (*a*) The nature of the belief which alone is susceptible to the influence of this stimulus to truth is on principle simple enough. It is a belief in a *superhuman* (and therefore inevitable) *retribution to follow* false swearing. The language of the judges in Omichund *v.* Barker [1] (in which the future Lord Mansfield was a leading counsel) has become classical:

1744, *Omichund* v. *Barker*, 1 Atk. 45. L. C. J. WILLES: "Though I am of opinion that infidels who believe a God and future rewards and punishments in the other world may be witnesses, yet I am as clearly of opinion that if they do not believe a God or future rewards and punishments, they ought not to be admitted as witnesses"; [in the other report:] "Nothing but the belief in a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath." L. C. J. LEE: "An oath is a religious sanction that mankind have universally established. . . . I agree that where the witness. . . . is of a religion, it is sufficient; for the foundation of all religion is the belief of a God." HARDWICKE, L. C. (approving a passage from Bishop Sanderson): "'Juramentum,' saith he, 'est affirmatio religiosa.' All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and the avenger of falsehood."

1852, MARTIN, B., in *Miller* v. *Salomons*, 7 Exch. 535: "The doctrine laid down [in Omichund *v.* Barker] was that the essence of an oath was an appeal to the Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood."

1824, WALWORTH, J., in *People* v. *Matteson*, 2 Cow. 433: "I apprehend the true test of the competency of a witness to be this: Has the obligation of an oath any binding tie upon his conscience? Or in other words, does the witness believe in the existence of a God who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world or in the world to come?"

1871, FREEMAN, J., in *Odell* v. *Koppee*, 5 Heisk. 91: "[The test of incompetency is] not to believe in a God or any responsibility for his conduct beyond such penalties as human laws may inflict." [2]

§ 1817. [1] A case of which Burke said in 1794 (Works, Little & Brown's ed., XI, 77): "one of the cases the most solemnly argued that has been in man's memory, with the aid of the greatest learning at the bar, and with the aid of all the learning on the bench, both bench and bar being then supplied with men of the first form." The case is also reported fully in Willes 538, and shortly in 1 Wils. 84.

[2] *Accord:* 1897, State *v.* Washington, 49 La. An. 1602, 22 So. 841 ("the appreciation of a Supreme Being to punish sin and reward virtue"); 1909, Pumphrey *v.* State, 84 Nebr. 636, 122 N. W. 19.

It might have been expected that difficulty would arise over the nature of the punishing power, — whether the belief should relate to a personal God or not; whether any notion of supernatural force was essential; and so on. But, strangely enough, no such doubt seems to have presented itself, and any more definite interpretation of the idea of God, or Supreme Being, than the above passages indicate has been ignored by the judges.

(*b*) A difficulty did arise, however, as to the place and time of punishment. Would a belief in a *punishment in the present life* suffice, or must the apprehension be of a punishment in a *future life?* The language of Lord Chief Justice Willes, in Omichund *v.* Barker, looked both ways, being differently reproduced by the different reports. On principle, no doubt could seem to exist; for a belief, if genuine, of a sure punishment, whether material or spiritual, in the present existence, would be no less efficacious a preventive of falsehood than a belief in a punishment after death. The very nearness of the former sort would be a more vivid and forceful reminder than the distant indefiniteness of the latter; moreover, the deliberate thought necessary to bring one to the former and less usual belief would perhaps indicate a mind more keenly susceptible to conscientious sanctions than that of a person professing the customary and perhaps only half-realized tenets of the unquestioning multitude.

After an interval of more or less uncertainty, the English Courts declared the distinction to be immaterial, — *i.e.* whether the punishment is believed to impend in a future existence or in the present one; and the American courts, particularly in later rulings, have generally reached the same result:[3]

1885, Brett, M. R., in *Attorney-General* v. *Bradlaugh*, L. R. 14 Q. B. D. 697: "There is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough."

1856, Pearson, J., in *Shaw* v. *Moore*, 4 Jones L. 26: "There is no ground for making a distinction between the fear of punishment by the Supreme Being in this world and the fear of punishment in the world to come. Both are based upon the sense of religion. . . .

[3] *Accord:* 1841, Blocker *v.* Burness, 2 Ala. 355; 1902, Beeson *v.* Moore, 132 Ala. 391, 31 So. 456; 1822, Noble *v.* People, 1 Ill. 56 (but here the witness believed in a future state of existence); 1856, Central M. T. R. Co. *v.* Rockafellow, 17 Ill. 553, *semble;* 1881, Searcy *v.* Miller, 57 Ia. 613, 10 N. W. 912; 1818, Hunscom *v.* Hunscom, 15 Mass. 184, *semble;* 1829, Com. *v.* Bachelder, Thacher's Cr. C. 198, Thacher, J.; 1914, State *v.* Pitt, 166 N. C. 268, 80 S. E. 1060; 1879, Free *v.* Buckingham, 59 N. H. 225; 1824, People *v.* Matteson, 2 Cow. N. Y. 433, Walworth, J.; 1840, Brock *v.* Milligan, 10 Oh. 121; 1877, Clinton *v.* State, 33 Oh. St. 33; 1841, Cubbison *v.* M'Creary, 2 W. & S. Pa. 263; 1856, Blair *v.* Seaver, 26 Pa. 276; 1846, Jones *v.* Harris, 1 Strobh. L. S. C. 160; 1852, Bennett *v.* State, 1 Swan Tenn. 411; 1841, Arnold *v.* Arnold's Estate, 13 Vt. 362.

Contra (declaring belief in future world punishment essential): *Can.* 1899, Bell *v.* Bell, 34 N. Br. 615, 624; *U. S.* Fed. 1827, Wakefield *v.* Ross, 5 Mason 19, Story, J., *semble;* 1828, Atwood *v.* Welton, 7 Conn. 70 (Peters, J., diss.); 1820, Jackson *v.* Gridley, 18 Johns. N. Y. 103, Spencer, C. J.; 1823, Butts *v.* Swartwood, 2 Cow. N. Y. 432, Sutherland, J.; 1829, M'Clure *v.* Tennessee, 1 Yerg. Tenn. 206, *semble;* 1871, Anderson *v.* Maberry, 2 Heisk. Tenn. 658, *semble.*

Uncertain: 1897, State *v.* Washington, 49 La. An. 1602, 22 So. 841.

The efficacy of the fear of punishment in either case depends upon the degree of belief as to the certainty of that punishment, so that there can be upon reason no ground for making a distinction. The rule of law which requires a religious sanction is satisfied in either case."

In addition to formulating this general definition, the Courts have also frequently been called on to rule upon the sufficiency of *sundry individual beliefs*, expressed in language more or less inexact and variant. These decisions merely apply the above principles to the facts of each case, and can hardly be treated as precedents.[4]

In regard to *children*, there has always been a proper inclination to avoid ascertaining the test-belief in formal and abstract language.[5]

§ 1818. **Form of the Oath.** Such being the essentials of the belief regarded as a security for trustworthiness, it follows that the *form* of the administration of the oath *is immaterial*, provided that it involves, in the mind of the witness, the bringing to bear of this apprehension of punishment. The oath's efficacy may depend upon both the general name and nature of the witness' faith and the formula of words or ceremonies which he considers as binding, *i. e.* as subjecting him to the risk of punishment. But it cannot matter what tenets of theological belief or what ecclesiastical organization he adheres to, provided the above essentials are fulfilled,[1] and it *cannot matter what words or ceremonies are used* in imposing the oath, provided he recognizes them as binding by his belief. Therefore *any form* suffices which actually binds the particular witness' conscience, even if it varies from the orthodox form.

This was long ago settled (after some earlier suggestions to the contrary, in favor of the exclusive efficacy of Christian forms) in the great case of Omichund *v.* Barker, and has never since been doubted:[2]

1744, *Omichund* v. *Barker*, 1 Ark. 45, L. C. J. WILLES: "The form of oaths varies in countries according to different laws and constitutions, but the substance is the same in all. . . . It would be absurd for him to swear according to the Christian oath, which he

[4] 1786, R. *v.* White, 1 Leach Cr. L., 4th ed., 430 (rejected); 1845, R. *v.* Serva, 2 C. & K. 56, Platt, B. (that the witness was a Christian, accepted); 1916, U. S. *v.* Miller, D. C. W. D. Wash., 236 Fed. 798 (a person believing that "all his punishment in this world, while he is here; I don't think it comes from God," held incompetent to take oath; opinion obscure); 1842, Scott *v.* Hooper, 14 Vt. 538 (belief in no God; rejected).

[5] The cases are placed *post*, § 1821.

§ 1818. [1] See Dr. William Paley's Principles of Moral and Political Philosophy, 1785, Book III, Part I, Chapter XVI, "Oaths."

[2] 1913, R. *v.* Curry, N. Sc. S. C., 12 D. L. R. 13 (perjury; the defendant had been sworn "by holding up his right hand without being asked whether he had any objection to being sworn in the regular way," and no Bible was used; held by two judges, that "a good and valid oath could only be taken by the witness touching or kissing the Book," that no statute had changed this, and that for a Christian the form actually used was not valid; Graham, E. J., in an elaborate opinion learnedly examines the history of oaths; it is a pity that neither of these opinions offers any words of criticism for the effete and nonsensical law which punishes judicial perjury only when it is committed according to narrow formalities; herein our law remains grossly and disgracefully inept for its purposes; Russell, J., dissenting, mildly terms the result "the extreme of drollery"; Drysdale, J., also dissenting, the Court was equally divided, and the perjurer was punished after all); 1809, Curtiss *v.* Strong, 4 Day 55; 1871, Odell *v.* Koppee, 5 Heisk. 91; 1841, Arnold *v.* Arnold's Estate, 13 Vt. 362. This doctrine is often re-declared by statute: *post*, § 1828.

does not believe, and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath." HARDWICKE, L. C.: "The next thing . . . is the form of the oath. It is laid down by all writers that the outward act is not essential to the oath. . . . It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."

1776, MANSFIELD, L. C. J., in *Atcheson* v. *Everitt*, Cowp. 389: "I there argued [in Omichund *v.* Barker], and the judges in delivering their opinions agreed, that upon the principles of the common law there is no particular form essential to an oath to be taken by a witness; but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most."

1852, ALDERSON, B., in *Miller* v. *Salomons*, 7 Exch. 535, 558, 615: "Omichund *v.* Barker has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing. Thus, a Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like." POLLOCK, C. B.: "It appears to me to have decided merely this, — that the common law of England agrees with the law of nations, that the form of an oath is to be accommodated to the religious persuasion which the swearer entertains."

1822, REYNOLDS, C. J., in *Gill* v. *Caldwell*, 1 Ill. 53: "The pure principle of the common law is that oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences."

The recognition of sundry unusual forms of oath as being suitable for peculiar variants of theological beliefs is copiously illustrated in judicial annals.[3]

The usual form of oath at common law in *criminal* cases was as follows:

1841, Mr. *Joseph Chitty*, Criminal Law, 4th Amer. ed., I, 616: "The form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in his hand, and, when that is done, to say to him, 'The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, So help you God!'; upon which the witness kisses the book."

[3] *Eng.* 1738, Fachina *v.* Sabine, 2 Stra. 1104 (Mahometan); 1764, R. *v.* Morgan, 1 Leach Cr. L., 4th ed., 54 (same); 1786, Mildrone's Case, 1 Leach Cr. L., 4th ed., 412 (local custom of holding up the hand, without touching or kissing the Book); 1788, Walker's Case, 1 Leach Cr. L. 498 (using the Old Testament, by the rite of the Kirk of Scotland); 1791, Mee *v.* Reid, Peake N. P. Cas. 23 (same form); 1824, Edmonds *v.* Rowe, Ry. & Moo. 77 (a Methodist, who preferred swearing on the Old Testament); 1842, R. *v.* Entrehman, C. & M. 248 (Chinese); *Can.* 1904, R. *v.* Lai Ping, 11 Br. C. 102 (oath to Chinese by burning a piece of paper on which the witness had written his name, etc., held to be the established practice); *U. S.* 1822, Gill *v.* Caldwell, 1 Ill. 53 (swearing without Bible and with uplifted hand); 1810, Vail *v.* Nickerson, 6 Mass. 262 (French); 1834, Com. *v.* Buzzell, 16 Pick. Mass. 156 (Roman Catholics, on the Holy Evangelists); 1905, State *v.* Davis, 186 Mo. 533, 85 S. W. 354 (Chinese); 1847, Newman *v.* Newman, 7 N. J. Eq. 26 (Hebrew); 1897, State *v.* Gin Pon, 16 Wash. 425, 47 Pac. 961 (blowing out a candle and praying to be snuffed out likewise if perjured; used for Chinese).

No special form of swearing is necessary, if according to the witness' religion none exists: 1860, R. *v.* Pah-Mah-Gay, 20 U. C. Q. B. 196.

It may be noted that, of the forms of oath hitherto usually reported to our Courts as appropriate for Chinese, namely, breaking the saucer or killing the cock, neither is in strictness a legal form of oath in that nation; in Chinese courts there is no oath; and the forms above noted are merely those employed in certain of the powerful secret societies: 1882, Giles, Historic China, 354, 397. No doubt the ceremonies may have some efficacy upon the witness (though obviously he must at least come from the district and the society where the particular form is used); but their true place in Chinese practice need not be misunderstood.

For early Filipino forms, see Judge N. Romualdez' article on "Prehistoric Legislation of the Philippines" (Phill. L. Journal, 1914, I. 149).

For specific forms *sanctioned by statute*, see *post*, § 1828.

The usual form of words in *civil* cases differed slightly:

"The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth; So help you God!" [4]

In most jurisdictions a modern statute (*post*, § 1828) prescribes the usual form.

For an *interpreter*, the form is adapted to his specific function.[5]

The form of oath is to be that one which binds the particular witness; in other words, its force is to be tested subjectively.[6] It would seem to follow that, if the witness recognizes *degrees of bindingness* in different forms, the highest efficacy should be secured by administering that which in his opinion is most binding: [7]

1820, Lord ERSKINE, in *Queen Caroline's Trial*, 2 Hans. Parl. Deb., 2d ser., 911: "When I was counsel in a cause tried in the court of King's Bench, an important witness called against me . . . stated that he would hold up his hand and would swear, but that he would not kiss the Book. . . . He gave a reason, which seemed to me a very absurd one, 'because it is written in the Revelations that the angel standing upon the sea held up his hand.' I said, 'This does not apply to your case; for, in the first place, you are no angel; secondly, you cannot tell how the angel would have sworn if he had stood on dry ground, as you do.' Lord Kenyon sent into the Common Pleas, to consult Lord Chief Justice Eyre, who expressed himself of opinion that, although the witness was not of any particular sect, yet if he stated (whether his reason was a good or a bad one) that there was a particular mode of swearing which was most consistent with his feelings of the obligation of an oath, this mode ought to be adopted. So the witness was sworn in his own fashion."

§ 1819. **Time of Administration and of Objection; Omission; Waiver of Error.** (*a*) The desire to save the time required to repeat the oath to each

[4] The following are earlier variants: 1660, Mass. Revised Laws and Liberties, "Presidents and Forms," p. 86 ("You swear by the Living God that the evidence you shall give to this Court concerning the cause now in question shall be the truth, the whole truth, and nothing but the truth, So help you God, etc."); 1571, Duke of Norfolk's Trial, before the House of Lords, Jardine's Crim. Tr., I, 176 (a witness was sworn in the following formula: "The evidence that *you* shall give before the peers and noblemen here assembled shall be the truth and the whole truth").

The orthodox custom of *kissing the Book* has come to be generally recognized as both repulsive and unsanitary; celluloid covers are sometimes provided (20 Montreal Legal News 274). But it should be clearly understood that the ceremony of kissing is for most persons a wholly unessential feature. England has by statute abolished the practice (Oaths Act, 1909, quoted *post*, § 1828).

[5] 1786, Ruston's Case, 1 Leach Cr. L., 4th ed., 408 (an interpreter for a deaf and dumb person was sworn "well and truly to interpret" to the witness "the questions and demands made by the Court to the said J. R. and his answers made to them"). *Statutes* prescribing a form for interpreters are noted *post*, § 1828.

[6] The witness therefore *must not be forced* to take an inapplicable form of oath after the propriety of another form appears; here his own declaration as to his belief and the binding form will usually suffice, but the trial judge should determine: 1912, R. *v.* Lee Tuck, 4 Alta. 388 (the witness, a Chinese, declared that he was a Christian and wished to be sworn upon the Bible; but the trial judge ordered the ceremony of burning the paper to be used; held, error, on the facts).

[7] *Accord:* 1903, Birmingham R. & E. Co. *v.* Mason, 137 Ala. 342, 34 So. 207 (question on cross-examination whether a Jewish witness considered an oath binding when taken without the hat on, allowed).

Contra: 1820, The Queen's Case, 2 B. & B. 284; s. c., Queen Caroline's Trial, Linn's ed., I, 142 (holding irrelevant a question whether he considered another form more binding); 1911, State *v.* Browning, 153 Ia. 37, 133 N. W. 330 (Jew). And this rule has been repudiated by statute in many jurisdictions: *post*, § 1828.

Compare the doctrines of § 1820, par. *c*, *post*.

witness has led to a custom of administering it *at once to all the witnesses* in a group at the opening of the testimony.[1] This practice is not in violation of principle. But it is objectionable; first, because its hurried practicality lessens the solemnity of the occasion; secondly, because the influence upon the witness' mind has somewhat diminished by the time he is called to the stand; and thirdly, because it leads to errors and confusion. There is much skepticism in modern times about the effect and value of the oath. No doubt the abatement of theological interest, and the rationalization of popular theology, have tended to diminish the subjective potency of the oath (*post*, § 1827). But whatever value it still has is frittered away in modern times by the irreverent and perfunctory administration of it. Before its abandonment is considered, we should at least seek to restore its efficacy to the maximum degree nowadays conceivable, by reforming the practice of administering it. Judges are censurable for having allowed clerks of courts to fall into the thoughtless, trivial, and degenerate modern practice.

(*b*) This modern practice does not abate the ordinary rule that the failure to make an objection to competency at the proper time is a waiver (*ante*, §§ 18, 486). Hence, if a witness who has not taken the oath is by inadvertence put on the stand, the opponent's *subsequent* discovery and *objection* should not avail; [2]

§ 1819. [1] 1897, Com. *v.* Jongrass, 181 Pa. 172, 37 Atl. 207 (the clerk need not repeat the oath each time that a foreign witness is called; here the interpreter administered it). The following ruling is of course correct: 1897, State *v.* Thompson, 141 Mo. 408, 42 S. W. 949 (administration to an expert witness before his extrajudicial study of the material is not necessary).

[2] CANADA: 1882, Richards *v.* Hugh, 51 L. J. Q. B. 361 (witness deposing on affirmation, without oath; a party not objecting at the time, held to have waived).

IRELAND: 1852, Birch *v.* Somerville, 2 Ir. C. L. R. 243 (a peer having testified without a legal oath, the party calling him and not objecting was held to have waived).

UNITED STATES: 1888, Smith *v.* State, 81 Ga. 480, 8 S. E. 187; 1905, Rhodes *v.* State, 122 Ga. 568, 50 S. E. 361 (after verdict); 1905, Southern R. Co. *v.* Ellis, 123 Ga. 614, 51 S. E. 594; 1859, Slauter *v.* Whitelock, 12 Ind. 338 ("If it was known before the jury retired, the mistake could have been corrected by swearing the witness and rehearing the evidence"; failure to make a motion on discovery "would amount to an acquiescence"); 1904, State *v.* Smith, 124 Ia. 334, 100 N. W. 40, *semble* (a failure to object to an inadvertent omission of the oath is a waiver); 1833, Cady *v.* Norton, 14 Pick. Mass. 236 ("The defendant, knowing that the witness had not been sworn, before the cause went to the jury, without giving notice thereof to the Court or taking an exception, has waived his right to except, after a verdict"); 1889, State *v.* Hope, 100 Mo. 347, 13 S. W. 490 ("An oath may be waived . . . either expressly, or by going forward in the matter without inquiry or objection"); 1906, People *v.* McAdoo, 184 N. Y. 304, 77 N. E. 260 (police-commissioner's hearing, upon three charges; a witness having inadvertently failed to take oath on a recall to speak to one of the charges, the defendant's knowing failure to object, and his cross-examination of the witness, held a waiver); 1909, U. S. *v.* Perez, 13 P. I. 287; 1912, People *v.* Coll, 18 P. R. 355, 364; 1895, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046 (after counsel has cross-examined, "having thus gone forward without inquiry or objection," there is an implied waiver); 1893, Goldsmith *v.* State, 32 Tex. Cr. 112, 22 S. W. 405 (on a motion for new trial it is too late to raise the question).

Contra: 1904, Lo Toon *v.* Terr., 16 Haw. 351, 356, *semble* (but here the presumption of an interpreter having been duly sworn was applied); 1829, Hawks *v.* Baker, 6 Greenl. Me. 72 (omission not discovered till after verdict; held, no waiver, and a new trial granted; leading opinion, by Mellen, C. J.; its fallacy lies in the assumption that in administering the oath "the counsel for the opposite party has no concern with the transaction"; this is contrary to the fundamental principle, *ante*, § 18, by which the opponent must watch for all violations of the rules of evidence if he cares to take advantage of them); 1898, Barr *v.* State, — Miss. —, 23 So. 628 (following the preceding case).

nor should the opponent, after a witness has taken the oath, be allowed to *inquire as to its binding effect* upon him.[3]

(*c*) Whether the *omission of the oath*, without fault of the objector, is an error material to require a new trial (*ante*, § 21) is a larger question.[4]

2. Capacity to take the Oath

§ 1820. **Mode of ascertaining Capacity.** The process of ascertaining the capacity of taking the oath raises two classes of questions: first, the sources to be consulted in ascertaining the capacity; next, the rules, if any, which determine for certain kinds of persons the existence of such capacity.

In ascertaining the *capacity to take the oath*, the inquiry resolves itself into this objective: Does this proffered witness hold the necessary belief?

(*a*) In the first place, this inquiry falls to the *party objecting*, *i.e.* the burden is on the objector to show the witness' lack of the necessary belief.[1] The examination of a *child*, however, is made usually by the *judge;* though either counsel has of course the right to supplement it by questions tending to bring out whatever may be in favor of his contention.[2]

[3] *Accord: Can.* 1915, Shajoo Ram *v.* Rex, 26 D. L. R. 267, Can. Sup. (perjury by a Hindoo when testifying through an interpreter; failure to object that the form of oath was not binding, held not to exonerate him); *U. S.* 1905, Curtis *v.* Lehmann, 115 La. 40, 38 So. 887 (where the oath is taken in the usual form without objection, that form will be presumed to be the binding one); 1921, Brown *v.* State, — Nebr. —, 185 N. W. 344 (Mexican; alleged error, pointed out on appeal, that the most binding form was not used, held unavailable for one who did not at the time of the testimony object specifically or interrogate the witness for the purpose); 1916, State *v.* Riddell, 38 R. I. 506, 96 Atl. 531 (fraudulent arson; the witness' answers showed him to be an atheist; but as defendant did not object nor examine him until after he was sworn, nor after disclosure of his atheism ask for an affirmation under G. L. 1909, c. 32, § 10, the objection was held ineffectual). *Contra:* 1820, The Queen's Case, 2 B. & B. 284; s. c., Queen Caroline's Trial, Linn's ed., I. 142. This ruling has apparently been repudiated by the English statute of 1888: *post*, § 1828. *Not decided:* 1922, Foy *v.* Com., — Va. —, 111 S. E. 269.

A different rule should perhaps obtain where the *idiocy* of one sworn is *discovered after* his testimony is begun; here he may be examined and rejected if incapable: 1866, R. *v.* Whitehead, L. R. 1 C. C. R. 38.

[4] *Eng.* 1824, R. *v.* Kiddy, 4 Dowl. & R. 734 ("Swearing him after his examination is taken is a very incorrect mode of proceeding"; *U. S.* 1920, Sears *v.* U. S., 1st C. C. A., 264 Fed. 257 (failure to administer the oath to two witnesses, held immaterial, partly because of counsel's knowledge of it, and partly because of defendant's admission of the facts testified to); 1903, Langford *v.* U. S., 4 Ind. T. 567, 76 S. W. 111 (citing the precedents); 1898, People *v.* Board of Police Com'rs, 155 N. Y. 40, 49 N. E. 257 (hearing before a police commissioner; the commissioner intentionally omitted to swear any of the witnesses, erroneously believing that his power to act needed not to be based on sworn testimony; the omission was held to invalidate the decision); 1918, People *v.* Fisher, 223 N. Y. 459, 119 N. E. 845 (oath of official interpreter at a former hearing, presumed); 1872, Thompson *v.* State, 37 Tex. 121; 1900, Ogden *v.* State, — Tex. Cr. —, 58 S. W. 1018; 1901, State *v.* Williams, 49 W. Va. 220, 38 S. E. 495; 1916, Karakutza *v.* State, 163 Wis. 293, 156 N. W. 965 (murder).

Swearing the witness, and causing him to *re-testify before close of testimony*, cures the irregularity: 1905, Southern R. Co. *v.* Ellis, 123 Ga. 614, 51 S. E. 594 (on being sworn, to cure the error, the witness may merely state that what he had testified was true); 1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283.

§ 1820. [1] 1892, Gray *v.* Macallum, 2 Br. C. 104 (the trial judge held not bound to examine the witness; the objecting counsel must do so); 1854, Com. *v.* Smith, 2 Gray Mass. 516, Shaw, C. J.; 1909, Pumphrey *v.* State, 84 Nebr. 636, 122 N. W. 19 (a Japanese).

Compare §§ 486, 497, *ante*.

[2] 1921, People *v.* Delaney, — Cal. App. —, 199 Pac. 896 (lewd conduct with a child: held that in the particular case the trial court should have allowed 'voir dire' examination by defendant's counsel; whether counsel has an absolute right, not decided; careful opinion by Finlayson, P. J.).

It has been ruled that the judge may not

(*b*) As to the evidence to be used in showing this, more or less doubt has prevailed. There are three possible methods, — either exclusively the witness' *own answers* to interrogations; or, exclusively *other persons' testimony* about his former expressions of opinion; or, *both* of these.

The *first* of these methods, for adults, seems to have been generally discredited; *i. e.* the witness' own answers are not conclusive as to his belief.[3]

The *second* seems to be a purely American doctrine,[4] growing up early in the 1800s, at a time when, on the one hand, the rules of witness-privilege were not clearly settled, and, on the other, the emphasis of current thought was upon freedom of faith and action, supposed in this country to be peculiarly guaranteed. A tendency thus arose to extend the privilege of witnesses to interrogations about theological belief. The argument was also put forward that it was illogical to receive testimony, even on 'voir dire,' from a person whose very capacity to respect the sanctions of all testimony was in issue.[5]

It is enough to say, of the privilege argument, that no such privilege was known to the orthodox common law, and that it is inconsistent to hold that an infidel is presumably a falsifier, and, in the next moment, to accept a possible falsifier provided he can succeed in concealing his moral deficiency; as to the logical argument, it must be taken to be in theory unanswerable, but practically of little force in view of the artificial nature of the general principle.

It thus became a widely accepted doctrine that the proffered witness could not be interrogated as to his theological belief, and that the reliance must be upon other sources of evidence, *i. e.* upon testimony from those who were familiar with his expressed opinions. There was, however, no agreement as

examine the child *in private:* 1841, State *v.* Morea, 2 Ala. 278. But this seems unsound, provided counsel are allowed to attend; for in the public court-room it may be impossible to prevent the child from being overcome by fear or diffidence; *accord:* 1880, McGuire *v.* People, 44 Mich. 286, 287, 6 N. W. 669, and the statutes for juvenile courts, cited *post*, § 1835.

In Hughes *v.* R. Co., 65 Mich. 10, 31 N. W. 603 (1887), it was said that the trial judge *must himself* make the examination, and not leave it to counsel; but this seems unsound.

In Young *v.* State, 122 Ga. 725, 50 S. E. 946 (1905), it is held that the judge *cannot decline* to examine a child, on demand by the party objecting; but this seems a pedantic interference with the trial Court's discretion; *contra:* 1909, Simmons *v.* State, 158 Ala. 8, 48 So. 606 (the trial judge's discretion controls, as to conducting the examination himself, or letting counsel conduct it).

Should the examination take place necessarily on 'voir dire'? Yes, of course: 1907, People *v.* Rivera, 12 P. R. 386, 391 (murder; child of five years, required to be examined before testifying, not afterwards).

For statutes as to examination of a child, see *post*, § 1828; also *ante*, § 508, in regard to examination to learn general testimonial capacity. For *instructing* the child, see *post*, § 1821.

[3] 1820, The Queen's Case, 2 B. & B. 284.

[4] 1861, Maden *v.* Catanach, 7 H. & N. 360 (interrogation held proper; Bramwell, B.: "The invariable practice is to take the evidence of the witness himself"; here on the 'voir dire').

[5] 1861, Bramwell, B., in Maden *v.* Catanach, 7 H. & N. 360 ("By hypothesis, he is made incredible by a statement which is not to be believed"); 1846, Scott, J., in Perry *v.* Com., 3 Gratt. 632, 642 ("If, as the objection supposes, he is incapable of telling the truth, he will deny his opinions, and what is the test worth? If he is honest enough to subject himself to the disability rather than tell a lie, why exclude him?"). Compare Bentham's arguments, *post*, 1827.

to the reasons for this. Some Courts preferred the argument from privilege.[6] Others, and the majority, preferred the argument from logic.[7] Still others laid down the rule with a mention of both reasons or of neither.[8]

A number of Courts, and these mostly of later date, have abandoned the doctrine entirely, and employ the *third* method [9] (the natural and convenient one) of consulting both sources — the witness' own answers, as well as the testimony of others.

(*c*) Finally, when such questioning is allowed, it must of course not extend beyond the queries *necessary to elicit the essentials* of belief; additional inquiries directed to bringing out minor points of belief are not to be allowed.[10] There is here again, perhaps, something of the notion of privilege, and yet on the ground of irrelevancy such evidence should equally be rejected.

§ 1821. **Capacity of Children.** (*a*) It was formerly thought that for children there was an *age* below which the incapacity to take the oath was beyond doubt and was to be regarded as always wanting.[1] This notion was probably due to the unwarranted transfer into the law of Evidence of some principles of substantive law, by which certain ages, especially that of seven years, were thought to mark the beginnings of capacity for various purposes. But this view was finally repudiated in a case of much deliberation:

> 1779, *R.* v. *Brasier*, East, Pleas of the Crown, I, 443: "An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath. For there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received."

[6] 1914, Fernandez *v.* State, 16 Ariz. 269, 144 Pac. 640; 1829, Com. *v.* Bachelder, Thacher's Cr. C. 197; 1854, Com. *v.* Smith, 2 Gray Mass. 516; 1879, Free *v.* Buckingham, 59 N. H. 225, *semble*.

For a further examination of the *privilege* not to disclose *theological belief*, see *post*, § 2213. For theological belief as *discrediting* a witness, see *ante*, § 935. For statutes on the present point, see *post*, § 1828.

[7] 1809, Curtiss *v.* Strong, 4 Day Conn. 55; 1810, Swift, Evidence, 49; 1836, Com. *v.* Wyman, Thacher's Cr. C. Mass. 436; 1841, Smith *v.* York, 18 Me. 159; 1820, Jackson *v.* Gridley, 18 Johns. N. Y. 220; 1841, Cubbison *v.* M'Creary 2 W. & S. Pa. 263.

[8] 1828, Atwood *v.* Welton, 7 Conn. 70; 1881, Searcy *v.* Miller, 57 Ia. 613, 10 N. W. 912; 1819, Den *v.* Vancleve, 2 South. N. J. 653.

[9] 1856, Central M. T. R. Co. *v.* Rockafellow, 17 Ill. 553 (but the extrinsic testimony is better); 1890, Hronek *v.* People, 134 Ill. 139, 150, 24 N. E. 861 (not decided; but "the better practice" forbids questioning the witness); 1879, Arnd *v.* Amling, 53 Md. 197, *semble;* 1858, Harrel *v.* State, 38 Tenn. 126; 1871, Odell *v.* Koppee, 5 Heisk. 91, and the cases in the next note.

[10] 1790, R. *v.* Taylor, Peake, N. P. Cas. 11; 1820, The Queen's Case, 2 B. & B. 284; 1796, Beardsley *v.* Foot, 2 Root 399; 1871, Donkle *v.* Kohn, 44 Ga. 271, *semble;* 1879, Free *v.* Buckingham, 59 N. H. 225.

Compare the doctrine of § 1818, note 7, *ante*, and of § 935, *ante* (discrediting by theological belief); also § 2213, *post* (privilege as to theological belief).

For the mode of *examining a child*, see the next section.

§ 1821. [1] 1628, Co. Litt. 6 b, 247 b; 1680, Hale, Pl. Cr., I, 302, 634, II, 279, 283; 1767, Buller, Nisi Prius, 293; 1704, Young *v.* Slaughterford, 11 Mod. 228; 1726, R. *v.* Travers, 1 Stra. 700.

Since this decision, the natural rule has been clearly accepted, that there is *no specific age* below which capacity will always be deemed wanting.[2] The capacity of the infant, therefore, depending upon the circumstances of its understanding as exhibited in each instance, is to be determined by the trial Court.[3] In a few jurisdictions, however, a trace of the old notion is still preserved in a rule that children under a certain age — usually ten or fourteen years — will not be assumed to be capable, so that their capacity must first be shown.[4]

(*b*) The *nature of the child's belief* is in theory to be judged by the *same theological tests* ordinarily applicable (*ante*, § 1817). For children, however, it is customary to employ simpler language and more concrete tests than are usual with adults. The practice traditionally followed is illustrated in the following colloquies:[5]

[2] *Accord:* 1769, Blackstone, Comm., IV, 214; 1840, R. *v.* Perkins, 2 Moo. Cr. C. 139, per Alderson, B.; s. c., 9 C. & P. 395, 399, per Parke, B.; *U. S.* 1889, McGuff *v.* State, 88 Ala. 150, 7 So. 35; 1867, Flanagin *v.* State, 25 Ark. 96; 1869, Warner *v.* State, 25 Ark. 447; 1858, People *v.* Bernal, 10 Cal. 66; 1902, Featherstone *v.* People, 194 Ill. 325, 62 N. E. 684 ("The requirement is not one of age, but of understanding"); 1889, State *v.* Severson, 78 Ia. 653, 43 N. W. 533, *semble;* 1876, State *v.* Richie, 28 La. An. 327; 1891, Davis *v.* State, 31 Nebr. 247, 47 N. W. 855; 1905, Freasier *v.* State, — Tex. Cr. —, 84 S. W. 360; and the cases in the ensuing notes usually declare the rule also.

For the same principle, as applied to a child's *capacity irrespective of the oath*, see *ante*, § 507.

[3] Statutes have often attempted to deal with the question; see *post*, § 1828, where the statutes expressly dealing with the oath are collected, and *ante*, § 488, where those defining the general capacity of children are placed. With the following decisions illustrating the general principle should be compared those cited *infra*, note 5, dealing with the sufficiency of the child's belief, and *ante*, § 507, dealing with the child's general capacity as a witness: *Ala.* 1874, Wade *v.* State, 50 Ala. 164; 1903, White *v.* State, 136 Ala. 58, 34 So. 177 (child under twelve, excluded on the facts); 1904, Landthrift *v.* State, 140 Ala. 114, 37 So. 287 (rape; a child of eleven held qualified on the facts); *Ariz.* 1898, Donnelley *v.* Terr., 5 Ariz. 291, 52 Pac. 368 (child of nearly seven held incompetent on the facts); *Fla.* 1912, Lassiter *v.* State, 64 Fla. 337, 59 So. 894; *Ga.* 1873, Peterson *v.* State, 47 Ga. 524, 527 (trial Court's discretion in admitting a child of seven or eight, held proper); 1878, Johnson *v.* State, 61 Ga. 35 (similar); 1885, Johnson *v.* State, 76 Ga. 76 (child of ten, held incompetent on the facts); 1887, Moore *v.* State, 79 Ga. 498, 5 S. E. 51; 1898, Mills *v.* State, 104 Ga. 502, 30 S. E. 778 (child of ten, held competent on the facts); 1900, Miller *v.* State, 109 Ga. 512, 35 S. E. 152 (child of eight, excluded on the facts); *Ia.* 1889, State *v.* Severson, 78 Ia. 653, 655, 43 N. W. 533 (child of twelve, held competent on the facts); 1917, State *v.* Yates, 181 Ia. 539, 164 N. W. 798; *Mass.* 1852, Com. *v.* Hills, 10 Cush. 532; 1861, Com. *v.* Mullins, 2 All. 296; 1886, Com. *v.* Lynes, 142 Mass. 580, 8 N. E. 408; 1896, Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121 (child of five years and nine months, admitted); *N. H.* 1876, Day *v.* Day, 56 N. H. 316; *N. J.* 1907, State *v.* Labriola, 75 N. J. L. 483, 67 Atl. 386; *N. Y.* 1917, Nowakowski *v.* New York & N. S. Tr. Co., 220 N. Y. 51, 114 N. E. 1042 (child of eight to nine years, excluded); *N. C.* 1878, State *v.* Edwards, 79 N. C. 650; *Pa.* 1898, Com. *v.* Wilson, 186 Pa. 1, 40 Atl. 283 (boy of thirteen, presumed competent).

[4] Besides the following decisions, compare also the statutes *post*, § 1828, and those collected *ante*, § 507, which deal with the child's general capacity, but sometimes cover also the present subject: 1907, R. *v.* Armstrong, 15 Ont. L. R. 47 (child of twelve); 1867, Flanagin *v.* State, 25 Ark. 96; 1858, People *v.* Bernal, 10 Cal. 66; 1876, State *v.* Richie, 28 La. An. 327.

[5] In the following cases will be found other examples: ENGLAND: 1861, R. *v.* Holmes, 2 F. & F. 788 (the child said its prayers and believed it was bad to tell a lie; accepted).

UNITED STATES: *Federal:* 1920, Oliver *v.* U. S., 4th C. C. A., 267 Fed. 544 (a child of thirteen need not be able to define the meaning of an oath); *Alabama:* 1879, Carter *v.* State, 63 Ala. 53; 1882, Beason *v.* State, 72 Ala. 191; 1895, Grimes *v.* State, 105 Ala. 86, 17 So. 184 ("if she knew where she would go when she died, if she swore a lie and did bad," etc.; accepted); 1896, Williams *v.* State, 109 Ala. 64, 19 So. 530 (a statement that she would "go to hell"; admitted); 1906, Jones *v.* State, 145 Ala. 51, 40 So. 947 (a girl who had been to

1684, *Braddon's Trial*, 9 How. St. Tr. 1127, 1148. *Attorney-General:* "What age are you of?" *Witness:* "I am thirteen, my lord." *A.-G.:* "Do you know what an oath is?" *W.:* "No." *L. C. J. Jefferies:* "Suppose you should tell a lie; do you know who is the father of liars?" *W.:* "Yes." *L. C. J.:* "Who is it?" *W.:* "The devil." *L. C. J.:* "And if you should tell a lie, do you know what will become of you?" *W.:* "Yes." *L. C. J.:* "If you should call God to witness to a lie, what would become of you then?" *W.:* "I should go to hell-fire." *L. C. J.:* "That is a terrible thing;" and the child was admitted.[6]

1857, *Spollen's Trial*, p. 44 (Ire.). Lucy Spollen, the defendant's daughter, ten years old, was produced and questioned by C. J. LEFROY: "Do you know the nature of an oath?" "Yes, sir." "And the consequence of taking a false oath?" "Yes, sir." "What punishment?" "Going to hell." "Were you ever taught to say that?" "No, sir." "How did you learn it?" "I was told, sir." "When were you told?" "When I first took an oath." "And were you never told until you first took an oath?" "No, sir." "And when did you first take an oath?" "After my father was arrested." "Would you ever know that yourself unless you were told by the person who administered the oath?" "No, sir." Then, upon questions by the counsel for the prosecution, she told of regular church-going and of daily prayers, and further said: "It is a bad thing to tell a lie. I learned that people who told lies would be punished by God in the next world. I never knew before what an oath was, but I knew that God would punish people who told lies." Mr. J. MONAGHAN: "Administer the oath."

1885, SIMPSON, C. J., in *State* v. *Belton*, 24 S. C. 185, 186, 188: "This witness was a [colored] boy about twelve years of age; he seems to have been a boy of at least ordinary intelligence; and, although he had learned from his mother, since dead, the Lord's Prayer when he was five years old, and according to his statement had repeated it every day since, yet he said he had never heard of a God or the devil or of heaven or hell or of the Bible, church and Sunday school, and thought that, if she lied, God could put her in jail, excluded); 1906, Gordon *v.* State, 147 Ala. 42, 41 So. 847 (child of twelve, admitted, though she did not "know the nature of a judicial oath"); *Arkansas:* 1910, Hart *v.* State, — Ark. —, 124 S. W. 781 ("Do you know what you mean when you hold up your hand and take the oath?" "Yes, sir; tell the truth." "If you was not to tell the truth, what would be done to you?" "I don't know, sir." "Would it be wrong?" "Yes, sir"; this was held not to have enough theology in it; McCulloch, J., diss., justly terms the decision "a backward step"); *Georgia:* 1875, McMath *v.* State, 55 Ga. 307; 1906, Young *v.* State, 125 Ga. 584, 54 S. E. 82 (a child of twelve, who did not know what is the "sanctity of an oath," but otherwise was theologically fit, admitted). 1911, Berry *v.* State, 9 Ga. App. 868, 72 S. E. 433 (sensible opinion by Russell, J.); *Illinois:* 1873, Draper *v.* Draper, 68 Ill. 17 (the witness would go to hell if she did not tell the truth; accepted); *Indiana:* 1858, Blackwell *v.* State, 11 Ind. 196; 1869, Weldon *v.* State, 32 Ind. 82; *Iowa:* 1907, State *v.* Meyer, 135 Ia. 507, 113 N. W. 322; 1917, State *v.* Yates, 181 Ia. 539, 164 N. W. 798; *Massachusetts:* 1921, Com. *v.* Tatisos, — Mass. —, 130 N. E. 495 ("The ultimate test cannot be the amount of moral training and religious understanding, but must depend upon the existence of understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment. The child need not and probably will not understand this in all its fullness; it is unnecessary for her to do so."); *Oklahoma:* 1915, Walker *v.* State, 12 Okl. Cr. 179, 153 Pac. 209; *Pennsylvania:* 1905, Com. *v.* Furman, 211 Pa. 549, 60 Atl. 1089 (good example of a liberal ruling); *Tennessee:* 1871, Vincent *v.* State, 3 Heisk. 121 ("if she swore to a lie, she would go to the bad world"; accepted); *Texas:* 1873, Davidson *v.* State, 39 Tex. 129; 1920, Williams *v.* State, 88 Tex. Cr. 214, 225 S. W. 173; 1922, Rodriguez *v.* State, — Tex. Cr. —, 236 S. W. 726; *Washington:* 1917, State *v.* Smith, 95 Wash. 271, 163 Pac. 759 (girl of eight); *West Virginia:* 1893, State *v.* Michael, 37 W.Va. 568, 16 S. E. 803.

The following case seems to stand alone: 1894, Williams *v.* U. S., 3 D. C. App. 335, 340 ("A child that has an adequate sense of the impropriety of falsehood does understand the nature of an oath in the proper sense of the term, even though she may not know the meaning of the word 'oath' and may never have heard that word used").

Compare the cases cited *post*, § 1828, dealing with the effect of constitutional removal of theological incapacity.

[6] Other early examples: 1679, Atkin's Trial, 7 How. St. Tr. 231, 241; 1680, Giles' Trial, 7 How. St. Tr. 1129, 1147.

and that 'he had never heard and had no idea what became of the good or of the bad after death.' He said, however, that he had heard it said that the bad man caught those who lied, cursed, etc., and upon being examined he repeated the Lord's Prayer. The presiding judge, in his report of the case as to this matter, states as follows: 'As for the colored youth, he manifested an unusual sense of the efficacy of prayer and the future torments by the bad man awaiting those who speak falsely, though his answers as to a God, heaven, etc., were singular.' . . . Did he believe in a God and his providence? He stated to the Court he had never heard of a God or of a heaven or of a hell or of a devil. How then could he have a belief in the existence and providence of a Great Being, of whom up to the time when he was offered as a witness he had never heard even? Such a belief under such circumstances seems impossible. In the absence of such a belief he was incompetent, under the authorities cited."

1900, Fort, J., in *State* v. *Cracker*, 65 N. J. L. 410, 47 Atl. 643: "The boy under examination, to ascertain whether he should be sworn, was asked and answered the following questions: 'Q. Do you know what it is to take an oath? A. No, sir. Q. Do you go to Sunday school? A. Yes, sir. Q. Do you know what will happen to you if you do not tell the truth? A. Yes, sir. Q. What will happen? A. It is a sin. Q. Have you any idea as to the punishment which will follow if you do not tell the truth? A. Yes, sir. Q. What? A. They will put me in the reform school. Q. After you die, do you know what happens? Do you expect to live forever? A. No, sir. Q. After you have done living, what becomes of you then? A. Then I shall go to Heaven. Q. Suppose you have not been entirely good; what becomes of you then? A. Then I shall go to Hell.' It seems to me that this youth, judged by what is ordinarily considered orthodox, had a comprehensive idea of the rewards and punishments incident to honest and dishonest living, and in addition knew clearly what punishment the law inflicted for perjury, viz. confinement in the reform school."

But it may be doubted whether this analysis of a child's belief, which sometimes becomes a far from edifying proceeding, is ever of any real profit. A child's inclination to tell the truth or the opposite is apt to be more a matter of instinct and of previous training and surroundings than of a conscious reflection upon the prospects of a future state. It has already been suggested (*ante*, § 509, *post*, § 1828) that, for any purpose whatever, the preferable course is to accept a child's story for what it seems to be worth, as ascertainable upon testifying, and not to impose any fixed limitations. For the same reasons, any theological tests, especially when applied in crude form by laymen in court, must be more or less inappropriate.[7] So long as they continue to be employed, the practice will exhibit from time to time an artificiality and incongruousness meriting the celebrated satire of that novelist whose pen so often chastised the law's abuses:

1852, *Charles Dickens*, Bleak House, Chap. XI; Little Jo, the crossing-sweeper, is called to the coroner's inquest, to say what he knows of the dead lodger, and these are his an-

[7] How coarse and irreverent the spectacle of examination into infantile theology often becomes is seen in the following current anecdote (New York letter to the Chicago Tribune, June 7, 1901): "Emma Gaukof, eight years old, of West Hoboken, answered readily in court at Jersey City to-day a question that has puzzled the profoundest theologians. Questioning her understanding of the value of an oath, Lawyer Max Salinger asked what became of little girls who did not tell the truth. 'Why, sir, they go to hell,' replied Emma. 'And where is hell?' questioned the lawyer. 'I don't think the counsellor could answer that question himself,' remarked Judge John A. Blair. 'I know where it is, sir,' said the girl. 'It's up somewhere near Schuetzen Park, Union Hill. I know it's there, — 'cause I heard a man say once that he was going there to raise it!' The child was permitted to give testimony."

swers: "'Name, Jo. Nothing else that he knows on . . . No father, no mother, no friends. Never been to school. What's "home"? Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him after he's dead if he tells a lie to the gentlemen here, but believes it'll be something wery bad to punish him, and serve him right, and so he'll tell the truth.' 'This won't do, gentlemen!' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. 'Out of the question,' says the coroner. 'You have heard the boy. "Can't exactly say," won't do, you know. We can't take *that*, in a court of justice, gentlemen! It's terrible depravity! Put the boy aside.' Boy put aside; to the great edification of the audience; especially of Little Swills, the comic vocalist."

An example of the sound and sensible way to ascertain a child's capacity is found in the following judicial anecdote:

1908, Hon. E. J. SHERMAN, Justice of the Superior Court of Massachusetts, in "Recollections of a Long Life," p. 160: "A case was being tried before me against the Boston Elevated Railroad, and a little boy, perhaps seven years old, was called as a witness. The counsel for the defence objected to his being used as a witness, as he was too young to understand and appreciate an oath, and asked the court to examine him and ascertain that fact. The boy looked frightened and as if he was about to cry. He took the witness stand close beside the bench. His name was John ——. I said to him in a low voice, as if talking confidentially, 'John, do you play base-ball?' He replied, 'Yes, Judge.' He was a little short fellow, and I said, 'I guess you play short stop.' 'You are right, Judge,' replied Johnnie.

"By this time all disposition to be frightened or cry had disappeared. I then asked him about his school, etc., and he showed unusual brightness. I remarked, 'This boy will do, he is all right.'

"He made one of the best witnesses called in the case. If I had said to him in a stern voice, 'Do you understand the nature of an oath? What will happen to you if you tell a lie?' as is sometimes asked in like cases, the boy would have broken down in a crying spell."

(*c*) But suppose that the youthful witness is shown upon examination not to have *at the time* the required belief. Does exclusion follow necessarily and absolutely? Or is there some way of putting the child's mind into a condition fit to be properly influenced by the oath. If there were any real vitality in the test, if an indispensable element were the active and ingrained sense of responsibility to superhuman power, then it might well be said that the witness was absolutely incompetent. Only a long course of training could produce the proper appreciation of the oath? But if the test is after all only a formal one, if practically the necessary belief is only an acceptance, on authority, of certain theological propositions unprovable by personal knowledge, then it is perhaps not inconsistent to allow its content to be explained and accepted in five minutes or some longer time proportionate to the child's intelligence; in other words, *the judge may instruct* the child what this belief is, and the child may accept it on this authority and be as well prepared to take the oath on the spot as it would have been after receiving the same dictation from parental authority.

This, then, has been a point of grave judicial discussion — whether the

child-witness may become competent to take the oath after an interlocutory instruction by the court. It is settled, in this country at least, and notwithstanding a protest by Mr. Justice Patteson,[8] that a previous general religious education is not necessary, and that the judge may then and there impart theological instruction and produce the necessary belief; [9] and that for this purpose a temporary postponement of the trial is allowable.[10] Of course, if between the intervals of successive trials, a child at first incompetent grows in intelligence and receives proper parental instruction, no objection can be made to its taking the oath at the second trial.[11]

§ 1822. **Capacity of Persons Mentally Defective or Deranged.** There was in earlier legal annals some difference of opinion whether persons of weak or unsound mind were capable of taking the oath.[1] But in modern times the more rational principle has been accepted (as in the case of infants) that it must depend upon the mental condition of each witness: [2]

1851, CAMPBELL, L. C. J., in *R.* v. *Hill*, 2 Den. & P. C. C. 254: "It is for the judge to say whether the insane person has the sense of religion in his mind and whether he understands the nature and sanction of an oath. . . . A man may in one sense be 'non compos mentis,' and yet be aware of the nature and sanction of an oath."

The upholders of the propriety of judicial instruction of infants do not seem willing to admit that this principle is applicable to adults who are mentally capable though theologically uninformed; [3] yet the same process seems here also available.

§ 1823. **Distinction between Oath-Capacity and Testimonial Qualifications.** The distinction is clear between the capacity to take an oath and the moral qualifications to testify.

The oath is a special test or security, superadded and applied to persons assumed to be otherwise qualified as witnesses; and because the oath cannot have efficacy without the existence of a certain belief, the lack of that belief

[8] 1838, R. *v.* Williams, 7 C. & P. 320.

[9] *Ante* 1795, Anon., 1 Leach Cr. L., 4th ed., 430, *n.* (by all the judges); 1849, R. *v.* Baylis, 4 Cox Cr. 23; *U. S.* 1879, Carter *v.* State, 63 Ala. 53; 1900, State *v.* Todd, 110 Ia. 631, 82 N. W. 322 (instruction by the county attorney); 1886, Com. *v.* Lynes, 142 Mass. 578, 8 N. E. 408 ("provided she was of sufficient age and intellect to receive instruction"); 1921, Com. *v.* Tatisos, — Mass. —, 130 N. E. 495 (instructed by a priest); 1876, Day *v.* Day, 56 N. H. 316; 1839, People *v.* McNair, 21 Wend. N. Y. 608; 1878, State *v.* Edwards, 79 N. C. 650; 1904, North Texas C. Co. *v.* Bostick, 98 Tex. 239, 83 S. W. 12 (a boy nine years old was instructed by counsel; but this the Court disparaged; moreover, "it ought to appear that the answers . . . are not a parrot-like repetition of what he has been told to say").

[10] Anon., *supra;* Day *v.* Day, *supra;* 1846, R. *v.* Nicholas, 2 Cox Cr. 136, 2 C. & K. 246 (postponement refused, where the child was six years old; "where the defect is the result of immaturity," postponement is generally not desirable; otherwise, perhaps, for a child nine or ten years old).

[11] 1883, Kelly *v.* State, 75 Ala. 21.

§ 1822. [1] Comyn's Digest, "Testmoigne," A, 1; 1628, Coke upon Littleton, 6 *b;* 1801, Peake, Evidence, 122.

[2] *Accord:* Holcomb *v.* Holcomb, 28 Conn. 179; 1909, People *v.* Washor, 196 N. Y. 164, 89 N. E. 441 (trial Court's discretion).

Compare the learning as to *mental capacity* of such persons (irrespective of the oath), *ante*, §§ 492–501.

[3] 1824, 1 Moo. Cr. C. 86 (doubted); 1866, R. *v.* Whitehead, L. R. 1 C. C. R. 33 (an idiot; adjournment refused, but the question left undecided).

Distinguish the following: 1903, Texas & P. R. Co. *v.* Reid, — Tex. Civ. App. —, 74 S. W. 99 (a deaf witness, who could not hear the words of the oath, admitted).

excludes the witness. So long, therefore, as the oath remained an indispensable requirement, there was a natural tendency to confuse the theological belief which it presupposes and that moral sense which underlies all truth-telling. With the dispensation of the oath, however, the latter element is forced into prominence, and the question arises whether a sense of moral responsibility is not necessary, as an ordinary testimonial qualification, especially likely to be wanting in infants and lunatics. This requirement has already been considered in its place, under the head of Testimonial Qualifications (*ante*, §§ 495, 506).

It should here be noticed that the earlier rulings, before the statutory dispensation of oaths (*post*, § 1828), are often ambiguous, in that it is often difficult to be certain whether they mean to deal solely with oath-capacity or to prescribe some independent moral qualifications. The statutes, moreover, which concern the latter topic (collected *ante*, § 488) are also sometimes in terms concerned with the oath-capacity.

3. Persons subjected to the Oath

§ 1824. **Oath required for all Testimony delivered in Court; Interpreters.** The oath, as a special additional security for credibility, belongs by its very nature to that class of securities which are capable of being applied only to testimonial statements made in court or before some judicial officer.

(1) It follows, then, that wherever the law sanctions the reception of testimonial statements not made in court or before a judicial officer, *i.e.* wherever *exceptions to the Hearsay rule* (*ante*, § 1420) are allowed, the oath is dispensed with. Thus, the oath is required for statements made in depositions, but not for entries made in the regular course of business nor for statements of family history, nor for the other excepted classes of statements; except that for statutory affidavits (*ante*, § 1710) the very nature of the Exception presupposes an oath. That in these excepted classes an oath was not required has never been doubted. Yet, inconsistently, the theological capacity to take an oath has sometimes been predicated as a requirement, so that, if its lack appeared, the statement would be excluded. This notion is found in a few rulings dealing with dying declarations (*ante*, § 1443). It is of course unsound; for, if the oath is not required, the capacity to take it must be immaterial; the efficacy of the oath consists in the formal reminder of retribution at the moment of testifying, and not in the mere capacity to appreciate a reminder which is in fact not made; and not even the soundest believer could testify in court without the formality of the reminder.

(2) Conversely, for *all testimonial statements made in court* the oath is a requisite. Here comes into consideration the distinction between circumstantial and testimonial evidence (*ante*, § 25). This distinction is of considerable consequence in the application of the Hearsay rule, and the principles already examined (*ante*, § 1790) will suffice equally for the present situation. Instances, however, are comparatively rare. It is enough to note that unless

there is offered, in some form or other, a testimonial statement (*i.e.* an assertion used for inferring the truth of the fact asserted) made in court, the oath is not an applicable requirement.[1]

It may be added that an *interpreter*,[2] and also a *shower* at a view,[3] is a kind of witness, and must be sworn.

§ 1825. **Children, Peers, Accused Persons.** (1) There was a time when it was doubted whether an *infant* was in all cases to be rejected when incapable of understanding the oath. But in R. *v.* Brasier [1] it was settled that there should be no exception.[2] Enlightened modern statutes (*post*, § 1828) have in a few jurisdictions relaxed this rule.

(2) It was at one time disputed whether a *peer* of the realm could not give his testimony in a court of justice with the same formality only as in the House of Lords, namely, by testifying "upon his honor"; but here too the oath-requirement was held inexorable.[3]

(3) Originally, an *accused person* was allowed to produce no witnesses; later, he might produce them, but they testified without oath; and finally they were allowed to be sworn.[4] Here, however, the exception, in the transition stage, was regarded not as an exception in his favor, but as the refusal of a privilege. So, also, in many jurisdictions, the concession of an accused person's right to testify was preceded by a stage in which he was allowed to make a "statement," but not under oath. Here, again, the practice was looked upon as a refusal to concede the ordinary guarantee of credibility, and not as a favored exemption.[5]

§ **1824.** [1] 1886, Osborne *v.* Detroit, 32 Fed. 36 (to show the extent of the plaintiff's paralysis, a doctor who had not been sworn thrust a pin into her body in the jury's presence during the trial; held, not improper because performed by a person unsworn; "so far as we are aware, the law recognizes no oaths to be administered upon the witness-stand except the ordinary oath to tell the truth or to interpret correctly from one language to another"; this seems erroneous; the doctor helped in bringing out the evidence, and should have been treated as a witness); Com. *v.* Scott, 123 Mass. 224, 234 (defendant, not being sworn, was not allowed to utter words for the purpose of testing a witness who spoke to the identity of his voice).

[2] 1848, R. *v.* Douglas, 13 Q. B. 42, 59, 66, 72, *semble* (the standing oath of an official interpreter for depositions suffices); 1911, People *v.* Kelly, 17 Cal. App. 447, 120 Pac. 46 (under P. C. §§ 686, 869, the transcript of a deposition taken through an interpreter need not show that the interpreter was sworn); 1908, People *v.* Western, 236 Ill. 104, 86 N. E. 188 (the oath need not be administered during the questions necessary for ascertaining his competency; but the jury should be removed at that time, on demand); 1809, Amory *v.* Fellowes, 5 Mass. 219, 226 (oath of an interpreter to a deposition must expressly appear to have been taken); and cases cited, *ante*, § 1810.

For the *form of oath*, see *ante*, § 1818.

[3] *Ante*, § 1802, where the form of oath is given.

§ **1825.** [1] 1779, R. *v.* Brasier, East, Cr. Pl., I, 443, quoted *ante*, § 1821.

[2] *Accord:* 1921, State *v.* Brewer, — Del. —, 114 Atl. 604 (child of eight); 1861, Com. *v.* Mullins, 2 All. Mass. 296; 1845, People *v.* McGee, 1 Den. N. Y. 21 (including idiots); 1874, Smith *v.* State, 41 Tex. 352 (idiot); 1907, Hodd *v.* Tacoma, 45 Wash. 436, 88 Pac. 842. Compare the statutes cited *post*, § 1828.

[3] 1701, R. *v.* Preston, 1 Salk. 278; 1711, Meers *v.* Stoughton, 1 P. Wms. 146; 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 323, 470; 1725, L. C. Macclesfield's Trial, 16 How. St. Tr. 767, 1252.

Whether the King could without oath be a witness was also argued. In L. C. J. Campbell's Lives of the Chancellors, III, 215, 4th ed., the learned author expresses an opinion against the exemption of the King, and examines the precedents. But as the King was privileged not to testify (*post*, § 2370), and if he did testify could probably do so by certificate (*ante*, § 1674), the question remained an academic one.

[4] 1702, St. 1 Anne, c. 9, § 3, and cases cited *ante*, § 575.

[5] Cases cited *ante*, § 579.

B. The Oath under Statutes

§ 1827. **Abolition or Optional Dispensation of the Oath; Policy thereof.** There is a clear distinction between the total abolition of the oath-security and the making it optional with the witness. The two rest on very different grounds of policy.

(1) It can hardly be denied that the moral efficacy of the oath has long since ceased to be what it once was. In the days when the 'judicium Dei' was no empty phrase, and the community believed in the serious possibility of the manifestation of truth by the Divine hand in striking down the perjurer before the multitude, the oath's efficacy was at its highest. It may be assumed that no appreciable part of the community now regard the oath in this light. What may be claimed for it to-day is merely the effect presupposed in the common-law theory already examined (*ante*, § 1816), namely, a solemn reminder of inevitable Divine punishment at some future time. This, then, being the mode of its efficacy, is there any reason why it should be abolished as a security designed to increase the probabilities of truthfulness?

It is impossible, in this place, to examine all that has been advanced for and against this proposal to abolish totally the oath-formality.[1] Observe, however, that the question is not whether persons not having a certain theological belief shall be excluded as witnesses; nor whether it shall be made optional for persons of various sorts; but *whether persons having the sufficient belief shall be required to take it.* Eliminating all argument as to the injustice of exclusion, by assuming that persons of atheistic belief, and persons having scruples of conscience, and infants, are allowed to dispense with it, there remains this class of persons who would be unquestionably capable of taking it; and the inquiry therefore reduces itself to this, Whether for such persons it should be required or abandoned? The determination of this is seen to depend upon three considerations: (a) Is this class of persons an inappreciable portion of the community? (b) Are they actually so little influenced by the solemnity that it adds nothing appreciably to their determination to speak truly? (c) Are there any extrinsic disadvantages overcoming the testimonial benefit thus secured? If either of these three questions can be answered in the affirmative, then, and only then, should the oath be abolished.

§ 1827. [1] The arguments on both sides may be found in the following places: 1823, Bentham, Rationale of Judicial Evidence, b. II, c. VI, Bowring's ed., vol. 6, p. 308; 1823, Livingston, Introductory Report to the Code of Criminal Procedure, Works, ed. 1872, I, 399; 1828, Whately, Elements of Rhetoric, ed. 1858, pt. I, c. II, § 4; 1849, Denman, Speech in Parliament, Hans. Parl. Deb. June 22, vol. 106, 3d ser.; 1857, Reilly, Judicial Oaths, Jurid. Soc. Pap., I, 435; 1864, Maurice, Ought any person to be excluded from giving evidence on the ground of religious unbelief? Jurid. Soc. Pap., III, 95; 1868, T. C. Anstey, Judicial Oaths as Administered to Heathen Witnesses, Jurid. Soc. Pap., III, 371; 1860, Appleton, Evidence, c. XVI, 262; 1882, Thomas, Oaths in Legal Proceedings, North Amer. Rev. No. 310, Sept. 1882; 1895, M. D. Chalmers, Petty Perjury, Law Quarterly Rev., XI, 219; 1903, T. R. White, Oaths in Judicial Proceedings, American Law Register, N. s., XLII, 372 (the best consideration of the subject).

Now the answers to these questions must depend entirely upon experience; and experience must be chiefly a matter of locality, since the local conditions in all three respects may vary widely. No doubt in different localities the answers to these questions would differ. Yet, on the whole, it seems to be true that the answers have thus far been in the negative upon all three points. The class of persons whose belief makes them capable of being influenced by the prospect implied in an oath is decidedly the immense mass of the community. Furthermore, in practice these persons are apparently, for the most part, actually influenced for the better, in their mental operations on the witness-stand, by the imposition of the oath;[2] and, where experience looks to the contrary, the result has been due to the deplorable irreverence and triviality shown in the administration of the formality (*ante*, § 1819) rather than to the inherent inefficacy of the oath itself. Finally, there seem to be no real disadvantages (in spite of Mr. Bentham's ingenious suggestions) outweighing the gain in truthfulness produced by the oath.

There appears, therefore, in the present conditions, looked at as a whole, no reason to call for the abandonment of the oath for those persons whose belief makes them susceptible to its sanction.

(2) But the question of its invariable requirement from *all persons whatever* is an entirely different one. The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness wherever such a stimulus is feasible. Until the 1800s, however, this advanced notion of its purpose had not been reached. The requirement was inexorable; with the result that three classes of persons were absolutely excluded from testifying, namely, adults having an atheistical belief, infants lacking any theological belief, and adults having the requisite belief but forbidden by conscience[3] to take an oath. It came gradually to be perceived that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses, was not only an abuse of its true principle, but also a practical injustice to suitors who needed such testimony. This injustice is clearly enough seen to-day; but its perception was naturally slow in coming, so long as in the community at large the profession of belief in deism or atheism was associated closely with the notion of moral defects. This association hardly passed away in any degree until the middle of the 1800s, — an era marked, at the same time, by the indirectly related movements of literary romanticism, political liberalism, industrial invention, legal free speech, and theological free thought.

[2] "Uncle Rastus, testifying in a certain lawsuit, refused to be sworn. 'Ah will affirm,' he said. 'But, Uncle Rastus,' said the judge, 'how is this? Last week, in the Calhoun case, you swore readily enough.' 'Yo' honah,' said Uncle Rastus solemnly, 'Ah was mo' suah o' mah facks in dat case dan Ah is in dis one.'" (Minneapolis Journal).

The occasional inefficiency of the oath recalls the anecdote of Lord Eldon (in Twiss' Life, I, 133): "There were, when I was not much advanced in professional business, two attorneys, father and son, of the name of Priddle. In point of character they stood low. Old Lord Mansfield used to say to the father, 'Don't read your affidavit, Mr. Priddle; we give *the same* credit to what you say as we do to what you swear.'"

[3] According to the Scripture, "Swear not at all" (Matthew v, 34).

The first statutory efforts in England to relieve from this injustice are found at the end of the first quarter of the 1800s. To-day, practically everywhere, the injustice is remedied. Arguments are no longer needed to prove the impropriety of the old inexorable rule.[4] It is conceded that the oath should be dispensed with for appropriate classes of witnesses. We are to-day at the end of that stage of the question.[5] What is to be noted (but is sometimes forgotten [6]) is that the demand for the dispensation of the oath for witnesses for whom it is inappropriate differs entirely from the proposal to abolish the oath for persons theologically capable of taking it. One is a question of the past; the other is a question for the future.

§ 1828. **Same: State of the Law in the Various Jurisdictions.** In almost every jurisdiction there has been some legislation dealing with the subject of oaths.[1] The provisions sometimes are inconsistent, sometimes duplicate

[4] See the authorities cited *ante*, note 1, especially Bentham.

[5] The history of the legislation is fully given in Professor White's article, cited *supra*, note 1.

[6] It was long ago emphasized in the Second Report of the Common Law Practice Commissioners of 1853, at p. 14.

§ 1828. [1] The earliest statute making optional the oath is said by Professor Thayer to have been that of Rhode Island Colony (1 R. I. Col. Records, 181, cited in Thayer's Cases on Evid., 2d ed., 1067), "that a solemn profession or testimony . . . shall be accounted throughout the whole colony as of full force as an oath; and because many in giving engagement or testimony are usually more overawed with the penalty which is known than with the Most High who is little known in the kingdoms of men," the penalties of perjury are attached. This provision, however, does not appear in the volume of statutes now in force.

The modern legislation is as follows; but with these enactments should be compared those quoted *ante*, § 488, which are sometimes very broad:

England: 1833, St. 3 & 4 Wm. IV, c. 49 ("every person of the persuasion called Quakers and of Moravians" may affirm instead of swearing); c. 82 ("every person for the time being belonging to the said sect called Separatists" may affirm; the form being prescribed); 1838, St. 1 & 2 Vict. c. 77 (St. 1833 extended to persons formerly belonging to those sects); 1838, St. 1 & 2 Vict. c. 105 (whenever an oath may be administered, it is binding "provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding"); 1861, St. 24 & 25 Vict. c. 66 (a person who "shall refuse, or be unwilling, from conscientious motives, to be sworn," may make affirmation); 1861, Maden *v.* Catanach, 7 H. & N. 360 ("defect of religious faith," held to be still "an absolute bar" to competency, for persons in general); 1869, St. 32 & 33 Vict. c. 68, § 4 (a witness objecting to take an oath, or objected to as incapable thereof, "shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience," make affirmation); 1885, St. 48 & 49 Vict. c. 69, § 4 (on a charge of carnally knowing a girl under the age of consent, where the girl concerned "or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or justices, understand the nature of an oath," the child's testimony may be received without oath, if the Court believes that it "is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth"); 1887, R. *v.* Pruntey, 16 Cox Cr. 344 (preceding statute applied); 1888, R. *v.* Wealand, 16 Cox Cr. 402 (applied to admit the statement upon a conviction under § 9 of the statute); 1888, St. 51 & 52 Vict. c. 46, § 1 ("Every person, upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation"); § 3 (where an oath has been duly administered the fact the witness "had no religious belief" shall not affect its validity); § 5 (if any witness desires to "swear with uplifted hand," after the Scotch manner, he may do so); 1889, St. 52 & 53 Vict. c. 44, § 8 (similar to St. 1885, c. 69; oath unnecessary, if the child "does not understand the nature of an oath"); 1889, St. 52 & 53 Vict. c. 44, § 8 (similar to St. 48 & 49 Vict. c. 69, § 4, for offences of cruelty to children; oath unnecessary, if the child "does not understand the nature of an oath"); 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to St. 52 & 53 Vict. c. 44, *supra*, for offences under this act); St. 1908, 8 Edw. VII, c. 67, § 30 (Children Act; like St. 48 & 49 Vict. c. 69, § 4, for offences against children; corroboration required; see *post*, § 2066); St. 1909, 9 Edw. VII, c. 39, Oaths Act, § 2 ("Any oath may be adminis-

tered and taken in the form and manner following: The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words: 'I swear by Almighty God that . . . ' followed by the words prescribed by law. The officer shall [unless the person about to take the oath voluntarily objects thereto or is physically incapable of so taking the oath] administer the oath in the form and manner aforesaid without question"; provided that a person neither Christian nor Jew may take oath in any other now lawful manner); St. 1914, 4 & 5 Geo. V, c. 58, Criminal Justice Administration, § 28 (Children Act 1908 made applicable to "offences not mentioned in that section").

CANADA: *Dominion:* 1843, Eng. St. 6 & 7 Vict. 22 (reciting the doubt whether colonial laws, making admissible the testimony of various uncivilized tribes "being destitute of the knowledge of God and of any religious belief," would be void for repugnancy to English law, it provides that every such law shall be valid, subject to the usual royal veto rights); R. S. 1906, Crim. C. § 1003 (rape under age, and indecent assault; same); c. 145, Evid. Act, § 14 ("if a person called or desiring to give evidence objects on grounds of conscientious scruples to take an oath, or is objected to as incompetent to take an oath," he may affirm); § 15 ("If a person required or desiring to make an affidavit or deposition . . . refuses or is unwilling to be sworn, on grounds of conscientious scruples," the judge shall permit him to affirm); § 16 ("in any legal proceeding" the rule of Eng. St. 1885, c. 69, § 4, is adopted);
Alberta: St. 1910, 2d sess., c. 3, Evidence Act, § 14 (par. (1), like Eng. St. 1838, c. 105; par. (2), like Eng. St. 1888, c. 46, § 3); § 15 (like Dom. Evid. Act, § 14, but adding the proviso "and if the presiding judge . . . is satisfied that such person objects to be sworn from conscientious scruples, or on the ground of his religious belief or on the ground that the taking of an oath would have no binding effect on his conscience"); § 16 (like Eng. St. 1888, c. 46, § 5); § 17 (like Dom. Evid. Act, § 16);
British Columbia: Rev. St. 1911, c. 78, § 24 (like Eng. St. 1869, c. 68, § 4); § 6 (like Dom. Evid. Act, § 16); § 12 (affirmation may be received of any "aboriginal native, or native of mixed blood, of the continent of North America or the islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God and of any fixed and clear belief in religion or in a future state of rewards and punishments"); §§ 13–15 (provided that in preliminary inquiries the substance of such person's testimony shall be reduced to writing and signed by a mark, etc.); c. 78, § 25 (if any person desires to swear "with uplifted hand" as in Scotland, the oath shall be so administered "without further question"); c. 78, § 63 (if a person making affidavit or deposition is unwilling "from alleged conscientious motives, to be sworn," an affirmation may be made); c. 107, § 100 (contributing to a child's delinquency; like c. 78, § 6);
Manitoba: Rev. St. 1913, c. 57, § 25 (like Dom. Evid. Act, § 16); §§ 37, 38 (like Dom. Evid. Act, §§ 15, 16); c. 46, Rule 511 (witness on commission may be examined "on oath, affirmation, or otherwise, in accordance with his religion");
New Brunswick: Consol. St. 1903, c. 127, § 14 (if a person "shall refuse or be unwilling from alleged conscientious motives to be sworn," and the judge is "satisfied of the sincerity of such objection," he may permit an affirmation; the affirmation reciting that "the taking of an oath is according to my religious belief unlawful");
Newfoundland: Consol. St. 1916, c. 102, § 2 (a person, "upon objecting to be sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief," may affirm);
Nova Scotia: Rev. St. 1900, c. 163, § 46 (like Eng. St. 1888, c. 46, § 1);
Ontario: Rev. St. 1914, c. 76, § 14 (an oath binds if administered "in such form and with such ceremonies as such person may declare to be binding"); § 15 (when a person objects to take oath or is objected to as incompetent to do so, the judge may permit an "affirmation and declaration" if satisfied that such person objects "from conscientious scruples, or on the ground of religious belief or on the ground that the taking of an oath would have no binding effect on his conscience"); Rules of Court 1914, R. 282 (witnesses under a commission "shall be examined on oath, affirmation, or otherwise in accordance with the law of the country where the commission is executed"); St. 1916, c. 24, § 11 (amending Evidence Act, § 14, by inserting after "administered" the words "while such witness or deponent holds in his hand a copy of the Old or New Testament, or");
Prince Edward Island: St. 1889, c. 9, § 13 (like N. Br. Consol. St. c. 127, § 14);
Saskatchewan: Rev. St. 1920, c. 44, Evidence Act, § 36 (like Dom. Evid. Act, § 16); § 40 (like Dom. Evid. Act, § 15);
Yukon: Consol. Ord. 1914, c. 30, § 44 (like Eng. St. 51 & 52 Vict. c. 46, § 1).

UNITED STATES: *Federal:* Code § 3074 (Navy Articles of War 41; oath or affirmation); § 7033 (interstate commerce commission; witness shall be "cautioned and sworn [or affirmed, if he so request] to testify the whole truth"; a singular mutilation of the oath); § 8803 (bankruptcy; "any person conscientiously opposed to taking an oath may in lieu thereof affirm"); Rev. St. 1878, § 4117, Code 1919, § 6325 (in consular courts, the U. S. minister may prescribe "the form of oaths for Christian witnesses and the mode of examining all other witnesses"); St. 1911, Mar. 3, Code § 1139

(oath or affirmation of witnesses in the Court of Claims); St. 1916, Aug. 29, c. 418, § 3 (Articles of War; amending Rev. St. § 1342; Art. 19 prescribes the form of oath for witnesses and interpreters in courts-martial); St. 1920, June 4, ch. V, subchapter II, Articles of War, Art. 19 (oaths of witness and interpreter); Equity Rules 1912, No. 78 ("Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him").

Alabama: Code 1909, § 3959 ("The sanction of an oath, or affirmation equivalent thereto, is necessary to the reception of any oral testimony. The court may frame such affirmation according to the religious faith of the witness").

Alaska: Comp. L. 1913, §§ 1526, 1527 (like Or. Laws 1920, §§ 891, 892); § 1528 (substantially like Or. Laws 1920, § 731).

Arizona: Const. 1910, Art. II, § 7 ("The mode of administering an oath, or affirmation, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered"); § 12 (" . . . nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony"); Rev. St. 1913, Civ. C. § 1676 ("no person shall be incompetent to testify on account of his religious opinions, or for want of any religious belief"); § 1688 ("When an infant, or a person apparently of weak intellect, is produced as a witness, the Court may examine him to ascertain his capacity, and whether he understands the nature and obligation of an oath, and the Court may inquire of any person what peculiar ceremonies he deems most obligatory in taking an oath"); § 1763 ("Oaths and affirmations must be administered in such a manner as will best awaken the conscience and impress the mind of the one taking the same").

Arkansas: Const. 1874, Art. II, § 26 ("Nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations"); Art. XIX, § 1 ("No person who denies the being of a God shall . . . be competent to testify as a witness in any court"); Dig. 1919, § 4177 ("Every person who shall declare that he has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his solemn declaration or affirmation in the following form: 'You do solemnly and truly declare and affirm'"); § 4175 ("The usual mode" "by the person who swears laying his hand on and kissing the Gospels," to be observed except as otherwise provided); § 4176 ("Every person who shall desire it shall be permitted to swear with an uplifted hand in the following form, 'You do solemnly swear etc.'"); § 4178 ("Whenever the Court or magistrate . . . shall be satisfied that such person has any peculiar mode of swearing, connected with or in addition to either of the forms mentioned, which is more solemn and obligatory in the opinion of such person, the Court or magistrate may adopt such mode of swearing"); § 4179 ("Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of the modes heretofore prescribed").

California: Const. 1879, Art. I, § 4 ("No person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief"); C. C. P. 1872, § 1879 ("persons on account of their opinions on matters of religious belief" are not to be excluded); § 2094, as amended in 1874 (the form of administration may be: "You do solemnly swear [or affirm, as the case may be] that the evidence you shall give in this issue [or matter], pending between —— and ——, shall be truth, the whole truth, and nothing but the truth, so help you God"); 1903, People v. Parent, 139 Cal. 600, 73 Pac. 423 (§ 2094 was amended in 1901 by the Commissioners, by striking out the concluding clause, "So help you God"; though the amendment was unconstitutional, the omission of the above clause is not material); § 2095 ("Whenever the Court . . . is satisfied that he [the witness] has a peculiar mode of swearing, connected with or in addition to the usual form of administration, which in his opinion is more solemn or obligatory, the Court may in its discretion adopt that mode"); § 2096 ("When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such"); § 2097 ("any person who desires it may at his option, instead of taking an oath, make his solemn affirmation or declaration").

Colorado: Const. 1876, Art. II, § 4 ("No person shall be denied any civil or political right, privilege, or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Comp. L. 1921, § 6561 ("No person shall be deemed incompetent to testify as a witness on account of his or her opinion in relation to the Supreme Being or a future state of rewards and punishments; nor shall any witness be questioned in regard to his or her religious opinions"); § 6555 (like Cal. C. C. P. § 1879); § 7900 (in all cases where an oath is to be administered, "and such person shall have conscientious scruples against taking an oath, he or she shall be permitted, instead of taking an oath, to make his or her solemn affirmation or declaration"); § 7958 (on any occasion of administering an oath, "it shall be lawful . . . to administer it in the following form, to wit, The person swearing shall, with his or her

hand uplifted, swear 'by the ever living God'") § 7102 ("The solemn affirmation of witnesses shall be deemed sufficient"); § 8779 (form of oath at coroner's inquest); C. C. P. § 371 ("A witness who desires it may, at his option instead of taking an oath, make his solemn affirmation, or declaration").

Columbia (District): Code 1919, § 1056 ("All evidence shall be given under oath according to the forms of the common law, except that where a witness has conscientious scruples against taking an oath, he may in lieu thereof solemnly, sincerely, and truly declare and affirm").

Connecticut: Gen. St. 1918, § 5705 ("No person shall be disqualified as a witness in any action by reason of . . . his disbelief in the existence of a Supreme Being"); § 2201 (form of oath for interpreter, prescribed); § 2198 ("The ceremony to be used, by persons to whom an oath is administered, shall be the holding up of the right hand; but when any person, by reason of scruples of conscience, shall object to such ceremony; or when the court, or authority by whom the oath is to be administered, shall have reason to believe that any other ceremony will be more binding upon the conscience of the witness, such court or authority may permit or require any other ceremony to be used"); § 2199 ("When any person, required to take an oath, shall, from scruples of conscience, decline to take it in the usual form, or when the court is satisfied that any person called as a witness does not believe in the existence of a Supreme Being, a solemn affirmation may be administered to him in the form of the oath prescribed, except that instead of the word 'swear' the words 'solemnly and sincerely affirm and declare' shall be used; and instead of the words 'so help you God' the words 'upon the pains and penalties of perjury' shall be used"); § 2201 ("The forms of oaths shall be as follows, to wit: . . . For witnesses: You solemnly swear that the evidence you shall give concerning the case now in question, shall be the truth, the whole truth, and nothing but the truth; so help you God. For an interpreter in a criminal case: You solemnly swear that you will make a true interpretation of the information (or indictment) upon which the accused stands charged, in the language which he understands and can speak, and of all questions which may be propounded to him under the direction of the court; and that you will make a like true interpretation of his plea to said information (or indictment) and of his answers to such questions to this court (or to this court and jury), in the English language, according to your best skill and judgment; so help you God. For an interpreter in court: You solemnly swear that you will make a true interpretation of the oath to be administered to the witness, in the language which he understands and can speak, and of all questions which may be propounded to him under the direction of the court; and that you will make a like true interpretation of his answers to such questions to this court (or to this court and jury), in the English language, according to your best skill and judgment; so help you God").

Delaware: Rev. St. 1915, § 4245 ("The usual oath in this State shall be by swearing upon the Holy Evangels of Almighty God; the person to whom it is administered laying his right hand upon the Book and kissing it"); § 4247 ("A person may be permitted to swear with the uplifted hand; that is to say, he shall lift up his right hand and swear by the ever-living God, the searcher of all hearts, that, etc., and at the end of the oath shall say, 'As I shall answer to God at the Great Day'"); § 4248 ("A person conscientiously scrupulous of taking an oath may be permitted, instead of swearing, solemnly, sincerely, and truly to declare and affirm to the truth of the matters to be testified"); § 4249 ("A person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion, if there be any such"); § 4246 ("Whenever the oath shall be administered by swearing upon the Holy Evangels of Almighty God," the witness "shall not be required to kiss the book, if he does not desire to do so, but may in lieu thereof swear with his hand upon the book").

Florida: Const. 1887, Declaration of Rights, § 5 ("No person shall be rendered incompetent as a witness on account of his religious opinions"); Rev. Gen. St. 1919, § 3399, par. 14 (for an oath before justices in civil cases, "if the witnesses desire, the word 'affirm' may be used instead of 'swear,' and the words 'so help you God' may be omitted"); § 2703 ("Atheists, agnostics, and all persons who do not believe in the doctrine of future rewards and punishments, shall be permitted to testify in any of the Courts in this State; they may solemnly affirm instead of taking an oath"); § 2946 (affirmation may be substituted for oath, whenever required by law).

Georgia: Rev. C. 1910, § 5857 ("Religious belief goes only to the credit"); § 5868 ("The sanction of an oath, or affirmation equivalent thereto, is necessary to the reception of any oral evidence. The Court may frame such affirmation according to the religious faith of the witness"); § 6317 (civil cases; traditional form of oath, set out); P. C. 1910, § 106 (criminal cases; form of oath set forth).

Hawaii: Rev. L. 1915, § 2608 ("If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court, . . . upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn, to make his solemn affirmation or declaration in the words following, that is to say: I . . . do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is according to my religious

belief, unlawful, and I do now also solemnly, sincerely, and truly affirm and declare that the evidence, etc."); § 2611 (infants; quoted *ante*, § 488).

Idaho: Const. 1899, Art. I, § 4 ("No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Comp. St. 1919, § 7935 (like Cal. C. C. P. § 1879); §§ 8065–8068 (like Cal. C. C. P. §§ 2094–2097).

Illinois: Const. 1870, Art. II, § 3, draft Const. 1922, Art. I, § 3 ("No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Rev. St. 1874, c. 101, § 3 (an oath may lawfully be administered "in the following form, to wit: The person swearing shall, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospels"); § 4 (when "such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to-wit: You do solemnly, sincerely, and truly declare and affirm").

Indiana: Const. 1851, Art. I, § 7 ("No person shall be rendered incompetent as a witness in consequence of his opinions on matters of religion"); § 8 ("The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the person to whom such oath or affirmation may be administered"); Burns' Ann. St. 1914, § 529 ("No want of belief in a Supreme Being or in the Christian religion shall render a witness incompetent; but the want of such religious belief may be shown upon the trial"); § 517 (Before testifying, every witness shall be sworn to tell the truth, the whole truth, and nothing but the truth. "The mode of administering an oath shall be such as may be most consistent with and binding upon the conscience" of the witness).

Iowa: Const. 1857, Art. I, § 4 ("No person shall be . . . rendered incompetent to give evidence in any Court of law or equity, in consequence of his opinions on the subject of religion").

Kansas: Const. 1859, Bill of Rights, § 7 ("Nor shall any person be incompetent to testify on account of religious belief"); Gen. St. 1915, § 7249 ("The mode of administering an oath shall be such as is most binding on the conscience of the witness"); Gen. St. 1915, § 6745, Gen. St. 1868, c. 72, § 2 ("All oaths shall be administered by laying the right hand upon the Holy Bible, or by the uplifted right hand"); Gen. St. 1915, § 6746 ("Any person having conscientious scruples against taking an oath may affirm with like effect").

Kentucky: Const. 1891, § 5 ("The civil rights, privileges, or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching"); § 232 ("The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed by the General Assembly the most solemn appeal to God"); C. C. P. 1895, § 680 ("An oath required by this Code may be substituted by the affirmation of a person who is conscientiously opposed to taking an oath").

Louisiana: C. Pr. 1900, § 479 ("If the religious opinions of a witness are opposed to his taking an oath, his affirmation of the truth of his testimony shall suffice"); § 478 ("Previous to their being examined, the witnesses in a cause must be sworn on the Bible, in open court, and in presence of the parties, to speak the truth, all the truth, and nothing but the truth, in the testimony which they shall give in the cause"); R. S. 1870, § 1369 (form of witness' oath before a coroner).

Maine: Rev. St. 1916, c. 87, § 111 ("No person is an incompetent witness on account of his religious belief; but he is subject to the test of credibility; and a person who does not believe in the existence of a Supreme Being may testify under solemn affirmation and is subject to the pains and penalties of perjury"); § 122 ("A person to whom an oath is administered shall hold up his hand, unless he believes than an oath administered in that form is not binding, and then it may be administered in a form believed by him to be binding. One believing in any other than the Christian religion may be sworn according to the ceremonies of his religion"); § 123 ("Persons conscientiously scrupulous of taking an oath may affirm as follows: 'I affirm under the pains and penalties of perjury,' which affirmation is of the same force and effect as an oath").

Maryland: Const. 1867, Declar. of Rights, Art. 36 ("Nor shall any person, otherwise competent, be deemed incompetent as a witness or juror on account of his religious belief; provided he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts and be rewarded or punished therefor either in this world or the world to come"); Art. 39 ("That the manner of administering an oath or affirmation to any person ought to be such as those of the religious persuasion, profession, or denomination of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being"); Ann. Code 1914, Art. I, § 8 ("Wherever an oath is required by this Code an affirmation shall be sufficient, if made by a person conscientiously scrupulous of taking an oath"); § 9 ("The form of judicial and all other oaths to be taken or administered in this State, and not prescribed by the Constitution, shall be as follows: 'In the presence of Almighty God I do solemnly promise or declare,' etc. And it shall

not be lawful to add to any oath the words 'So help me God,' or any imprecatory words whatever"); § 10 ("The manner of administering oaths shall be by requiring the person making the same to hold up his hand in token of his recognition of the solemnity of the act, except in those cases wherein this form is not practicable, or when it shall appear that some other mode is more binding upon the conscience of the swearer").

Massachusetts: Gen. L. 1920, c. 233, § 15 ("The usual mode of administering oaths now practised in the Commonwealth, with the ceremony of holding up the hand, shall be observed in all cases in which an oath may be administered by law," except as provided in §§ 16–19); § 16 ("If a person to be sworn declares that a different mode of taking the oath is in his opinion more solemn and obligatory than the upholding of the hand, the oath may be administered in such mode"); § 17 ("A Friend or Quaker when called on to take an oath may solemnly and sincerely affirm, under the penalties of perjury"); § 18 ("A person who declares that he has conscientious scruples against taking any oath shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers, if the Court or magistrate on inquiry is satisfied of the truth of such declaration"); § 19 ("A person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion. A person not a believer in any religion shall be required to testify truly under the penalties of perjury; and the evidence of his disbelief in the existence of God may be received to affect his credibility as a witness").

Michigan: Const. 1908, Art. II, § 3 ("The civil and political rights, privileges, and capacities of no person shall be diminished or enlarged on account of his religious belief"); § 17 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief"); Comp. L. 1915, § 12556 (for children under ten, the oath may be dispensed with; quoted *ante*, § 488); § 12568 ("The usual mode of administering oaths now practised in this State, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law, except in the cases herein otherwise provided"); § 12569 ("Every person conscientiously opposed to taking an oath shall, when called on to take an oath, be permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury"); § 12570 ("No person shall be deemed incompetent as a witness in any court, matter, or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall be sworn"); 1858, People *v.* Jenness, 5 Mich. 305, 319 (since the statute, no inquiry at all can be made as to theological belief).

Minnesota: Const. 1857, § 17 ("Nor shall any person be rendered incompetent to give evidence in any Court of law or equity in consequence of his opinion upon the subject of religion"); Gen. St. 1913, § 5735 (form of oath of witnesses: "You do solemnly swear. . . . So help you God"; also form of oath of interpreters); § 8379 ("Whenever the Court before which any person is offered as witness is satisfied that such person has any peculiar mode of swearing, which is more solemn and obligatory, in the opinion of such person, than the usual mode, the Court may, in its discretion, adopt such mode of swearing such person; and every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if any there are"); § 8380 ("When an infant, or a person apparently of weak intellect, is produced as a witness, the Court may examine him to ascertain his capacity, and whether he understands the nature and obligations of an oath; and the Court may inquire of any person what are the peculiar ceremonies he deems most obligatory in taking an oath"); § 5736 ("If any person of whom an oath is required shall declare that he has religious scruples against taking the same, the word 'swear' and the words 'so help you God' may be omitted from the foregoing forms and the word 'affirm' and the words 'and this you do under the penalties of perjury' shall be substituted therefor, respectively, and such person shall be considered, for all purposes, as having been duly sworn"); § 999 (form of oath for witnesses before coroner).

Mississippi: Code 1906, § 1919, Hem. § 1579 ("A person shall not be incompetent as a witness because of his religious belief or the want of it"); Code § 1921, Hem. § 1581 ("Any witness, being scrupulous of taking an oath, may give testimony upon his solemn affirmation, which shall be as good and effectual as an oath. The form of affirmation shall be, in substance, as follows, to wit: 'You do solemnly and truly declare and affirm,' etc. In all cases where an oath or affidavit is required by law, it shall be sufficient if the same be made or given on the solemn affirmation of the party").

Missouri: Const. 1875, Art. II, § 5 ("No person can, on account of his religious opinions, . . . be disqualified from testifying"); Rev. St. 1919, § 5404 ("Every person who shall declare that he has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his solemn declaration or affirmation in the following form, 'You do solemnly declare and affirm,' etc., concluding with the words 'under the pains and penalties of perjury'"); § 5405 (substantially like Cal. C. C. P. § 2095); § 5406 ("Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies"); § 3891 (grand jury interpreter

shall be sworn "to correctly interpret all questions to the witness into his language and all the witnesses' answers into English").

Montana: Const. 1889, Art. III, § 4 ("No person shall be denied any civil or political right or privilege on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Rev. C. 1921, §§ 10694–10697 (like Cal. C. C. P. §§ 2094–2097); § 10881 (form of oath for witness before legislature).

Nebraska: Const. 1875, Art. I, § IV ("No person shall . . . be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations"); Rev. St. 1922, § 8871 ("The mode of administering an oath shall be such as is most binding upon the conscience of the witness"); § 8835 (Indians and negroes; cited *ante*, § 516); 1909, Pumphrey *v.* State, 84 Nebr. 636, 122 N. W. 19 (a Japanese presumed competent).

Nevada: Const. 1864, Art. I, § 4 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief"); Rev. L. 1912, §§ 5447, 5448 (like Cal. C. C. P. §§ 2096, 2097); § 5420 (like Cal. C. C. P. § 1879); § 7453 ("The solemn affirmation of witnesses shall be deemed sufficient" in criminal cases).

New Hampshire: Pub. St. 1891, c. 224, § 10 ("No other ceremony shall be necessary in swearing than holding up the right hand, but any other form or ceremony may be used which the person to whom the oath is administered professes to believe more binding upon the conscience"); § 11 ("Persons scrupulous of swearing may affirm; the word 'affirm' being used in administering the oath, instead of the word 'swear,' and the words 'this you do under the pains and penalties of perjury,' instead of the words 'so help you God'"); § 12 ("No person conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him").

New Jersey: Const. 1844, Art. I, § 4 ("No person shall be denied the enjoyment of any civil right merely on account of his religious principles"); Comp. St. 1910, Oaths & Affidavits, § 24 ("In all cases where, by any act of the legislature of this State now in force or hereafter to be made, an oath is or shall be allowed or required, the same shall, on the request of the party to be sworn, be taken with the ceremony of holding up the hand and swearing by the ever-living God, instead of that of touching and kissing the book of the gospels, although no provision for that purpose is or shall be made in such act"); § 26 ("Every person, who shall be permitted or required to take an oath in any case, where by law an oath is allowed or required, and who shall allege that he or she is conscientiously scrupulous of taking an oath, shall, instead of the form of an oath, be permitted to make his or her solemn affirmation or declaration; and if such person shall choose to affirm, it shall be in words following, to wit: I, . . . , do solemnly, sincerely, and truly declare and affirm: But if such person shall choose to declare, it shall be in the words following, to wit: I, . . . , do declare, in the presence of Almighty God, the witness of the truth of what I say: Either of which forms shall be as good and effectual in law, as an oath taken in the usual form in which affirmation or declaration, the words 'so help me God,' at the close of the usual oath, shall be omitted"); § 39 ("It shall not be necessary to the solemnity nor obligation of any oath administered in any court of justice or any legal proceeding, civil or criminal, in this state, for the person taking the oath to kiss the holy scriptures; but the taking of such oath, while the hand shall be held upon the book, shall answer all the purposes and requirements of the law, any usage or custom to the contrary heretofore notwithstanding"); coroners, § 12 (form of oath at inquests); St. 1911, Apr. 24, c. 207 (amending Rev. 1898, District Courts, § 158; form of witness' oath).

New Mexico: Const. 1911, Art. II, § 11 ("No person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship"); Annot. St. 1915, § 2165 (every witness offered "shall be admitted to give evidence on oath or solemn affirmation"); § 3933 (the oath is to be taken "in the following form, viz.: The person swearing shall, with his right hand uplifted, follow the words required in the oath as administered, beginning: I do solemnly swear, and closing: So help me God"); § 3934 (when a person "shall have conscientious scruples against taking the same, he shall be permitted, instead of such oath, to make a solemn affirmation, with uplifted right hand, in the following form, viz.: You do solemnly, sincerely, and truly declare and affirm, and close with: And this I do under the pains and penalties of perjury"); § 2165 ("Hereafter, in the courts of this State no person offered as a witness shall be disqualified to give evidence on account of any disqualification known to the common law, but all such common-law disqualifications may be shown for the purpose of affecting the credibility of any such witness and for no other purpose; provided, however, that the presiding judge, in his discretion, may refuse to permit a child of tender years to be sworn, if, in the opinion of the judge, such child has not sufficient mental capacity to understand the nature and obligation of an oath").

New York: Const. 1895, Art. I, § 3 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief"); St. 1899, c. 340, now C. P. A. 1920, § 360, and J. C. A. 1920, § 243 ("Except as otherwise specially prescribed in this article, when an oath is administered, the witness shall lay his hand

on the Gospels and express assent to the oath, and it shall be according to the present practice, except that the witness need not kiss the Gospels"); C. P. A. 1920, § 361, and J. C. A. 1920, § 244 ("The oath must be administered in the following form, to a person who so desires, the laying of the hand upon the Gospels being omitted: 'You do swear, in the presence of the ever-living God.' While so swearing, he may or may not hold up his right hand, at his option"); C. P. A. § 362, and J. C. A. § 245 ("A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: 'You do solemnly, sincerely, and truly declare and affirm'"); C. P. A. § 363, and J. C. A. § 246 ("If the Court or the officer, before which or whom a person is offered as a witness, is satisfied that any peculiar mode of swearing, in lieu of, or in addition to, laying the hand upon the Gospels, is, in his opinion, more solemn and obligatory, the Court or officer may, in its or his discretion, adopt that mode of swearing the witness"); C. P. A. § 364, and J. C. A. § 247 ("A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed herein"); C. P. A. § 365, and J. C. A. § 248 (the Court "may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory"); C. Cr. P. 1881, § 392, as amended by St. 1892, c. 279 (in criminal proceedings, when a child "actually or apparently" under twelve "does not in the opinion of the Court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath, if in the opinion of the Court or magistrate such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offence upon such testimony unsupported by other evidence"); S. C. A. 1920, § 24 (interpreter's oath of office in Kings County Surrogate Court); 1906, People *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164 (St. 1892, c. 279, applied; the presumption is that a child thus admitted without oath was duly found by the trial Court not to understand its nature); 1907, People *v.* Sexton, 187 N. Y. 495, 80 N. E. 396 (C. Cr. P. § 392, is constitutional).

North Carolina: Con. St. 1919, § 3189 (officers administering an oath shall require the party "to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth he may be justly deprived of all the blessings of the Gospel and made liable to that vengeance which he has imprecated on his own head; and he shall kiss the holy Gospel, as a seal of confirmation to the said engagements"); § 3190 ("When a person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching, the holy Gospels; and the oath required shall be administered in the following manner, namely: he shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also, in token, that if he should swerve from the truth, he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely: 'I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known,' etc., as the words of the oath may be"); § 3191 ("The solemn affirmation of Quakers, Moravians, Dunkers, and Mennonists, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions"); § 3199 (under "Oaths of Office" are given forms of oath for witnesses, which are in the usual phrases of the common-law custom, and not in those of the foregoing sections); § 1535, No. 29 (form of oath of witness in justice court); 1898, Pearre *v.* Folb, 123 N. C. 239, 31 S. E. 475 (oath not on a Bible, held void under the statute).

North Dakota: Const. 1889, Art. I, § 4 ("No person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief"); Comp. L. 1913, § 7882 ("Before testifying the witness must be sworn to testify as follows: 'You do solemnly swear [etc.] . . . so help you God.' Any witness who is conscientiously scrupulous of taking the oath above described shall be allowed to make affirmation, substituting for the words 'so help you God' at the end of the oath the following: 'This you do affirm under the pains and penalties of perjury'"); § 7926 (so also for interpreters).

Ohio: Const. 1851, Art. I, § 1 ("When an oath is required or authorized by law, an affirmation in lieu thereof may be taken by a person having conscientious scruples to taking an oath"); § 7 ("Nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations"); Gen. Code Ann. 1921, § 10215 ("A person may be sworn in any form he deems binding on his conscience"); § 11520 ("Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth").

Oklahoma: Comp. St. 1921, § 605 ("Before testifying, the witness shall be sworn to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding on the conscience of the witness").

Oregon: Const. 1859, Art. I, § 6 ("No person shall be rendered incompetent as a witness

or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice, touching his religious belief, to affect the weight of his testimony"); § 7 ("The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered"); Laws 1920, §§ 890–893 (like Cal. C. C. P. §§ 2094–2097, substituting in § 2097, after "any person," "who has conscientious scruples against taking an oath," instead of "who desires it"); § 731 (like Cal. C. C. P. § 1879).

Pennsylvania: St. 1718, May 31, § 4, Dig. 1920, § 16254, Oaths and Affirmations (capital crimes; witnesses for accused shall "take an oath or affirmation to say the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the King are by the law of this province obliged to do"); ib. § 3, Dig. § 16253 (witnesses in "all manner of crimes and offenses, matters and causes whatsoever, shall qualify themselves "according to their conscientious persuasion, respectively, either by taking a corporal oath or by the solemn affirmation allowed by act of parliament to those called Quakers in Great Britain"); St. 1772, Mar. 21, as amended by St. 1895, Apr. 3, Dig. § 16251 (in all "crimes, offenses, matters, causes, and things whatsoever," witnesses shall qualify themselves "according to their conscientious persuasions, respectively, either by taking the solemn affirmation or any oath in the usual and common form, by laying the hand upon an open copy of the Holy Bible, or by lifting up the right hand and pronouncing or assenting to the following words: 'I, A. B., do swear by Almighty God, the searcher of all hearts, that I will . . . , and that as I shall answer to God at the last great day'"; this oath to have the same effect as "an oath taken in common form"); St. 1909, Apr. 23, Dig. 1920, § 21833, Witnesses ("The capacity of any person who shall testify in any judicial proceeding shall be in no wise affected by his opinions on matters of religion"; "no witness shall be questioned in any judicial proceeding concerning his religious belief, nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility"; affirmation may be used by "any witness who desires to affirm").

Philippine Islands: C. C. P. 1901, § 382 (like Cal. C. C. P. § 1879); P. C. 1911, Gen. Order 58 of 1900, § 55 (like Cal. C. C. P. § 1879).

Porto Rico: Rev. St. & C. 1911, § 12 (all oaths and affirmations "shall be administered in the mode most binding upon the conscience of the person taking the same"); § 1406 (like Cal. C. C. P. § 1879).

Rhode Island: Const. 1842, Art. I, § 3 ("[One's opinion in matters of religion] shall in no wise diminish, enlarge, or affect his civil capacity").

South Carolina: C. C. P. 1922, § 274 (any witness "may make solemn and conscientious affirmation and declaration, according to the form of his religious belief or profession, as to any matter or thing whereof an oath is required," to be as valid as if taken "on the Holy Evangelists"); C. Cr. P. 1922, § 1034 (form of oath for witnesses at a coroner's inquest).

South Dakota: Const. 1889, Art. III, § 3 ("No person shall be denied any civil or political right, privilege, or position, on account of his religious opinions"); Rev. C. 1919, § 2733 (interpreters; like N. D. Comp. L. § 7926); § 2749 (form for civil cases; "You do solemnly swear . . . so help you God"; but "any person having conscientious scruples against taking an oath" may substitute "affirm" and "under the pains and penalties of perjury"); § 10183 (coroner's inquest; oath to testify "concerning the death of the person here lying dead").

Tennessee: Shannon's Code 1916, § 5593 ("Persons who do not believe in a God and a future state of rewards and punishments may be witnesses in any cause pending in any of the courts of this State. Said unbelievers may solemnly affirm instead of taking an oath, and false testifying by such persons shall be punished as perjury, as [provided] by law under such circumstances. Such unbelief in God and a future state of rewards and punishments shall go only to the credibility of the witness"); § 5551 (the witness shall "lay his hand upon the New Testament and solemnly swear upon the Holy Evangelists of Almighty God to speak the truth, the whole truth, and nothing but the truth, or other oath prescribed in the particular case, and kiss the Book as a seal of confirmation of the engagement"); § 5552 ("If the person to be sworn is conscientiously scrupulous of taking the book oath, he may be sworn with the right hand uplifted in the following form: 'I (or you) do solemnly appeal to God, as a witness of the truth and avenger of falsehood, as I shall answer for the same at the great day of judgment, when the secrets of all hearts shall be known,' etc., as the nature of the case may be"); § 5553 ("All persons conscientiously scrupulous of taking an oath may make solemn affirmation in the words of the oath required"); § 5554 ("Persons may also be sworn according to the forms of their own country, or particular religious creed, when required").

Texas: Const. 1876, Art. I, § 5 ("No person shall be disqualified to give evidence in any of the courts of this State on account of his religious opinions or for want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury"); Rev. P. C. 1911, § 796, Rev. C. Cr. P. § 12 ("No person is incompetent to testify on account of his religious opinion or for the want of any religious

each other without need, sometimes are merely declaratory of the common law; and it would be profitless here to attempt to analyze the precise state of the law in each jurisdiction.

With reference to the *abolition* or *dispensation* of the oath, the condition in general may be summarized as follows:

(1) In no jurisdiction has the use of the oath been *abolished.*

(2) In almost every jurisdiction the rigor and injustice of the common-law rule has been removed, for persons having an *incompatible theological belief,* in one of two ways:

belief"); Rev. Civ. St. 1911, § 3691 (substantially the same); § 9 (like Const. I, 5, second sentence).

Utah: Const. 1895, Art. I, § 4 ("Nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof"); Comp. L. 1917, § 7122 (like Cal. C. C. P. § 1879); §§ 7148–7151 (like Cal. C. C. P. §§ 2094–2097).

Vermont: Const. 1793, c. I, Art. 3 ("Nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculia[r] mode of religious worship"); Gen. L. 1917, § 1895 ("A person shall not be incompetent as a witness in any Court, matter, or proceeding, on account of his opinions on matters of religious belief; nor shall a witness be questioned, nor testimony taken or received, in relation thereto"); § 7473, Form 9 (form of oath for witnesses); Form 10 (form of oath for interpreters).

Virginia: Const. 1869, Art. V, § 14 ("[Men's opinions in matters of religion] shall in no wise affect, diminish, or enlarge their civil capacities"); this article is omitted in Const. 1902; Code 1919, § 35 (reënacts the words of Const. 1869, Art. V, § 14); St. 1920, Feb. 17, c. 63 (no person making oath shall be required "to kiss the Holy Bible or any book or books thereof," but may be required "to place their hand on the Holy Bible").

Washington: Const. 1889, Art. I, § 6 ("The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered"); § 11 ("Nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony"); R. & B. Code 1909, § 1266 ("Whenever the Court or officer before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing connected with or additional to the usual form of administration, which, in witness' opinion, is more solemn and obligatory, the Court or other officer may, in its discretion, adopt that mode"); § 1267 ("When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the ceremonies of his religion, if there be any such"); § 1268 ("Any person who has conscientious scruples against taking an oath may make his solemn affirmation, by assenting, when addressed, in the following manner: 'You do solemnly affirm that,' etc., as in section 1265"); § 1265 ("An oath or affirmation may be administered as follows: The person who swears holds up his hand, while the person administering the oath thus addresses him: 'You do solemnly swear . . . so help you God'").

West Virginia: Const. 1872, Art. III, § 15 ("[Men's opinions in matters of religion] shall in no wise affect, diminish, or enlarge their civil capacities"); c. 13, § 11 ("A solemn affirmation shall be equivalent to an oath in all cases, unless otherwise expressly provided").

Wisconsin: Const. 1848, Art. I, § 19 ("No person shall be rendered incompetent to give evidence in any Court of law or equity in consequence of his opinions on the subject of religion"); Stats. 1919, § 3637 (prescribes a form for justice courts, and allows an affirmation for one having conscientious scruples); § 4081 ("In all cases in which an oath or affidavit is required or authorized by law, the same may be taken in any of the usual forms"); § 4084 ("Every person who shall declare that he has conscientious scruples against taking any oath or swearing in the usual form shall be permitted to make his solemn declaration or affirmation"); § 4871 (form of oath at coroner's inquest).

Wyoming: Const. 1889, Art. I, § 18 ("No person shall be rendered incompetent . . . to serve as a witness . . . because of his opinion on any matter of religious belief whatever"); Comp. St. 1920, § 5534 ("A person may be sworn in any form he deems binding on his conscience"); § 6433 ("Persons conscientiously opposed to swearing or to taking any oath may affirm"; when an oath is required, it shall be lawful to use this form: "The person swearing shall with his or her right hand uplifted swear, concluding with the words 'So help me God'"); § 5334 (oath-form for witnesses at a coroner's inquest); § 5826 ("Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth").

(*a*) In all but a few jurisdictions (*e. g.* Oklahoma, Virginia) a *statute* allows the witness to *choose to make affirmation* instead of oath. This choice is usually provided for those who lack the requisite belief, and for those who may have the belief but are forbidden by conscientious scruples.[2] Sometimes the option is even wider and is given to all who prefer to affirm, whether or not they could in belief or conscience take the oath. This option is broader than would seem necessary, and can be excused only upon the policy that to force an exposure of theological belief is undesirable.

(*b*) Another way of relief has commonly been found under *constitutional* (rarely statutory) provisions guaranteeing that theological belief shall not affect one's *civil capacities* (or, specifically, one's competency as a witness). These provisions are almost universal; in only three jurisdictions (Arkansas, Maryland, North Carolina) is a theological belief expressly declared necessary.[3] By usual construction, the result of this legislation has been to allow the administration of the oath to *persons*, both *adults* and *children, lacking the common-law belief*.[4] The singular result is that relief is afforded, not in

[2] Under such statutes the witness must first explicitly state that the scruple exists: 1892, R. *v.* Moore, 17 Cox. Cr. 458 (under St. 1869, 32–33 Vict. c. 68, § 4); 1911, R. *v.* Deakin, 16 Br. C. 271 (under Can. Evid. Act, § 14).

[3] A similar provision formerly existed in Maine: 1841, Smith *v.* Coffin, 18 Me. 157, 166 (a statute providing that "no person who believes in the existence of a Supreme Being" shall be excluded applies to exclude from the oath a person not having that belief, even though he might have affirmed if he had scruples).

[4] Notice that the result is sometimes reached under the broad testimonial statutes quoted *ante*, § 488: *Arizona:* 1914, Fernandez *v.* State, 16 Ariz. 269, 144 Pac. 640 (an aged Indian woman, admitted, under Const. Art. 2, § 12, though not understanding "the full technical meaning of the common-law oath"); *California:* 1861, Fuller *v.* Fuller, 17 Cal. 612 (a statute that "no person offered as a witness shall be excluded on account of his opinion on matters of religious belief" was held to make "religious sentiments or convictions" immaterial; here, a Chileno who understood "the meaning of the word 'obligation' as applied to an oath" was admitted); 1921, People *v.* Delaney, — Cal. App. —, 199 Pac. 896 (lewd conduct with a boy not quite four years old; held that the child need not understand the religious sanction or nature of an oath, under Const. Art. I, § 4, and C. C. P. § 1879, but need only be qualified by intelligence under C. C. P. § 1880; enlightened opinion by Finlayson, P. J.); *Florida:* 1907, Clinton *v.* State, 53 Fla. 98, 43 So. 312 ("Neither belief in a Supreme Being nor in divine punishment is requisite to the competency of a witness" under the statute and Constitution; here applied to a child); 1917, Thomas *v.* State, 73 Fla. 115, 74 So. 1 (a witness who "did not know what would happen to him if he told a lie and died, or where he would go," admitted: "the common law rule has been changed in this State"); *Georgia:* 1878, Johnson *v.* State, 61 Ga. 36, *semble* (theological test not required for children; nor, perhaps, for imbeciles; but probably for adults of sound mind possessing the proper belief, the oath under that sanction is required; capacity to take an oath now means, "perhaps," the child's intelligence "that she ought to tell the truth on a solemn occasion rather than a lie"); 1916, Gantz *v.* State, 18 Ga. App. 154, 88 S. E. 993 ("religious belief or the lack of it" does not in this State disqualify a witness; here applied to a Chinese); *Idaho:* 1918, State *v.* Harp, 31 Ida. 597, 173 Pac. 1148 (rape under age; whether a child understood the nature of an oath, held "not the exclusive test" under Rev. C. §§ 5956, 5957); *Illinois:* 1889, Ewing *v.* Bailey, 36 Ill. App. 191, 193 (similar to the next case); 1890, Hronek *v.* People, 134 Ill. 139, 152, 24 N. E. 861 ("There is no longer any test or qualification in respect to religious opinion or belief"; and the oath may be taken irrespective of it); *Indiana:* 1840, Snyder *v.* Nations, 5 Blackf. 295 (statute removes the necessity of religious faith; here a deaf-and-dumb person who "had no conception of the religious obligation of an oath" was admitted); *Iowa:* 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 (under Code § 4601, quoted *ante*, § 488, a child's "intelligence, and not belief, nor the power of moral perception, is the test"); 1905, Clark *v.* Finnegan, 127 Ia. 644, 103 N. W. 970 ("If a child has the necessary intelligence, and appreciates the moral duty to tell the truth, he need not fully understand the nature of an oath, or have any particular religious belief or training"; here, a child of seven, who "un-

the natural way, by substituting affirmation for oath, but in an evasive way, by preserving an invocation which has no meaning for the witness and by thus reducing the oath to an empty formula. It would be equally consonant with the words of the Constitution to interpret them merely as allowing persons to affirm instead of swearing; it is unnecessary to suppose that the Constitution intended to devitalize the oath without abolishing it.

In the few jurisdictions where the Constitution, in such an article, expressly *saves all oaths and affirmations*, it is clear that the oath ought to remain, as to the requisite belief, precisely what it was at common law;[5] but under such Constitutions, nevertheless, the witness' right to make affirmation instead of oath should be with equal certainty guaranteed.[6]

(3) The special class of persons (*ante*, § 1827, par. 2) of whom an oath ought not to be required, nor even the exercise of an option to affirm be expected, namely, *children* qualified to testify but *lacking in theological under-*

derstood that he was to tell the truth," was admitted); 1917, State *v.* Yates, 181 Ia. 539, 164 N. W. 798 (child); *Kentucky:* 1882, Bush *v.* Com., 80 Ky. 244, 249 (the constitutional clause alters the common law and "permits persons to testify without regard to religious belief or disbelief"; here an atheist witness was allowed to be sworn; the ruling is irrespective of the Civil Code provision allowing affirmation and making all persons competent); 1894, White *v.* Com., 96 Ky. 180, 28 S. W. 340 (preceding case approved, and applied to a child); 1905, Bright *v.* Com., 120 Ky. 298, 86 S. W. 527 (like White *v.* Com., which however is not cited; the judge being new in office); *Louisiana:* 1903, State *v.* Williams, 111 La. 179, 35 So. 505 (a child, otherwise sufficiently intelligent, is admissible without regard to theological belief; Act No. 29, of 1886, quoted *ante*, § 488, abolishes all other grounds of disqualification; State *v.* Washington, 49 La. An. 1602, 22 So. 841, repudiated); *New Mexico:* 1918, State *v.* Ybarra, 24 N. M. 413, 174 Pac. 212 (murder; a child "of tender years," allowed to testify, under Code § 2165, leaving it to the trial Court's discretion; "the fact that a child states in express terms that he does not understand the nature of an oath is not of itself sufficient ground for his exclusion"); *North Carolina:* 1914, State *v.* Pitt, 166 N. C. 268, 80 S. E. 1060 (a witness who "did n't know what would happen to a liar except be put in the lockup," held competent under Revisal, §§ 1496, 2360); *South Dakota:* 1895, State *v.* Reddington, 7 S. D. 368, 64 N. W. 170 (Kellam, J.: "No witness, whether child or adult, is required to be able or willing to discuss with the Court or counsel either the fact or condition of a future state. He may even have no established views of general theology. He is only required to be able to distinguish the moral difference between right and wrong; and, when the law or the Court says he must understand the obligation of an oath, it means only that, possessing such ability to discriminate, he understands that his position as a witness imposes upon him the moral and legal duty to tell only what is true. Whether a witness is so qualified is left in the first instance to the discretionary judgment of the trial Court"; here a child was admitted); *Texas:* 1905, Freasier *v.* State, — Tex. Cr. —, 84 S. W. 360 (to know that "it is wrong to tell a lie" suffices, for a child); *Virginia:* 1846, Perry *v.* Com., 3 Gratt. 632, 641 (the Bill of Rights abrogates all incapacity by reason of religious belief; eloquent opinion by Scott, J.; the leading case on the subject).

Distinguish the following, which goes rather on the principle of § 506, *ante:* 1903, Lee *v.* Missouri P. R. Co., 67 Kan. 402, 73 Pac. 110 (a boy of eleven, excluded because he did not know that it was wrong to lie under oath; though the Constitution made theological belief unnecessary).

The following case merely refuses to reach the result of the above cases under the testimonial statutes quoted *ante*, § 488: 1880, Priest *v.* State, 10 Nebr. 393, 399 (a statute making competent "every human being of sufficient capacity to understand the obligation of an oath," held still to require "an immediate sense of responsibility to God," and not to have "changed the character of an oath"; here an Indian was excluded).

[5] 1877, Clinton *v.* State, 33 Oh. St. 31 (a provision that "no person shall be incompetent to be a witness on account of his religious belief, but nothing herein shall be construed to dispense with oaths and affirmations," held to preserve all the common-law requirements of religious belief as a part of the capacity to take oaths). *Contra*, Hronek *v.* People, Ill., *supra*, note 4.

[6] This latter question seems not to have arisen for decision; probably because a statute usually gives the option of affirmation.

standing, remain unfortunately in most jurisdictions unprovided for. A statute similar to that of England,[7] and applicable to all trials whatever, is a desirable enactment,[8] and its absence was long ago forcibly criticised by an eminent judge of great experience.[9] The ill effect of the error is sometimes indirectly removed by the legislation above mentioned.

§ 1829. **Statutory Changes as to Nature, Form, Capacity, Proof, Persons.** A summary survey may now be taken of the effect of statutes upon the remaining detailed rules laid down at common law:

(1) The *nature* of the oath (*ante*, § 1817) is changed in two types of provisions: (a) those which allow mere belief in a Supreme Being (irrespective of punishment) to suffice; (b) those which declare theological belief immaterial and yet, by judicial construction, permit the oath to be taken (*ante*, § 1828).

(2) For the *form* of the oath (*ante*, § 1818), the common-law doctrine is usually found preserved in the statutes, sometimes with specific sanction for certain forms. There is often a provision allowing or requiring the most obligatory form to be used, — a stricter rule than was usually recognized at common law.

(3) The *capacity* to take the oath has in some jurisdictions been expressly changed for children, and in others for adults also by implication of certain constitutional provisions (*ante*, § 1828). The *proof* of capacity is often affected by statutory prohibition of questions to the witness. Certain statutes have also regulated the mode of *examination of a child* as to general competency (*ante*, §§ 488, 508). The practice of discrediting a witness by his religious belief has also been altered (*ante*, §§ 935, 1820).

(4) The *persons* by statute excepted from the necessity of taking oaths are the three classes already noted (*ante*, § 1828).

Sub-title II: Perjury-Penalty

§ 1831. **Nature of the Security.** The two expedients of the oath and the perjury-penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power. The reminder, in the case of the perjury-penalty, is rarely found expressly uttered in the formula of words for administering an oath or an affirmation; it seems to be taken for granted as known to the witness. Nevertheless, it is a real and powerful security for truth-telling, and its function has been only the more emphasized since the general recognition of the dispensability of the oath:

[7] St. 1885, 48 & 49 Vict. c. 69.

[8] Canadian jurisdictions already have it, as well as Michigan and New York (*supra*, § 1828, n. 1).

[9] 1876, Stephen, Digest of Evidence, Art. 107, Appendix, Note XL.

In *Pennsylvania* such an exception has been virtually read into the law, without statute: 1905, Com. *v.* Furman, 211 Pa. 549, 60 Atl. 1089.

Compare the passages quoted *ante*, § 509.

1824, Mr. *Thomas Starkie*, Evidence, 91: "The testimony must be sanctioned, not merely by an oath, but by a judicial oath, in the course of a regular proceeding, by an authorized person. For if the oath were extrajudicial, the witness could not be punished for committing perjury under that oath, and therefore one of the securities for truth which the law has provided would be wanting."

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." [1]

§ 1832. **Rules of Exclusion depending on this Requirement.** No special rules of exclusion deducible from the theory of this security have found their way into the common law. Singular as this may seem, it appears to be due merely to the overshadowing importance of the oath, during the formative period of the law, when the oath's rigid requirements received so much attention that the perjury-penalty became a mere auxiliary to the oath, and no effort was made to develop independently any rules for securing amenability to the perjury-penalty. The only rules, therefore, seem to be such as are preserved as surviving parts of the oath-requirement even where the oath has been dispensed with.

(1) On the one hand, as no one doubts, the imposition of the perjury-penalty is allowable only for testimonial statements delivered *in court* or before a *judicial officer*, like the oath (*ante*, § 1824), and is therefore never exacted for extrajudicial statements admissible under the Exceptions to the Hearsay rule (*ante*, § 1420). On the other hand, it is exacted of all such infrajudicial testimonial statements; so that, supposing the oath to be dispensable, still no person could be admitted to the stand without at least making affirmation, *i.e.* subjecting himself to the perjury-penalty.

(2) But the requirement goes no further; that is to say, looking at the nature and operation of the perjury-penalty, there is *no exclusion* of a witness because circumstances exist which make him *legally* or *practically not amenable* to the influence of the penalty. This absence of rules deduced from the theory of the security is observable in several classes of cases:

(*a*) When a *deposition* is taken under a commission *in another country*, the deponent ordinarily could not be punished for perjury, either because the crime was committed out of the jurisdiction, or because the oath was given by a foreign officer, or because the deponent does not come within the jurisdiction; nevertheless, the deposition is admissible: [1]

1744, WILLES, C. J., in *Omichund* v. *Barker*, Willes 538, 553: "When the depositions of witnesses are taken in another country, it frequently happens that they never come over hither, or if [they do] they cannot be indicted for perjury because the fact was committed in another country. Those therefore who are plainly not liable to be indicted for

§ 1831. [1] Mr. Wm. A. Purrington has forcefully commented on the practical inefficiency of the modern perjury-penalty ("The Frequency of Perjury," Columbia Law Review, VIII, 67, 1908); as also Judge Chalmers (in his article cited *ante*, § 1827, n. 1).

§ 1832. [1] In Lincoln *v.* Battelle, 6 Wend. 475, 481 (1831), a deposition sworn abroad before the foreign Court and not before the commission, the foreign law prohibiting the commission to exact an oath, was held admissible, for if the witness swore before the commission, and were perjured, "he would probably escape punishment."

perjury have often been, and for the sake of justice must be, admitted as witnesses. And so there is an end of this objection."

(*b*) When a deposition 'in perpetuam memoriam' is taken, it usually will not (and under the early Chancery rule it could not) be used until after the deponent's death (*ante*, §§ 1403, 1412); so that the risk of temporal punishment for perjury is mainly or entirely wanting; nevertheless, such a deposition is receivable:

1822, LEACH, V. C., in *Angell* v. *Angell*, 1 Sim. & Stu. 88: "Inasmuch as those written depositions can never be used until after the death of the witnesses, and are not indeed published until after the death of the witnesses, it follows, whatever may have been the perjury committed in these depositions, it must necessarily go unpunished. And this testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury."

(*c*) Where a *child* is competent as a witness, but is not old enough under the criminal law to be guilty of the crime of perjury, its testimony would nevertheless be received.[2]

(*d*) Where the testimony is not on a *material point*, the witness is not guilty of the crime of perjury and therefore is not amenable to punishment; nevertheless, testimony is never excluded on this ground.[3] In general, moreover, an *informality* of proceedings, such as would render a prosecution for perjury impossible, is not treated as ground for exclusion; for example, informalities in taking a deposition prevent its acceptance because the testimony is not taken before one lawfully authorized or lawfully acting as a judicial officer (*ante*, § 1376), but not because the perjury-penalty is inapplicable. A contrary view has indeed been advanced in the ecclesiastical courts, but it rests on an unfounded belief as to the common-law practice and is out of harmony with the analogies already cited:

1840, Dr. LUSHINGTON, in *Woods* v. *Woods*, 2 Curt. Eccl. 516, 523 (rejecting depositions stated to have been taken improperly on questions submitted by the wrong person): "Nothing, in my judgment, can be more dangerous to the credit of these Courts than that it should be considered that they would decide questions affecting the rights and interests of the parties upon evidence the individuals giving which, if they depose falsely and corruptly, might not be liable to an indictment for perjury. Nothing, indeed, could be more fatal to the due administration of justice than that evidence should be received under such

[2] 1878, Johnson v. State, 61 Ga. 36; 1896, Com. v. Robinson, 165 Mass. 426, 43 N. E. 121; 1901, Com. v. Ramage, 177 Mass. 349, 58 N. E. 1078.

Contra: 1905, Freasier v. State, — Tex. Cr. —, 84 S. W. 360 (here proceeding on the words of the Constitution that oaths "shall be taken subject to the pains and penalties of perjury," and upon a statute making children of under nine years incapable of perjury; none of the above cases are cited; Brooks, J., dissenting, forcibly points out "the monstrosity of the result"). But a Texas statute of 1905 (c. 59, § 1), P. C. 1911, § 34, doubtless passed in response to the recommendation in this case, has made an infant below nine years capable of perjury "when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath"; so that the foregoing decision is presumably no longer law.

Point raised but not decided: 1920, Williams v. State, 88 Tex. Cr. 214, 225 S. W. 173.

[3] So also at one time it was thought that no prosecution for perjury would lie for a statement "I believe" by a witness, but this objection was not allowed to prevail: *ante*, § 728, note 1, at the end.

circumstances. . . . If a prosecution for perjury could not be sustained against witnesses, I should be bound to reject their evidence. Such is the established rule of other Courts; . . . and I think the rule is founded in justice, — otherwise persons giving evidence would be liberated from a consideration of great weight, the fear of punishment for false swearing."

Thus the establishment of the perjury-penalty, while a real and useful security for truth, has not carried with it any group of exclusionary rules; and there appears no reason for regretting this failure to add more complications to our system of Evidence.

Sub-title III: PUBLICITY

§ 1834. **General Nature of the Security.** The publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony; it would be essentially desirable and demandable on additional grounds. Nevertheless, it plays an important part as a security for testimonial trustworthiness, and would exist as an independent requirement for that reason only, even were other grounds wanting. The reasons for its existence therefore fall under two heads, first, those which make it a security for trustworthiness and completeness of testimony, and, secondly, those which have other advantages in view.

(1) Its operation in tending to *improve the quality of testimony* is twofold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information. The operation of this latter reason was not uncommonly exemplified in earlier days in England, when attendance at court was a common mode of passing the time for all classes of persons:

1797, Lord ELDON, in Twiss' Life, I, 300: "I prosecuted a ship at Bristol to condemnation for having on board smuggled goods to a great amount. George Rous, who was a good-natured friendly man, but violent in court, and particularly as counsel for smugglers, raved in this case and swore that I had contrived to have these goods put on board in order to condemn the ship, whilst the captain had gone ashore to see a wife whom he tenderly loved and his children whom he was extremely fond of, at the end of a very long voyage in which he had been absent from them. This was all coinage.[1] But it was put a stop to by a sailor in court starting up and exclaiming, 'Well, that's a good one! That's a good fetch! Why, my mistress and her children were aboard ship with our captain during the whole of the voyage!'"

§ 1834. [1] In those days, as the accused could not testify, his counsel was by sufferance accustomed to embody the supposed explanations of the accused in his address, and this license was of course sometimes abused.

The same advantage is gained, and much relied on, in more modern times, when the publicity given by newspaper reports of trials is often the means of securing useful testimony.[2]

These two sets of reasons have often been expounded as justifying and demanding the traditional common-law practice of holding trial with open doors:

1690 (?), Sir *John Hawles*, Solicitor-General, commenting on *Cornish's Trial*, in 11 How. St. Tr. 460: "The reason that all matters of law are, or ought to be, transacted publicly is that any person, unconcerned as well as concerned, may as 'amicus curiæ' inform the Court better, if he thinks they are in error, that justice may be done; and the reason that all trials are public is that any person may inform in point of fact, though not subpœna'd, that truth may be discovered, in civil as well as in criminal cases. There is an invitation, to all persons who can inform the Court concerning the matter to be tried, to come into the court, and they shall be heard." [3]

1768, Sir *William Blackstone*, Commentaries, III, 373: "This open examination of the witnesses, 'viva voce,' in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."

1823, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. II, c. X, § 2 (Bowring's ed., vol. VI, p. 355): "The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security it operates in the first place upon the deponent. . . . In many cases, say rather in most (in all except those in which a witness bent upon mendacity can make sure of being apprized with perfect certainty of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. However sure he may think himself of not being contradicted by the deposition of any percipient witnesses, yet if the circumstances of the case have but afforded a single such witness, the prudence or imprudence, the probity or improbity, of that one original witness may have given birth to derivative and extrajudicial testimonies in any number. Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected channel burst forth to his confusion. . . . [§ 6.] Another advantage of this publicity [by printing the proceedings] . . . is the chance it affords to justice of receiving, from hands individually unknown, ulterior evidence, for the supply of any deficiency or confutation of any falsehood, which inadvertency or mendacity may have left or introduced."

(2) The other reasons, independent of evidential service, for requiring publicity are of three distinct sorts. (*a*) Subjectively, a wholesome effect is produced, analogous to that secured for witnesses, upon all the officers of the court, in particular, upon judge, jury, and counsel. In acting under the

[2] One notable instance occurred in the trial of Smyth *v.* Smyth, in 1853 (Woodley's Celebrated Trials, I, 115, 140, 144) where a jeweller, reading the report of the first day's proceedings, saw that perjury was committed as to the date of engraving a ring and brooch left with him; and his information enabled the defence to expose the falsity of the entire claim, in which an estate of $20,000 yearly income was at stake.

A good instance is dramatically told in Mr. Ashton Hilliers' romance, "Fanshawe of the Fifth" (1907, p. 336), a story laid in England in the early 1880s.

[3] In Lilburne's Trial (1649), 4 How. St. Tr. 1269, 1273, he claims the right of a public trial.

public gaze, they are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public.[4] (*b*) Persons not called as parties to the suits before the court may nevertheless be affected, or think themselves likely to be affected, by pending litigation. They should have the opportunity of learning whether they are thus affected, and of protecting themselves accordingly; they have "a right to be present for the purpose of hearing what is going on."[5] (*c*) The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.[6]

In general, therefore, and as a rule, a trial must be conducted in such a way as to allow the access of the general public.[7]

§ 1835. **Exceptions to the Rule of Publicity: (1) Excluding Persons from the Court-Room; Juvenile Court Procedure.** All the reasons for requiring publicity are of a contingent and abstract nature. In the long run certain general advantages are secured by a usual practice. No tangible and positive advantage is gained for a party in a given case by publicity or lost by privacy. Moreover, since the whole community cannot enter, the exclusion of some only who might have entered does no definite harm. Finally, in certain conditions, the advantages may be overbalanced by disadvantages. The rule therefore need not be absolute and invariable. Exceptions may properly be recognized. It is an excess of sentimental obstinacy to deny the propriety of allowing exceptions.

(1) At common law, the propriety of exclusion of *mere spectators* in a given instance should depend upon the facts of each case. Both as to the classes of persons excluded and as to the grounds for exclusion, all that can be required is that the measure be a reasonable one under the circumstances. The danger of overcrowding, the risk of violence or brawls, the moral harm of satisfying pruriency in trials of certain crimes, — these are the ordinary

[4] See Bentham, *ubi supra*.

[5] Daubney *v.* Cooper, 10 B. & C. 237, 240.

[6] See Bentham, *ubi supra*. The whole of his Chapter X well repays perusal. A conception of the advantages of publicity may be gained by perusing the contrasting history of French procedure (Esmein, Histoire de la procedure criminelle en France, *passim*, translated as History of Continental Criminal Procedure, vol. V of the Continental Legal History Series); described also in Raoul de la Grasserie's "De la preuve au civil et au criminel en droit français et dans les législations étrangères," 1912, Vol. II, pp. 341, 477. Compare also Mr. (afterwards L. C. J.) Denman's praise of this security in 40 Edinb. Rev. 195 (1824), and Charles Reade's Readiana, "Our Dark Places," II.

[7] 1829, Daubney *v.* Cooper, 10 B. & C. 237, 240 ("We are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed, have a right to be present for the purpose of hearing what is going on"); 1831, Collier *v.* Hicks, 2 B. & Ad. 663, 668 (at a trial before magistrates in an open court, "the public had a right to be present, as in other courts," per Tenterden, L. C. J.); Cooley, Constitutional Limitations, 6th ed. c. 10, p. 379; 1887, State *v.* Brooks, 92 Mo. 542, 573 (the passage in Mr. J. Cooley's work quoted with approval).

A *coroner's inquest* is not a trial: 1827, Garnett *v.* Ferrand, 6 B. & C. 611, 626.

grounds for exclusion. It cannot be doubted that such exceptions are within the judicial power to allow.[1] By statute, they are in most States expressly sanctioned, either in general terms, or for *special classes of cases*, such as divorce, rape, and the like, or for *special classes of persons*, such as minors.[2]

§ 1835. [1] 1917, Davis *v.* U. S., 8th C. C. A., 247 Fed. 394 (train robbery; exclusion of all spectators except defendant's relatives, members of the bar, and reporters, held improper on the facts); 1917, Re Emigh, D. C. N. D. N. Y., 243 Fed. 988 (whether in certain bankruptcy proceedings the examination of witnesses may be private); 1884, People *v.* Swafford, 65 Cal. 223, 3 Pac. 809 (a judicial order excluding all except judge, jurors, witnesses, and persons connected with the case, does not violate the requirement of publicity); 1887, People *v.* Kerrigan, 73 Cal. 222, 14 Pac. 849 (so also for an order, to prevent disorder by the spectators, excluding all but court officers, reporters, and "friends of the defendant and persons necessary for her to have"); 1917, People *v.* Tugwell, 32 Cal. App. 520, 163 Pac. 508 (murder; exclusion of spectators because of disorder, held not improper on the facts); 1917, People *v.* Stanley, 33 Cal. App. 624, 166 Pac. 596 (failure to support an illegitimate child; the exclusion of "all except persons who have any legitimate interest here," held proper on the facts); 1908, Tilton *v.* State, 5 Ga. App. 59, 62 S. E. 651 (with limitations; collecting the cases); 1840, Stone *v.* People, 3 Ill. 326, 338; 1904, State *v.* Worthen, 124 Ia. 408, 100 N. W. 330; 1897, People *v.* Yeager, 113 Mich. 228, 71 N. W. 491 (under Const. Art. VI, § 28; following People *v.* Murray, 89 Mich. 276, 50 N. W. 95, and holding invalid Act 408, § 18, of 1893: "Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading or peculiarly immoral acts or conduct, will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereof, to retire and absent himself or herself from the court-room during such trial, or any portion thereof"; in the trial here, for assault with intent to rape, the Court had admitted the friends of both sides; this decision is deplorable); 1907, State *v.* Callahan, 100 Minn. 63, 110 N. W. 342 (assault of rape; exclusion of spectators held proper on the facts; Elliott, J., diss.); 1918, Rhoades *v.* State, 102 Nebr. 750, 169 N. W. 433 (rape under age; order excluding "those present merely as listeners," held improper; unsound; the trial Court knew best; why not give trial Courts an opportunity to exercise their powers and be man-size Judges, instead of constantly twitching wires upon them as if they were marionettes?); 1909, State *v.* Nyhus, 19 N. D. 326, 124 N. W. 71 (rape; exclusion of general public, held proper on the facts); 1906, State *v.* Hensley, 75 Oh. 255, 79 N. E. 462 (rape under age; order of exclusion of the public held too general in its terms; here the ruling is reprehensible, because it gave no effect to the defendant's practical waiver of objection; it is an indignity to the Constitution to enforce its rights for a party who does not care enough about them to claim them at its trial); 1909, State *v.* Osborne, 54 Or. 289, 103 Pac. 62 (rape; order of exclusion held improper; good opinion by King, J.).

[2] ENGLAND: 1848, St. 11 & 12 Vict. c. 42, § 19 (the justices have power "in their discretion to order that no person shall have access to or remain in the room or building, if it appear to them that the ends of justice will be best answered by so doing"); commented on, with reference to later statutes of 1896, in 100 Law Times, pp. 234, 267, 291; Eng. St. 1920, c. 75, Official Secrets Act, § 8 (at any trial for an offence of disclosing official secrets, the Court may order that "all or any portion of the public shall be excluded during any part of the proceeding").

CANADA: *Manitoba:* Rev. St. 1913, c. 46, Rule 50 (trials for seduction or criminal conversation; the judge "may order that the public, or any particular class or classes of the public," be excluded; also in any other case where he deems it to be, "in the interest of public morals").

UNITED STATES: *Federal*: Code 1919, § 7112 (trusts and monopolies; at hearings "the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable"); *Alabama*: Const. 1901, Art. VI, § 169 ("In all prosecutions for rape and assault with intent to ravish the Court may in its discretion exclude from the court-room all persons except such as may be necessary in the conduct of the trial"); Code 1907, § 4019 ("During the trials in all courts in this state, of any case of seduction or divorce, or other case where the evidence is vulgar or obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right, in his discretion and on his own motion, or on motion of plaintiffs or defendants, or their attorneys, to hear and try the said case after clearing the court-room of all or any portion of the audience whose presence is not necessary"); *Arizona:* Rev. St. 1913, Civ. C. § 694 (when a cause is of a "scandalous or obscene nature," the Court may exclude "all minors whose presence is not necessary as parties or witnesses");

(2) The modern *juvenile court* rightly relies upon kindly paternal spirit in its procedure, as a necessary means to reach the emotions of the delinquent and to secure candid avowals and ready amenability to treatment.

Arkansas: Dig. 1919, § 1995 (committing magistrate; quoted *post*, § 1837, n. 10); *Colorado:* Comp. St. 1921, C. C. P. § 463 (it shall be the Court's duty to exclude persons not officers or connected with the case, on counsel's suggestion that the evidence "will be of such character that unnecessary publicity would operate injuriously on public morals"); *Delaware:* Rev. St. 1915, § 3021 ("divorce hearings may be held privately in chambers"); *Georgia:* Rev. C. 1910, § 5885 (in trials for "seduction or divorce or other case where the evidence is vulgar and obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young," the trial Court has discretion to exclude "all or any portion of the audience"); 1921, McClelland *v.* State, — Ga. App. —, 110 S. E. 245 (unspecified offense; order to exclude women and minors, not passed upon); 1921, Moore *v.* State, 151 Ga. 648, 108 S. E. 47 (rape; the trial Court on motion of the State excluded all persons except officers of the court, defendant's relatives, prosecutrix' relatives, members of the bar, and newspaper reporters, during the taking of the prosecutrix' testimony, under Civ. C. 1910, § 5885; held (1) that the statute was constitutional, (2) that the order was reasonable and valid); *Idaho:* Comp. St. 1919, § 6476 (in actions for "divorce, criminal conversation, seduction, or breach of promise of marriage," the Court may exclude "all persons except the officers of the court, the parties, their witnesses, and counsel"); *Iowa:* Code 1919, § 2101; *Kansas:* Gen. St. 1915, § 6367, St. 1885, c. 144 (minors may be excluded during a proceeding "in which vulgar, obscene, or immoral evidence is elicited or produced"); C. Cr. P. 1895, § 63 (committing magistrate may exclude "all persons" from the room, except the attorneys, etc.); *Kentucky:* Stats. 1915, § 979 (infants under 16, not witnesses nor kin to the parties, shall be excluded from the court-room during trials for rape, seduction, etc., and in civil trials for slander, seduction, and breach of promise of marriage); *Maine:* Rev. St. 1916, c. 87, § 26 (Court may exclude minors during any trial, "when their presence is not necessary as witnesses or parties"); *Massachusetts:* Gen. L. 1920, c. 55, § 40 (at election inquests, the judge "may exclude all persons whose presence is not necessary at such inquest"); c. 220, § 13 (any court "may exclude minors as spectators," if their presence "is not necessary as witnesses or parties"); *Michigan:* Comp. L. 1915, § 15700 (on a charge of rape, seduction, etc., a committing magistrate may exclude all persons not officers of the court or required to attend); § 15679 (committing magistrate may exclude minors during the examination of witnesses); § 12253 (on any trial "which involves scandal or immorality," the Court may exclude "all minors, as a matter of public policy, unless such minor or minors are parties or witnesses"); *Minnesota:* Gen. St. 1913, § 9203 (no person under seventeen, not a party, etc., shall be present at a criminal trial); *Mississippi:* Const. 1890, III, § 26 (accused is entitled to a public trial; but "in prosecutions for rape, adultery, fornication, sodomy, or the crime against nature, the Court may in its discretion exclude from the court-room all persons except such as are necessary in the conduct of the trial"); Code 1906, § 268, Hem. § 217 (bastardy proceedings; justice may exclude all persons except parties, counsel, officers, and witnesses); § 1679, Hem. § 1421 (in divorce proceedings, the Court may exclude all persons except officers, parties' attorneys, parties, and witnesses); *New York:* Cons. L. 1909, Judiciary, § 4 (Court sittings shall be public, except as in Utah Rev. St. § 1789); *North Carolina:* Con. St. 1919, § 4636 (in rape trials, during prosecutrix' testimony, the judge or the justice may "exclude from the court-room all persons except the officers of the court, the defendant, and those engaged in the trial of the case"); *North Dakota:* Comp. L. 1913, § 7337 (the judge may in his discretion "on the trial of cases of a scandalous or obscene nature" exclude "all persons not necessarily present as parties or witnesses"); *Philippine Islands:* C. C. P. 1901, § 10 ("The sitting of every court of justice shall be public, but any court may, in its discretion, exclude the public when the testimony to be adduced is of so indecent a nature as to require such exclusion in the interests of morality"); *Texas:* Rev. C. Cr. P. 1911, § 23 ("The proceedings and trials in all courts shall be public"); *Utah:* Comp. L. 1917, § 1789 ("In an action for divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the Court may in its discretion exclude all persons who are not directly interested therein, except jurors, witnesses, and officers of the court"); *Vermont:* Gen. L. 1917, § 3574 (divorce trials; Court may exclude all but officials and parties); *Virginia:* Code 1919, § 4906 (in all criminal cases, "the Court may in its discretion exclude from the trial any or all persons whose presence is not deemed necessary"); *Wisconsin:* Stats. 1919, § 4789 (magistrate may exclude all bystanders and others not officers or otherwise required to be present, on examination for rape, assault with intent to rape, seduction, adultery, bastardy, "or other offense against chastity, morality, or decency").

With this purpose, it seeks to eliminate the usual incidents of a criminal court, particularly the strict formality and the tense combativeness. Privacy of examination of the delinquent and his family is therefore regarded as generally useful and occasionally essential; and statutes usually provide for this.[3]

But in so far as such statutes make privacy compulsory, or so far as practice habitually exercises the power, it has its dangers. No court of justice can afford habitually to conduct its proceedings strictly in private. The reasons above given are as applicable to juvenile courts as to others. The tendency to undue privacy should be checked.

An eminent judge of long experience in the juvenile court thus comments on the subject:

1921, Hon. EDWARD F. WAITE (Judge of the Juvenile Court, Minneapolis), "How far can court procedure be socialized without impairing individual rights?" (Journal of Criminal

[3] CANADA: *Newf.* St. 1919, 9 Geo. V, c. 6, § 22, Protection of Children Act ("the room in which the examination takes place shall not be deemed a public court, and no person shall be permitted to be present other than the officers of the law," etc., etc.); *Saskatchewan:* R. S. 1920, c. 192, § 25 (children's court; the judge shall exclude from the room all persons except counsel, witnesses, etc.).

UNITED STATES: *Alabama:* Code 1907, § 6453, as amended by St. 1915, No. 510, p. 577, § 4 (juvenile court; "no person shall be admitted to hear the trial of any juvenile delinquent" except officers, attorneys in the cause, parents or guardians, etc.); *Connecticut:* Gen. St. 1918, § 1856 (juvenile delinquents; Court shall ordinarily "hear complaints . . . in chambers"); St. 1921, c. 336, § 11 (juvenile courts; judges shall exclude "any person whose presence is in the court's opinion not necessary"); *Georgia:* St. 1915, Aug. 16, No. 210, § 11 (juvenile court may "exclude the general public from the room" admitting only those who "have a direct interest in the case"); P. C. § 889 (juvenile court; "the hearing shall be, as far as practicable, private"); *Hawaii:* Rev. L. 1915, § 2286 (trial of juveniles; judge may exclude any person not interested "whose presence he deems prejudicial to the interests of the child"); *Idaho:* Comp. St. 1919, § 7910 (on disposal of dependent child, the Court may "exclude the general public," admitting only those who have a "direct interest in the case"); *Indiana:* Burns Ann. St. 1914, § 1633 (juvenile court; judge may exclude all persons "not necessary for the trial of the case"); *Kansas:* Gen. St. 1915, § 10084 (boys under sixteen entitled to "a private examination and trial, to which only the parties to the case shall be admitted," unless parent, etc., demands public trial); § 6385, St. 1901, c. 106 (dependent children; the Court may exclude "all persons other than the counsel and witnesses in the case, officers of the law or of any children's aid society or institution, and the immediate friends or relatives of the child or parent"); *Maine:* St. 1919, c. 58, amending R. S. c. 144, § 3 (juveniie delinquents; the Court may "exclude the general public other than persons having a direct interest in the case"); *Michigan:* Comp. L. 1915, § 2013 (juvenile delinquents; judge may exclude "any person whose presence is deemed prejudicial to the interests of the child or the public, when such person does not have a recognized personal interest in the case"); *Minnesota:* St. 1917, c. 397, § 24 (juvenile court; general public may be excluded, admitting only those interested, etc.); *Mississippi:* St. 1916, c. 11, § 14 (juvenile offenders; judge "may exclude the public from the room"); *New Hampshire:* St. 1915, Apr. 7, c. 96, amending St. 1907, c. 125, § 3 (juvenile court; minors shall be excluded, unless the Court deems their presence necessary); *New Mexico:* St. 1917, Feb. 19, note 7 (juvenile court may, and on application of juvenile or his custodian, shall, "order the hearing to be private"); *North Carolina:* Con. St. 1919 (juvenile court; "the general public may be excluded," admitting only those who "have a direct interest in the case"); *Porto Rico:* St. 1915, March 11, No. 37, § 16 (juvenile court; the judge may conduct the case as in Kan. Gen. St. § 10084); *Rhode Island:* St. 1915, c. 1185 (juvenile court and superior court; like Me. St. 1919, c. 58); *Wisconsin:* Stats. 1919, § 4801 (juvenile court, "the hearing . . . shall be private, and all persons, except the officers of the court, the parties, their witnesses, and counsel, shall be excluded therefrom; and the record thereof shall not be open to the public except upon order of the judge").

See "The Socialization of Juvenile Court Procedure," by Miriam Van Waters (Journal of Crim. L. and Criminology, 1922, XIII, 61).

Law and Criminology, XII, 339): "One who is accused of crime has a constitutional right to a public trial. As to what a public trial is, the courts have differed. If a juvenile court is organized as a criminal court for children, any child who comes before it charged with an offense is entitled to a public trial. If the court that deals with him is exercising chancery jurisdiction, no such constitutional right exists; and for the purposes of this discussion non-criminal courts with purely statutory jurisdiction over children will be classed, though not with technical exactness, as courts of chancery jurisdiction. To a mind 'not warped,' as somebody has said, 'by study and practice of the law,' it may seem absurd that the hearing in the case of Johnny Jones must be public if he is charged in a criminal court with stealing, and need not be so if he is charged in a non-criminal court with being delinquent because he stole. I shall not now defend this seeming inconsistency. If it is constitutional law, it is binding on the courts and legislatures, and can be changed only by constitutional amendments. There is no constitutional right to a public hearing when dependency or neglect is the issue; and the court has no right to deny it in cases of 'contributing,' since here it acts always as a criminal court, whether or not it has also chancery jurisdiction. Even when the right to a public trial exists, much discretion is allowed the judge in the matter of excluding idle onlookers in the interest of public decency or the good order of the court proceedings. Probably no reasonable exercise of this discretion would ever be questioned by or on behalf of a juvenile delinquent, for the protection of whose sensibilities and reputation it is commonly exercised. Indeed, all doubtful questions that have arisen in my own experience have had reference to *in*clusion rather than *ex*clusion. I have sometimes found it puzzling to know how far it was just to children and their parents to permit their troubles to be heard even by qualified social observers who wished to use the clinical opportunities afforded by court sessions."

(3) An *adjournment of the court to another place* than the regular court-room could not in itself result in preventing publicity, even though the Court were held in a lawyer's office or the like, unless during the session there an actual prohibition of the public's attendance were issued. Such adjournments might, however, involve irregularities of procedure on grounds independent of the present principle; and, as they have generally been treated from that point of view, no definition of the exceptional justifying causes, as allowable under the present principle, seems to have been made.[4] It would seem that exceptions could be recognized.

§ 1836. **Same**: (2) **Preventing Publication of Proceedings.** Does the policy of publicity justify and demand, as a necessary deduction, the opportunity for the general public of ascertaining the tenor of the proceedings through *contemporaneous printed reports*, no less than through personal attendance in the court-room?

[4] Since the subject is one rather of trial procedure than of evidence, no attempt has been made to collect all the precedents. Rulings dealing with the subject are as follows: 1921, Ex parte Liggett, — Cal. —, 202 Pac. 660 (committal to State hospital for dipsomaniacs; C. C. P. § 2185*c* held to authorize holding of the hearing elsewhere than at the court-house); 1897, Reed *v.* State, 147 Ind. 41, 46 N. E. 135 (in a room other than the usual one); 1877, Mohon *v.* Harkreader, 18 Kan. 383 (at a private law office); 1916, State *v.* Tracy, 34 N. D. 498, 158 N. W. 1069 (assault with intent to rape; adjournment to a hospital to take the victim's testimony, held proper); 1842, Le Grange *v.* Ward, 11 Oh. 257 (not at the county seat); 1915, U. S. *v.* Lim Tin, 31 P. I. 504; 1892, Bates *v.* Sabin, 64 Vt. 511, 514, 24 Atl. 1013 (at the judge's house); 1895, Sutton *v.* Snohomish, 11 Wash. 24, 39 Pac. 293 (adjourning to the house of a witness on account of his illness, to take his testimony); 1898, Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 975 (adjourning to the plaintiff's house, on account of her illness, to take her testimony).

Of the advantages gained by publicity, as enumerated above (*ante*, § 1634), it will be observed that the first sort (the tendency to improve the quality of testimony) is here equally to be expected, though not in the same degree, and that the second sort is also to be expected, though again hardly in the same degree. Publicity by contemporaneous reports, furthermore, is, on the one hand, the more effective sort, first in that an absolutely larger number of persons are certain to be reached, and secondly in that at the present day the attendance of representatives of all classes of the community at court sessions is (in cities at least) not so common as it formerly was. On the other hand, this mode of publicity is nowadays in our own country much less effective than in England, because ordinarily the newspapers (in cities at least) are so neglectful of the civic duties of their occupation that they give only scanty space to reports of legal proceedings, and are satisfied with fragmentary and misleading accounts. It is also less necessary because the exploitation of the news of crime usually occurs at the time of its commission and of its investigation by the police, so that its use in inducing informed persons to bring forward evidence has been mainly exhausted before the time of the trial. Finally, it is less necessary, because the absence of this mode of publicity would still leave all the advantages and guarantees of the other mode in as ample a manner as they existed at common law before daily newspapers existed or followed this practice. There are thus balancing considerations; so that the sum of the case seems to be on the whole as it was first stated, namely, that this mode of securing publicity is calculated to secure the same kinds of advantages as publicity by personal attendance, though not to secure them in the same degree. It may be assumed, then, that the requirement of publicity calls also for the preservation of this mode of securing it, though not with the same urgency.

There may, then, properly be exceptions, *i.e.* situations in which the Court may forbid the printed publication of the proceedings pending the progress of the trial. It is usually assumed that such a publication is lawful unless a specific order of the Court has prohibited it. The question then is, For what reasons may a Court properly prohibit it?

Of palpably just grounds, there are at least two: first that the proceeding is only a preliminary or 'ex parte' one, and that a publication would therefore give an erroneous impression of the conduct of the parties; secondly, that conditions of popular emotion exist, amid which the publication before verdict rendered would tend to excite the public mind, to cause pressure upon the minds of the witnesses, the judge, and the jury, and thus to do injustice to one of the parties by preventing a fair and unbiassed investigation of the facts. The whole question, however, has not been and cannot be developed in judicial precedent solely with reference to its evidential bearings; for it is commonly complicated with two other matters of law, — on the one hand, the law of libel by privileged reports, and, on the other hand, the law of contempt of court (*i.e.* obstruction of justice) by comment on a pending

trial. For this reason, and for the reason that publicity has also an independent utility (*supra*, § 1834), it is hardly possible to say that there is upon this subject any rule having reference purely to the evidential bearings of the policy of publicity,[1] and it is unlikely that there ever will be.

§ 1836. [1] Some of the earlier precedents are as follows: *England:* 1811, R. *v.* Fisher, 2 Camp. 563 (preliminary examination); 1817, Watson's Trial, 32 How. St. Tr. 80, 109, 111, 538 (order not to publish the proceedings till the close of the trial; here the prosecution's opening address was so published); 1817, Brandreth's Trial, 32 How. St. Tr. 776, 779, (order only); 1817, Turner's Trial, 32 How. St. Tr. 957 (same as in Watson's case); 1820, Brunt's and Thistlewood's Trials, 33 How. St. Tr. 1182, 1335, 1563 (publication presumably in aid of the accused); s. c., R. *v.* Clement, 4 B. & Ald. 218; see an examination of the earlier English cases by Mr. (afterwards L. C. J.) Denman, in 40 Edinb. Rev., 197 ff. (1824).

United States: 1842, U. S. *v.* Holmes, 1 Wall. Jr. 1, 11 (reporters of newspapers were by order refused admission within the bar, except on condition of not publishing the proceedings pending trial; the Court construed the Act of March 2, 1831, Rev. St. § 725, as preventing them from prohibiting the publication); 1858, Dunham *v.* State, 6 Ia. 245; 1851, Tenney's Case, 23 N. H. 162 (bill in equity); 1896, *Re* Hughes, 8 N. M. 225, 43 Pac. 692; 1884, State *v.* Frew, 24 W. Va. 416.

SUB-TITLE IV: SEQUESTRATION[1] OF WITNESSES

CHAPTER LXI.

§ 1837. **History; Statutes.** The expedient of separating a party's witnesses, in order to detect falsehood by exposing inconsistencies, seems to have been early discovered and long practised in various communities. Though probably not in itself older or more widespread than some other fundamental notions of proof, nevertheless its age and universality have come to be more emphasized in our own legal annals because of the instance recorded and handed down in the apocryphal Scriptures. The story of Daniel's judgment in Susanna's case has given to this expedient a unique and classical place in our law as well as in our literature:

The History of Susanna: "[Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly;] and the elders said: 'As we walked in the garden [of Joacim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.' Then the assembly believed them, as those that were the elders and judges of the people. . . . But [Daniel,] standing in the midst of them, said: . . . 'Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel?' . . . Then Daniel said unto them, 'Put these two aside, one far from another, and I will examine them.' So when they were put asunder one from another, he called one of them, and said unto him:[2] 'Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?' who answered, 'Under a mastick tree.' And Daniel said, 'Very well; thou hast lied against thine own head.' . . . So he put him aside, and commanded to bring the other, and said unto him,[3] . . . 'Now therefore tell

§ 1837. [1] This term for the process of placing prospective witnesses out of the hearing of a testifying witness has precedent in the usage of Louisiana (37 La. An. 463), of Texas (3 S. W. 539), and of Georgia (Code Index, *s. v.* "Witness"), and seems preferable to any other; there is indeed no other single term in acceptance. In the Southern States, by an early usage of obscure origin, it is termed (*e. g.* in 2 Swan 257) "putting under the rule," the word "rule" being merely the original English term for "order of court."

[2] Here Daniel, in several lines of vituperation, prophesies the elder's downfall; it would seem that this indicates a desire to anger and confuse the witness, preventing him from recollecting the details of his story if he had invented one.

[3] Here again came disconcerting anathema.

me, under what tree didst thou take them companying together?' who answered, 'Under an holm tree.' Then said Daniel unto him, 'Well; thou hast also lied against thine own head.' . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people."

The story of Susanna's vindication, sanctioned as it was by its place in the Scriptures, came to serve as a powerful argument in English courts, after the spread of printing and the popularization of the Bible made the people at large familiar with it. From almost the beginning of our recorded trials, the story is found repeatedly cited, and was a favorite text of invocation for those who hoped in the same way to prove their innocence.[4]

Meantime, however, it is clear that the expedient already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law. It appears to have been customary to examine separately the secta-witnesses[5] and the transaction- and document-witnesses,[6] as well as other persons from whom a consistent story was expected in order to obtain legal action;[7] and the process seems to have had

[4] *Circa* 1460, Sir John Fortescue, L. C., in his De Laudibus Legum Angliæ, c. 21, dilates on the marvel of its success. Other examples: 1603, Sir Walter Raleigh's Trial, Jardine Crim. Tr., I, 419 ("My lords, for the matter I desire, remember too the story of Susannah; she was falsely accused, and Daniel called the judges 'fools, because without examination of the truth they had condemned a daughter of Israel,' and he discovered the false witnesses by asking them questions"); 1683, Sidney's Trial, 9 How. St. Tr. 817, 861 (cited by Sidney, arguing for himself); 1684, Rosewell's Trial, 10 How. St. Tr. 147, 190; 1696, Cook's Trial, 13 How. St. Tr. 311, 348, note; Fenwick's Trial, 13 How. St. Tr. 537, 722; 1725, Braddon, Observations on the Earl of Essex's Murder, 9 How St. Tr. 1229, 1278, 1283, 1294.

There appears to be no mention of it in the recorded trials about the time of the great dramatist's earlier life in London. Yet one likes to imagine that his "Daniel come to judgment" was inspired by the tale of some trial known to him in which an appeal to this story had furnished a theme for popular discussion; it could not have been Raleigh's trial, for the lines in the "Merchant of Venice" had already been printed some three years.

[5] See instances from Bracton's Note-Book, cited in Thayer, Preliminary Treatise on Evidence, 14; from the Norwich Custumal (*ante* 1340), quoted in Bateson's Borough Customs, 1904, I, 203, Selden Society, vol. XVIII.

[6] See instances collected by Professor Thayer, Prelim. Treatise, 20, 22, 98; Pollock and Maitland, Hist. Eng. Law, II, 635, 637. To these add the following: 1158 (?), Wallingford and Oxford *v.* Abbott Walkelin, Bigelow's Plac. Ang. Norm. 198, 201 (controversy over a right of market; a number of men of the county were chosen in order by their oaths to decide the claim, but "segregati, qui jurarent, diversis opinionibus causam suam confundebant," and their diversities are then stated in detail).

[7] The expedient was used in examining the summoners in a writ of mortdancester: Britton, b. III, c. 10, § 9 (Nichols, II, 92) (as to resummons in mortdancester, where the tenant denies that he was first summoned, "let the summoners be examined, and if upon examination they are found to disagree in the circumstances of the summoning, let the tenant be adjudged quit as to the default, and the summoners in mercy. And if they are found to agree, then he may defend the summons by his law"). See also, for this, Fleta, b. V, c. 3, § 7; b. VII, c. 6, §§ 12, 13, 20.

A good example of this practice with the summoners occurs in Bracton's Note-Book, pl. 10, where "omnes discordant adinvicem." Compare also the proceeding with the grand jury, quoted in Stephen, History of the Criminal Law, I, 248; 1300+, MS. Lex Mercatoria, cited by Mr. A. T. Carter, in 17 L. Q. Rev. 247 (sequestration shown to be a part of the procedure in the early market-courts); 1630 (?), Hudson's Treatise on the Star Chamber, p. 204, quoted in Leadam's Select Cases in the Star Chamber, Seld. Soc. Pub., vol. XVI, p. xxxiv. In short, it would seem that the value of the practice was well understood on all hands, and that it was resorted to in any sort of proceeding in which it was appropriate.

substantially the same object and probative operation that we find in it to-day:

1318, *Anon.*, Pl. Ab. 351, col. 1, London:[8] "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time, how and when [an alleged deed of release was made,] and other necessary circumstances touching the deed. . . . [Three of the four had said that] on a certain Thursday they all came together to the manor . . . and found there this said Richard, who showed them the said writing and said it was his deed. Each of them was asked, separately and by himself, at what hour they came there, and in what building in the manor Richard showed them the writing, and how he was dressed. One of them said that they came there in the morning before sunrise, and that the writing was shown to the four witnesses in the queen's chamber in the manor, and Richard was dressed in a German tunic 'de medleto,' and was shod in white shoes. The second said that they came at six o'clock, and the writing was shown to the four witnesses at this hour in the hall of the manor. The third said that they came, all at the same time, at nine o'clock, and Richard showed them the writing in the stable of the manor and he had on a black cloak. The fourth witness, William de Codinton, said that he never came to the manor with the said three witnesses, and never knew or heard of the making of the writing" except from the others' report. And judgment was given against the deed.

It was natural enough, when trial by jury had developed and the jurors had come to rely much upon the testimony of witnesses brought into court before them (that is, perhaps, after the 1400s), that the ancient expedient should continue to be applied in these new conditions. From the beginning of this epoch, and onwards, it is clear that the practice was well known and often used.[9] There is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change.

The practice of course crossed the water with the common law. To-day, in many jurisdictions of the United States and Canada, statutes have expressly (though unnecessarily) made provision for sequestration, usually concerning its employment before committing magistrates.[10] Occasionally

[8] As quoted in Thayer, *ubi supra*, 99.

[9] Examples: *Circa* 1460, Fortescue, De Laudibus Legum, c. 26; 1571, Duke of Norfolk's Trial, Jardine's Crim. Tr., I, 191; 1600, Earl of Essex's Trial, Jardine's Crim. Tr., I, 349; 1665, Guilliams *v.* Hulie, 1 Sid. 131; 1684, Rosewell's Trial, 10 How. St. Tr. 147, 160; 1696, Charnock's Trial, 12 How. St. Tr. 1396; 1754, Canning's Trial, 19 How. St. Tr. 330; 1775, Trial of Maharajah Nundocomar, 20 How. St. Tr. 934; 1793, Hudson's Trial, How. St. Tr. 1021.

[10] CANADA: *Alberta:* Rules of Court 1914, R. 190 (like Ont. Rule 254); *Manitoba:* Rev. St. 1913, c. 46, Rule 584 (the judge may order "some or all of the witnesses" to be removed, including "any party to the cause or his solicitor, intending or subpœnaed to give evidence"; or he may require the party to be examined before his other witnesses; and he may punish any witness who disobeys, and may "exclude the testimony of any witness who returns to or remains in the Court without leave of the judge"); *Ontario:* Rules of Court 1914, § 254 ("The judge shall at the request of either party order a witness to be excluded," and also "if the judge deems it expedient, a party intending to give evidence; or he may require such party to be examined before the other witnesses in his behalf"; in discretion the judge may exclude the testimony of "any witness or party" who disobeys).

UNITED STATES: *Alaska:* Comp. L. 1913, §§ 2423, 1492 (like Or. Laws 1920, §§ 1788, 854, 1601, 831); *Arizona:* Rev. St. 1913, P. C. § 882 (committing magistrate may exclude all witnesses while one is examined, and may also cause them to be kept separate); § 883 (he may also on defendant's request exclude all persons except prosecutor, counsel, officers having defendant in custody, and clerk); *Arkansas:* Dig. 1919, § 2928 (on accused's request, committing magistrate may exclude all persons except clerk, peace officer, prosecutor, accused, parties' attorneys, and witness under examination); § 2929 (he may

the statute serves to determine one of the mooted points hereafter to be noticed.

also cause the witnesses to be kept separate from each other and out of hearing of the witness deposing); § 4191 (civil cases; "If either party require it, the judge may exclude from the court-room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witness"); *California:* P. C. 1872, § 867 (committing magistrate "may exclude all witnesses who have not been examined; he may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined"); § 868 (he "must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody"); C. C. P. 1872, § 2043 ("If either party requires it, the judge may exclude from the court-room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses; but a party to the action or proceeding cannot be so excluded, and if a corporation is a party thereto, it is entitled to the presence of one of its officers, to be designated by its attorney"): *Connecticut:* Gen. St. 1918, § 239 (coroner may sequestrate witnesses); *Georgia:* Rev. C. 1910, § 5869, P. C. § 1043 ("In all cases, either party has the right to have the witnesses of the other party examined out of the hearing of each other; the Court will take proper care to effect this object as far as practicable and convenient; but any mere irregularity shall not exclude the witness"); *Idaho:* Comp. St. 1919, § 8030 (like Cal. C. C. P. § 2043); § 6476 (in any case the Court may in discretion "exclude any and all witnesses in the cause"); §§ 8752–8753 (like Cal. P. C. §§ 867, 868); *Illinois:* Rev. St. 1874, c. 361 (committing magistrate may exclude, during a witness' examination, other witnesses, or separate the witnesses so that they cannot converse with each other until they have been examined); *Iowa:* Code 1897, § 5225, Rev. Code, § 9179 (committing magistrate may exclude all witnesses except the one testifying, and may cause witnesses to be kept separate); § 5226, Rev. Code § 9180 (he must also exclude on defendant's request all persons except the attorneys and certain officers); *Kansas:* Gen. St. 1915, § 7959 (committing magistrate may in discretion exclude all witnesses not being examined, and, "may direct the witnesses for or against the prisoner to be kept separate so that they cannot converse with each other until they shall have been examined"); *Kentucky:* C. C. P. 1895, § 601 (judge may order separation, not to include parties or court officers); C. Cr. P. §§ 62, 63 (committing magistrate may order separation, and must do so on request of either party; but not so as to exclude the defendant, his counsel, the peace officer, the Commonwealth's attorney, or the prosecutor); *Maine:* Rev. St. 1916, c. 135, § 12 (committing magistrate may separate witnesses for accused from witnesses against him, and may examine "each one separately from all the others"); *Massachusetts:* Gen. L. 1920, c. 248, § 38 (separate examination authorized, in proceeding to free a person under restraint, of the person and of witnesses); c. 148, § 4 (same for fire marshal's inquest); c. 38, § 8 (at inquests of death, the witnesses may be kept separate); c. 55, § 10 (same for election inquest); c. 276, § 39 (committing magistrate may exclude all other witnesses during the examination of one, and may separate "the witnesses for or against the prisoner," so as not to converse); *Michigan:* Comp. L. 1915, § 15679 (committing magistrate may separate the witnesses, etc.); *Minnesota:* Gen. St. 1913, § 9082 (committing magistrate may in discretion exclude all witnesses not testifying, and may direct "the witnesses for or against the prisoner to be kept separate" until examined); *Missouri:* Rev. St. 1919, § 3823 (committing magistrate; like Cal. P. C. § 867); *Montana:* Rev. C. 1921, § 2750 (fire marshal's investigation; witnesses may be separated, etc.); §§ 11781, 11782 (like Cal. P. C. §§ 867, 868); § 10660 (like Cal. C. C. P. § 2043); *Nebraska:* Rev. St. 1922, § 9980 (committing magistrate, "if requested, or if he sees good cause," shall order separate examination, and separation of witnesses on one side from those on the other); *Nevada:* Rev. L. 1912, § 6984 (during defendant's examination before committing magistrate, witnesses on either side shall not be present; and the magistrate may exclude all unexamined witnesses during the examination of one, and may cause witnesses to be kept separate and be prevented from conversing with each other until all are examined); § 6985 (he shall on defendant's request exclude all persons except the clerk, prosecutor and counsel, attorney-general, district attorney of county, defendant and his counsel, and officer having him in custody); § 5449 (civil cases; like Cal. C. C. P. § 2043); *New Hampshire:* Pub. St. 1891, c. 252, § 11 (sequestration allowable on preliminary examination by magistrate); *New Mexico:* Annot. St. 1915, § 3211 (committing magistrate may exclude all unexamined witnesses during another's examination, and may keep witnesses apart and prevent them from conversing until all have been examined); *New York:* C. Cr. P. 1881, § 202 (committing magistrate may sequestrate witnesses while others are examined, and must do so while defendant is examined); Con. St. 1919, § 4562

§ 1838. **Probative Purpose and Operation.** The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony:

Circa 1460, Chief Justice FORTESCUE, De Laudibus Legum Angliæ, c. 26: "And if necessity requires, the witnesses may be separated, until they have testified to whatever they intended, so that what one says shall not instruct or warn another how to testify consistently."

1824, KIRKPATRICK, C. J., in *State* v. *Zellers*, 7 N. J. L. 226: "The less a witness hears of another's testimony, the more likely he is to declare his own knowledge simply and unbiassed."

1872, FREEMAN, J., in *Wisener* v. *Maupin*, 2 Baxt. 342, 357: "The object being to prevent the witnesses with feelings interested from being prepared to meet the statements of witnesses already made, and to compel them to rely on their own memory for the accuracy of their statements without being warped or influenced in their statements by what they have already heard deposed."

1902, MCCLELLAN, C. J., in *Louisville & N. R. Co.* v. *York*, 128 Ala. 305, 30 So. 676: "The purpose to be subserved in putting witnesses under the rule is that they may not be able to strengthen or color their own testimony, or to testify to greater advantage in line with their bias, or to have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses; and it is legitimate argument against the veracity or fairness of a witness to say that his testimony has been developed along the lines of his inclination in the case by the opportunities he has had, from hearing the other witnesses, to refute them or to amplify his own statements to meet the exigencies of the trial."

But the probative service thereby rendered is somewhat different according as the witnesses separated are called for opposing parties or for the same parties.

(1) If the hearing of an *opposing witness* were permitted, the listening witness could thus ascertain the precise points of difference between their testi-

(before a committing magistrate, no witnesses are to be present during accused's examination; during any witness' examination, others may be sequestrated); *North Dakota:* Comp. L. 1913, §§ 10603, 10604 (like Cal. P. C. §§ 867, 868, adding, "and such other person as he may designate" after "defendant and his counsel"); *Ohio:* Gen. Code Ann. 1921, § 13512 (committing magistrate may "if requested, or if there is good cause therefor," order separation of witnesses); *Oregon:* Laws 1920, § 854 (like Cal. C. C. P. § 2043); § 1788 (committing magistrate "may exclude the witnesses who have not been examined during the examination of the defendant or during the examination of a witness for the State or the defendant"); *Philippine Isl.* P. C. 1911, Gen. Order 58 of 1900, §§ 39, 40 (similar to Cal. P. C. §§ 867, 868); *Porto Rico:* Rev. St. & C. 1911, § 1518 (like Cal. C. C. P. § 2043); *Tennessee:* Shannon's Code, 1916, § 5599 (party is not to be put under the rule when he is a witness); § 7020 (committing magistrate may sequestrate witnesses); *Texas:* Rev. C. Cr. P. 1911, § 719 (at either party's request, witnesses on both sides may be removed so as not to hear testimony of any other witness); § 720 (those on one side may or may not be separated from those on the other, as the Court directs); § 721 (party requesting separation may designate some or all for the purpose); § 723 (witnesses thus sequestrated are to be instructed not to converse about the case nor to read reports of testimony); *Utah:* Comp. L. 1917, § 7207 (like Cal. C. C. P. § 2043); §§ 8748–8749 (like Cal. P. C. §§ 867, 868); § 1789 (exclusion of spectators in trials involving indecencies; "provided that in any cause the Court may in its discretion, during the examination of a witness, exclude any and all other witnesses in the cause"); *Vermont:* Gen. L. 1917, § 1888 (separation allowable in discretion, on demand of either party, in a county court); § 1982 (separate examination of witnesses demandable by either party in criminal cases); *Virginia:* Code 1919, § 4843 (witnesses may be sequestrated by committing magistrate); *West Virginia:* Code 1914, c. 155, § 13 (committing justice may sequestrate witnesses); *Wisconsin:* Stats. 1919, § 4788 (committing magistrate may in discretion exclude witnesses other than the one examined, and may cause the separation of "the witnesses for or against the prisoner"); *Wyoming:* Comp. St. 1920, § 7357 (like Oh. Gen. Code Ann., § 13512).

monies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is here purely preventive; *i. e.* it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony.

(2) But the separation of *witnesses on the same side* may do something more than this. It is equally preventive, in that it deprives the later witness of the opportunity of shaping his testimony to correspond with that of the earlier one. But it is, additionally, detective in its effects; *i. e.* it exposes their difference of statement on points on which, had they truly spoken, they must have made identical statements. This variance of statements is the significant achievement of the witnesses' separation, and seems to rest for its probative cogency on two salient circumstances, namely, (*a*) that the witnesses speak upon the same side, and (*b*) that the subject of their statements is the details of a single occurrence.

(*a*) The first circumstance serves to remove uncertainty, by fixing unmistakably upon one party's case the whole burden of error. Where two persons, claiming to have been present on the same occasion with equal opportunities of observation, are called upon opposite sides and contradict each other, the contradiction does not of itself establish anything; it may indicate that one of the two is falsifying, but it does not indicate one rather than the other as the falsifier; it is still open to either side to claim its witness as the truthful one, so that neither side is clearly fixed with the error or falsity. But where both speak for the same party, contradicting each other, it is manifest without anything further that the error is upon that particular side; the result is achieved by mere comparison of statements, without the necessity of first granting credit to an opposing witness and without any of the troublesome uncertainty which arises from being forced to weigh their respective credits.[1]

(*b*) The second circumstance, mentioned above, emphasizes the probability of a downright manufacture of testimony. The truth of the main fact is put forward by the party as confirmatively established by the harmony of their joint testimony; and, where two persons come purporting to have observed the same event in the same way, the details of that fact, necessarily and equally open to their observation at the same time, ought to produce the same harmony of impression, and therefore of testimony. If, then, that harmony disappears upon further questioning as to these details, one of two inferences follows: Either (b) there is an honest mistake, in observation or in memory on the part of one; but the former is less likely to the extent that the one fact was necessarily connected in observation with the other, and the latter is almost impossible where (as is usual) the statements are positive,

§ 1838. [1] Compare the theory of 'inconsistent statements of the same witness (*ante*, § 1017).

From the point of view of the logic and psychology of testimony, 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), especially §§ 234–243, 324–333.

and therefore mere failure of memory does not serve to explain; moreover, even an honest mistake as to details shows the probability of a mistake on the main fact. Or, (bb) there is a collusive arrangement, or a deliberate intention by one, to testify falsely; for, if on connected matters of detail, which by the operation of the senses ought equally to have produced identical impressions and therefore identical statements, there is no harmony, then the apparent harmony of statement on the principal fact can be explained only as artificial (*i. e.*) as the result of an individual plan or a combination to manufacture false testimony. This not only discredits one or both of the witnesses in all their testimony, but also throws suspicion on the entire mass of evidence of that party, if this fabrication by the witnesses may seem to have been known to him. More concisely and less accurately: If matters A, B, C, and D must have happened together, then a disagreement as to the tenor of matters B, C, and D, by witnesses called on the same side to prove A, indicates probable perjury by one or more as to A, and possible subornation of perjury by the party.

The weight of this exposure of contrary statements is of course diminished according to the degree of possibility of honest mistake, which in turn depends upon the necessariness of connection between the facts testified to and upon the extent to which one or more of the witnesses venture positive statements as to details. Moreover, the expedient is not invariably successful even where perjury does exist, because either a concerted working out of false details, or a cautious failure of memory, beyond the circle of the main fact, may sometimes baffle all efforts at detection. But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism; for, while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it.

From the following passages some illustrations of its working may be gathered:

1679, *Kerne's Trial*, 7 How. St. Tr. 707, 709; charge of being a priest; two women, Edwards and Jones, were offered to testify to hearing him say mass. *Defendant:* "I desire to ask her what discourse she had with Mary Jones, the other witness, for she has been instructing her what to say, and that they may be examined asunder"; which was granted. *L. C. J.* Scroggs: "Did she [Jones] tell you what she could say?" *Edwards:* "She did." *L. C. J.:* "What?" *Edwards:* "She went once to hearken, and she heard Mr. Kerne say something in Latin, which she said was mass." *L. C. J.:* "Call the other woman; you shall now see how these women agree." *Clerk:* "Call Mary Jones." *L. C. J.:* "Let the other woman [Edwards] go out. . . . What did you tell her you could say?" *Jones:* "I told her . . . he said somewhat aloud that I did not understand." *L. C. J.:* "Did you not tell Margaret Edwards that you heard him say mass?" *Jones:* "No, my lord." *L. C. J.:*

"Call Margaret Edwards again. Margaret Edwards, did Mary Jones tell you that she heard Mr. Kerne say mass?" *Edwards:* "Yes, my lord." *Jones:* "No, I am sure I did not, for I never heard the word before, nor do not know what it means." *L. C. J.:* "So they contradict one another in that."

1683–1725, *Braddon's Observations on the Earl of Essex's Murder*, 9 How. St. Tr. 1229, 1276; the Earl of Essex, in 1683, suspected of plotting with Protestants against Charles II, had been found dead in the Tower with his throat cut; it was given out as a suicide; but Braddon collected much evidence to prove that a band of ruffians, hired by the Papist Duke of York, who succeeded in 1685 as James II, had murdered the Earl; three of the guards had deposed, however, to giving the Earl a razor at his request just before his death. Braddon, who was convicted of seditious libel, afterwards published a defence, in which the guards' story is thus dealt with: "That this story, of the delivering the razor to my lord a little before his death, is the forgery of those who were privy to my lord's murder, appears very plain from the notorious contradictions as to the time of delivering this razor to my lord [for one said he delivered it the day previous, another put it at the early morning of the same day, and the third at a few moments before his death]. . . . If any gentleman shall say that all these three attendants upon my lord at the time of his death agree in this, viz. that there was a razor delivered to my lord when prisoner in the Tower, and that their contradictions are only in the point of time when this razor was delivered to his lordship — it is true they are [only] circumstantial contradictions in the *time* of delivering this razor to my lord of Essex. And the contradiction of the two elders, in their charge of adultery against Susanna, was only in point of the *place* where they took Susanna in adultery. For the first of those elders swore that they took Susanna in adultery under a mastick-tree; but the second swore it was under a holm-tree; but both these conspiring accusers agreed in the main, viz. that they took her in adultery. Yet nevertheless, by their contradictions as to the tree under which they pretended to have taken her in adultery, Daniel convinced the whole Court, which before had rashly condemned Susanna, that those two conspiring accusers had falsely sworn against Susanna. . . . And I never yet heard any person deny Daniel's wisdom and justice in this detection. . . . [Had the coroner, in the Earl's case, caused the three guards to be separately examined and their contradictions been exposed, then the jury must have believed] that they were all three preëngaged falsely to swear what might influence the coroner and his jury to believe that my lord himself cut his own throat. . . . That those warders and servant, who would have proved my lord 'felo de se,' have for that purpose sworn what is false in every material part of their evidence, doth plainly appear from this one consideration or maxim relating to proofs, viz.: When two or more who pretend to be co-witnesses to a fact shall contradict one another in some material circumstance relating to that fact, those contradictions strongly conclude that they have sworn falsely."

1685, *Oates' Trial*, 10 How. St. Tr. 1079, 1158; in this trial the notorious perjurer was at last brought to book; the case turning upon the truth of Oates' statement that he was in London on a certain day, and his witnesses having differed widely in their description of his dress when he was seen by them, Oates complained: "What does it signify, my lord, whether the wig were long or short, black or brown?" *L. C. J.* JEFFREYS replied: "We have no other way to detect perjuries but by these circumstances, . . . as in a controversy about words, were they spoken in Latin or in English, and so to all places and postures of sitting, riding, or the like; as you know the perjury of the elders in the case of Susanna was by their different testimony in particular circumstances discovered."

1915, *John Adye Curran*, K. C., Reminiscences, p. 13: "On one occasion I defended a prisoner before Chief Justice Whiteside. My defence was that the case for the prosecution was grounded on the concocted story of the two Crown witnesses; and I relied on contradiction, one by the other, in their evidence on facts not material to the issue. In my address to the jury I called their attention to the case of Susannah and the Elders, which, though not admitted by all to be part of the Scripture, was at all events very ancient history. There

the witnesses had, as here, been ordered out of court, with the result that, though agreeing in their concocted story, the Elders differed upon an apparently immaterial fact, the name of the tree under which the alleged offence had been committed, the result being the acquittal of the woman.

"The Chief Justice, in charging the jury, said that such an argument could not apply in every case, as otherwise one might argue that the history of the crucifixion of Our Lord was false, because the Gospels apparently differed as to whether both thieves were impenitent.

"At all events, the jury considered the case of Susannah was good enough for them, and acquitted the prisoner."

§ 1839. **Demandable as of Right.** A difference of judicial opinion exists as to whether sequestration is demandable as of right, or is grantable only in the trial Court's discretion.

It seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defence that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, in the case when it is most useful (namely, a combination to perjure), it is almost the only hope of an innocent opponent. After all is said and done, the fact remains (as Sir James Stephen has declared,[1] out of a lengthy experience as a criminal judge) that successful perjury is always a possible feature of human justice. No rule, therefore, should ever be laid down which will by possibility deprive an opponent of the chance of exposing perjury. Finally, it cannot be left with the judge to say whether the resort to this expedient is needed; not even the claimant himself can know that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance, if *he* thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable:

1870, SNEED, J., in *Rainwater* v. *Elmore*, I Heisk. 363, 365: "The lawyer who has practised long in jury cases cannot have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice. Human nature is frail, and that frailty is as often illustrated in the witness box as elsewhere. The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. . . . [He often] lapses into the conviction that the scene before him is a mere tilt and tourney, in which he enters to overturn and countervail the testimony of the adverse party. He has heard the evidence of his own party in regard to the transaction, and perhaps he remembers it somewhat differently; but a conflict would be fatal, and he often reasons his flexible conscience into the opinion that his own memory is at fault and the statement of his confederate is the true version; and he therefore corroborates it. He has heard the testimony of the adverse party, and his ingenuity is taxed at once to strike it where it is vulnerable and to destroy it; a brief and whispered conference behind the bar, and he finds one of his own party who saw the transaction as he saw it;

§ 1839. [1] Hist. Crim. Law, I, 403 ("Under particular circumstances, no really effectual protection against perjury ever has been or ever can be devised").

and the thing is done. Of what value is cross-examination — that most efficacious test of truth — under such circumstances? The witness who is disposed to ignore the truth may now defy the onset of the most skilful cross-examination; and even he who would fain lean towards an honest story finds himself confounded, and often yields his own conviction, to adopt the strong, emphatic statements of another. The object of the trial is to elicit the truth; but under such circumstances and in an excited controversy the truth is as often smothered as disclosed. . . . This doctrine, that upon the mere motion or suggestion of a party it does not seem a matter of right [to order the witnesses' separation], appears to be traceable to the darker ages of English jurisprudence. . . . We have no hesitation in declaring that such a doctrine cannot stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial guaranteed by the laws to the citizens of this country."

The most that ought to be conceded to the judge is to refuse an order of sequestration where it does not appear to be asked in good faith, *i. e.* not in the honest hope of exposing false testimony, but merely to obstruct the trial or to embarrass the opponent's management of his case.

A few Courts concede that sequestration is demandable as of right.[2] But the remainder, following the early English doctrine,[3] hold it grantable only in the trial Court's discretion;[4] declaring usually, however, that in practice

[2] *Eng.* 1837, R. *v.* Murphy, 8 C. & P. 307 ("almost a right for the opposite party"); 1852, R. *v.* Newman, 3 C. & K. 260 (ordered if the opponent insists, even where the witness is also the prosecutor); *U. S.* 1874, Meeks *v.* State, 51 Ga. 429, 432, *semble;* 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477; 1871, Walker *v.* Com., 8 Bush. Ky. 86, 89, 96, *semble;* 1881, Salisbury *v.* Com., 79 Ky. 425, 432; 1824, State *v.* Zellers, 7 N. J. L. 224 ("the strict rule is that they [defendant's witnesses] should be out of court [during the prosecution's testimony]"); 1852, Nelson *v.* State, 2 Swan Tenn. 237, 257; 1870, Rainwater *v.* Elmore, 1 Heisk. Tenn. 363 (see quotation *supra;* but the motion must be supported by affidavit); 1917, Bishop *v.* State, 81 Tex. Cr. 96, 194 S. W. 389 (murder; held, that "the statute guarantees a substantial right"; quoting the above language with approval); 1869, Gregg *v.* State, 3 W. Va. 707, 709.

More than a dozen other jurisdictions reach the same result by statute (*ante*, § 1837).

[3] 1696, Cook's Trial, 13 How. St. Tr. 311, 348 (L. C. J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity"); 1696, Vaughan's Trial, 13 How. St. Tr. 485, 494 (L. C. J. Holt: "You cannot insist upon it as your right, but only a favour that we may grant"); 1741, Goodere's Trial, 17 How. St. Tr. 1003, 1015. It was said, however, to be granted as of right to the crown: yet this is doubtful.

That it should be treated as a mere favor to the accused was natural enough in the 1600s, when the accused (*ante*, § 575) could not as of right have his own witnesses sworn or even called.

In the taking of evidence before the Houses of Parliament there was sequestration as a matter of course for all cases: 1811, Berkeley Peerage Trial, Sherwood's Abstract, 151; 1828, Taylor *v.* Lawson, 3 C. & P. 543.

[4] Besides the following rulings, the statutes cited *ante*, § 1837, have often a bearing: *Federal:* 1904, Bromberger *v.* U. S., 128 Fed. 346, C. C. A. (one witness); *Alabama:* 1849, McLean *v.* State, 16 Ala. 672, 673; 1867, Wilson *v.* State, 52 Ala. 299, 303 (but "should rarely if ever be withheld"); 1898, McClellan *v.* State, 117 Ala. 140, 23 So. 653; 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012; *California:* 1897, People *v.* McCarty, 117 Cal. 65, 48 Pac. 984; *Georgia:* 1853, Johnson *v.* State, 14 Ga. 55, 62 (but intimating that it is the right of the prosecution); *Illinois:* 1860, Errissman *v.* Errissman, 25 Ill. 136; *Indiana:* 1850, Porter *v.* State, 2 Ind. 435 ("a favor, it is true, rarely refused"); 1904, Coolman *v.* State, 163 Ind. 503, 72 N. E. 568; *Indian Terr.:* 1898, Parker *v.* U. S., 1 Ind. Terr. 592, 43 S. W. 858; *Iowa:* 1871, Hubbell *v.* Ream, 31 Ia. 289, 290 (but it is "rarely withheld"); 1900, State *v.* Davis, 110 Ia. 746, 82 N. W. 328; 1904, State *v.* Worthen, 124 Ia. 408, 100 N. W. 330, *semble; Kansas:* 1917, State *v.* Sweet, 101 Kan. 746, 168 Pac. 1112 ("In a murder trial [the request] if timely made is seldom denied"); *Kentucky:* 1895, Kentucky Lumber Co. *v.* Abney, — Ky. —, 31 S. W. 179; 1899, Baker *v.* Com., 106 Ky. 212, 50 S. W. 54; 1919, Music *v.* Com., 186 Ky. 45, 216 S. W. 116; *Louisiana:* 1893, State *v.*

it is never denied, at any rate for an accused in a criminal case. There is no reason for a distinction between civil and criminal cases; successful perjury is an equally deplorable result, in whatever form it overwhelms its victims.

§ 1840. **Mode of Procedure.** (1) The *time* for sequestration begins with the delivery of testimony upon the stand and ends with the close of testimony.

It is therefore not appropriate during the reading of the pleadings or the opening address of counsel;[1] any danger of improper suggestions at such times is to be dealt with in other ways (*ante*, § 786). It continues for each witness after he has left the stand,[2] because it is frequently necessary to recall a witness in consequence of a later witness' testimony. It need not be demanded at the very opening of the testimony,[3] at any time later, when the supposed exigency arises, the order may be requested.

(2) The sequestration may be *asked for* by *either party*.[4] But even though the party sees no exigency or does not care to incur the enmity of some opposing witness, or for other reasons fails to ask, the order may be made at the request of the *jury*,[5] or by the *judge* of his own motion.[6]

(3) The *notification of withdrawal* is accomplished either by furnishing a list to the sheriff specifying the witnesses on either side and obtaining an order from the Court directing him to take them apart; or, more simply, by obtaining an order notifying all prospective witnesses to withdraw from the court-room:

1833, GANTT, J., in *Anon.*, 1 Hill S. C. 251, 254: "It is usual and proper, as was done in this case, to furnish a list so as to enable the sheriff to see that they withdraw. But the

Hagan, 45 La. An. 839, 840, 12 So. 929; 1903, State *v.* Forbes, 111 La. 473, 35 So. 710; *Massachusetts:* 1892, Com. *v.* Follansbee, 155 Mass. 274, 277, 29 N. E. 471; 1893, Com. *v.* Thompson, 159 Mass. 56, 58, 38 N. E. 1111; *Michigan:* 1882, People *v.* Hall, 48 Mich. 482, 487, 12 N. W. 665, *semble;* 1887, People *v.* Burns, 67 Mich. 537, 35 N. W. 154; 1894, People *v.* Machen, 101 Mich. 400, 59 N. W. 664; 1895, People *v.* Considine, 105 Mich. 149, 63 N. W. 196; 1895, Johnston *v.* Ins. Co., 106 Mich. 96, 64 N. W. 5; *Missouri:* 1860, State *v.* Fitzsimmons, 30 Mo. 236, 239; 1895, State *v.* Duffey, 128 Mo. 549, 31 S. W. 98; 1916, State *v.* Sloan, — Mo. —, 186 S. W. 1002 (murder); *Nebraska:* 1884, Binfield *v.* State, 15 Nebr. 484, 487, 19 N. W. 607; 1896, Halbert *v.* Rosenbalm, 49 Nebr. 498, 506, 68 N. W. 622; 1894, Murphy *v.* State, 43 Nebr. 34, 61 N. W. 491; 1898, Chicago B. & Q. R. Co. *v.* Kellogg, 54 Nebr. 138, 74 N. W. 403; 1910, Johns *v.* State, 88 Nebr. 145, 129 N. W. 247; *North Carolina:* 1819, State *v.* Sparrow, 3 Murph. 487, *semble* (neither defendant nor prosecution may claim it as a right); *Texas:* 1870, Cavasos *v.* Gonzales, 33 Tex. 133; 1902, De Lucenay *v.* State, — Tex. Cr. —, 68 S. W. 796; *Utah:* 1881, People *v.* O'Loughlin, 3 Utah 133, 144, 1 Pac. 653; *Washington:* 1906, State *v.* Dalton, 43 Wash. 278, 86 Pac. 590 (murder); *Wisconsin:* 1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

§ 1840. [1] 1851, Benaway *v.* Coyne, 3 Chandl. Wis. 214, 219. The following ruling seems unsound: 1876, Penniman *v.* Hill, 24 W. R. 245, Hall, V. C. (not granted during the reading of affidavits).

[2] 1907, Joseph *v.* Com., — Ky. —, 99 S. W. 311 (in the trial Court's discretion; but not as of rule under Civ. C. Pr. § 601; 1874, Roach *v.* State, 41 Tex. 261, 263.

[3] 1837, Southey *v.* Nash, 7 C. & P. 632 (here, after the demandant's own witnesses had testified); 1918, Com. *v.* Principatti, 260 Pa. 587, 104 Atl. 53 ("black hand" agent killed by accused; trial judge's refusal on request to remove all Italians from the room during a witness' testimony who was afraid of revenge, held error; but this situation really involves the principle of § 786 or § 1399, *ante*).

[4] This is assumed on all hands; the statutes cited *ante*, § 1837, usually mention it.

[5] 1681, Earl of Shaftesbury's Trial, 8 How. St. Tr. 759, 778.

[6] 1867, Wilson *v.* State, 52 Ala. 299, 303; 1880, Ryan *v.* Couch, 66 Ala. 244, 248.

parties may, if they choose, decline making out lists, and by doing so they would be under the obligation of keeping their respective witnesses out of court. . . . But there is no necessity to put down the names of witnesses who are not in attendance; when they do attend, the party intending to swear them must either put their names on the list or see that they do not come into court before they are called to testify."

1858, HANLY, J., in *Golden* v. *State*, 19 Ark. 590, 598: "The course in such cases is either to require the names of the witnesses to be stated by the counsel of the respective parties by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw by an order from the bench accompanied with notice that if they remain they will not be examined."

(4) The *process* itself involves three parts: (a) preventing the prospective witnesses from consulting each other; (b) preventing them from hearing a testifying witness; (c) preventing them from consulting a witness who has left the stand; the last including consultation between witnesses who have left the stand, since they are still prospective witnesses.[7]

The first element is possibly not of great importance, because before trial there has been already unrestrained opportunity for consultation; the second element is the vital one; the third is scarcely less important. The prevention applies equally as between opposing witnesses and between witnesses for the same party; though, as noted already (*ante*, § 1838), it is the collusion of the latter that is mainly to be prevented. The prevention is accomplished usually by placing all the witnesses in a room separate from the trial-room, under charge of an officer, who is to restrain their departure and prohibit their conversation. This simple machinery enforces the rule in all three parts of its operation.

Under varying conditions, the rigor of the rule in these details may no doubt be relaxed in the trial Court's discretion.[8] But nothing should sanction any indirect method of conveying to the prospective witnesses information of the testimony already given. For example, it would seem obvious to good sense that the perusal of journals reporting the testimony should be forbidden.[9] On the other hand, repeating hypothetically upon examination the possible words of a former witness without suggesting whether he actually used them may be allowable.[10]

[7] These three parts are sometimes set forth in the statutes cited *ante*, § 1837, though commonly only the first two are in terms stated; but the first, as ordinarily stated, includes the third. In judicial decisions these elements of the process are rarely stated in detail, but there can be no doubt that the common-law rule implies all three.

[8] 1896, Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389 (the trial Court has discretion as to the instructions to be given to witnesses as to not communicating during adjournment); 1852, Nelson *v.* State, 2 Swan 237, 256 (whether they shall be locked up continuously, or be ordered to keep out of the court-house, or be allowed to disperse for meals, depends upon the trial Court's discretion).

[9] *Contra:* 1861, Com. *v.* Hersey, 2 All. 173, 176. The Texas statute provides against this.

A similar expedient is used in *patent-interference proceedings*, by requiring separate preliminary statements: 1912, Thomas *v.* Weintraub, 38 D. C. App. 281.

[10] 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?"). Compare § 787, *ante*, § 1963, *post*, where other cases are collected.

Whether an *attorney* in the cause *may consult* with a sequestered witness has been the subject of some difference of opinion;[11] the possibilities of abuse by unscrupulous persons (and by hypothesis there is about to be perjury, *i. e.* the rule is most needed for unscrupulous persons) are certainly great; and it seems clear, first, that it may not be done without leave of Court, and, secondly, that it may be done only aloud and in the presence of a court-officer; an honest attorney can hardly object to such regulations.

§ 1841. **Persons to be included in the Order.** (1) The *party demanding the sequestration* may not as of right insist upon the Court's *inclusion of all* persons, without exception, in the rule. No doubt the inclusion of all may sometimes be vital to his plan; but no doubt also it usually is not; and the possibilities of abuse, by indiscriminate exclusion, would be so great that the omission of individuals from the rule may properly be left to its trial Court's discretion, without doing violence to the doctrine (*ante*, § 1839) that sequestration, as a general principle, is demandable of right. It seems to be universally conceded that the trial Court may authorize individual omissions.[1]

[11] *Ga.* 1890, Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 814, 12 S. E. 18 (whether an agent assisting in the cause may not for some purposes consult with the witnesses without leave, not decided); *La.* 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); 1906, State *v.* James Co., 117 La. 419, 41 So. 702 (prosecuting attorney may consult the witnesses in the trial Court's discretion); *Miss.* 1876, White *v.* State, 52 Miss. 216, 224 (counsel may consult with witness); 1884, Allen *v.* State, 62 Miss. 627, 629 (same); 1901, Shaw *v.* State, 79 Miss. 21, 30 So. 42 (the party may still consult with his witness); *Tex.* 1871, Williams *v.* State, 35 Tex. 255 (attorney may confer with the witness, while under the rule, "in a proper manner"); 1877, Brown *v.* State, 3 Tex. App. 294, 310 (conference is allowable only when held in the presence of an officer of the court); Jones *v.* State, 3 Tex. 150, 153 ("the better practice" is to confer only in the presence "or at least by permission of the Court"); 1879, Davis *v.* State, 6 Tex. 196 (conference allowable in trial Court's discretion); 1880, Holt *v.* State, 9 Tex. 571, 580 (same for conference by defendant); 1883, Dubose *v.* State, 13 Tex. 418, 426 (trial Court's discretion); 1883, Creswell *v.* State, 14 Tex. 1, 16 (same); 1885, Kennedy *v.* State, 19 Tex. 618, 631 (same).

§ **1841.** [1] Besides the following rulings, the statutes cited *ante*, § 1837, frequently deal with this point: *Alabama:* 1889, Riley *v.* State, 88 Ala. 193, 196, 7 So. 149; Barnes *v.* State, 88 Ala. 204, 208, 7 So. 38; 1893, Webb *v.* State, 100 Ala. 47, 52, 14 So. 865 (sheriff); 1899, Roberts *v.* State, 122 Ala. 47, 25 So. 238; 1903, Hall *v.* State, 137 Ala. 44, 34 So. 681; *Arkansas:* 1892, Vance *v.* State, 56 Ark. 402, 19 S. W. 1066 (expert witnesses to sanity); 1921, Benson *v.* State, 149 Ark. 633, 233 S. W. 758 (officer aiding prosecution); *California:* 1866, People *v.* Garnett, 29 Cal. 622 (excepting the chief of police); 1882, People *v.* Hong Ah Duck, 61 Cal. 387, 394; 1886, People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673 (Garnett case approved); *Florida:* 1920, Robinson *v.* State, 80 Fla. 736, 87 So. 61 (witness assisting the counsel); *Georgia:* 1859, Thomas *v.* State, 27 Ga. 287, 296; 1876, City Bank *v.* Kent, 57 Ga. 283; 1877, Turbaville *v.* State, 58 Ga. 545; 1891, Dale *v.* State, 88 Ga. 552, 557, 15 S. E. 287; 1893, Central R. Co. *v.* Phillips, 91 Ga. 526, 527, 17 S. E. 952; 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477 (though the exclusion is a right, the trial Court has a discretion; here the remaining of two witnesses to assist in the prosecution was held not improper); 1898, Keller *v.* State, 102 Ga. 506, 31 S. E. 92; 1903, Kelly *v.* State, 118 Ga. 329, 45 S. E. 413; 1905, City Electric R. Co. *v.* Smith, 121 Ga. 663, 49 S. E. 724; 1921, Davis *v.* State, — Ga. App. —, 107 S. E. 883; *Hawaii:* 1898, Republic *v.* Tsunikichi, 11 Haw. 341, 344; *Indiana:* 1851, Johnson *v.* State, 2 Ind. 652; 1904, Coolman *v.* State, 163 Ind. 503, 72 N. E. 568 (prosecuting witness allowed to remain to aid the State's attorney); *Iowa:* 1909, State *v.* Pell, 140 Ia. 655, 119 N. W. 154 (family of murdered man); 1920, State *v.* Smith, — Ia. —, 128 N. W. 4 (rape; prosecutrix' father allowed to remain); *Kentucky:* 1910, Druin *v.* Com., — Ky. —, 124 S. W. 856 (rape under age; father of prosecutrix allowed to remain); *Louisiana:* 1874, State *v.* Baptiste, 26 La. An. 134, 136 (physicians); 1882, State *v.* Revells, 34 La. An. 381, 383; 1885, State *v.* Ford, 37 La. An. 443, 463; *Missouri:* 1880, State *v.* Hughes, 71 Mo. 633, 636; 1895, State *v.*

(2) The *party against whom the demand is made* may not as of right insist on the *omission of any specific person*, other than himself and his counsel, from the order of exclusion; the trial Court's discretion here also must control. For example, it cannot be insisted that members of the party's family[2] or expert witnesses[3] remain in court. Frequently, however, trial Courts sanction the omission of a prospective witness whose assistance in the management of the cause is under the circumstances indispensable.[4]

Under the English practice, where the *attorney* has no official status in the trial, his case was no different from that of other witnesses, and the trial Court's discretion might include him in the order of exclusion;[5] on the other hand, it seems clear that a *counsel* would never have been excluded, though the question seems not to have arisen there, since a counsel would hardly ever be a witness (*post*, § 1911). But in the United States, where the functions of attorney and counsel are not separated, the rule for counsel would of course apply, and a counsel of record in the cause should be permitted as of right to remain.[6]

The case of the *party himself* is more difficult. It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to

Whitworth, 126 Mo. 573, 29 S. W. 595 (father of the prosecutrix in a rape case); *North Dakota:* 1904, King *v.* Hanson, 13 N. D. 85, 99 N. W. 1085; *Tennessee:* 1904, Smartt *v.* State, 112 Tenn. 539, 80 S. W. 586 (prosecutor); 1912, Hughes *v.* State, 126 Tenn. 40, 148 S. W. 543 (detective assisting in preparing the case for trial); *Texas:* 1879, McMillan *v.* State, 7 Tex. App. 142, 144; 1881, Johnson *v.* State, 10 Tex. App. 571, 577 (medical experts); 1884, Spear *v.* State, 16 Tex. App. 98, 114 (same); 1886, Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539; 1898, Dement *v.* State, 39 Tex. Cr. 271, 45 S. W. 917; 1898, Johnican *v.* State, — Tex. Cr. —, 48 S. W. 181 (clerk of court); 1899, Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769; *Utah:* 1881, People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653; *Vermont:* 1877, State *v.* Hopkins, 50 Vt. 316, 322, 332 (here, the sheriff); 1886, State *v.* Lockwood, 58 Vt. 378, 3 Atl. 539 (deputy sheriff); 1886, State *v.* Ward, 61 Vt. 153, 179, 17 Atl. 483 (attorney not employed in the case); *Virginia:* 1898, Jackson *v.* Com., 96 Va. 107, 30 S. E. 452; *West Virginia:* 1915, State *v.* Hoke, 76 W. Va. 36, 84 S. E. 1054 (special agent of defendant).

[2] 1889, McGuff *v.* State, 88 Ala. 147, 150, 7 So. 35; 1879, People *v.* Sprague, 53 Cal. 491; 1894, May *v.* State, 94 Ga. 76, 20 S. E. 251; Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595; 1920, People *v.* Martin, 210 Mich. 139, 177 N. W. 193 (party's witnesses in general); 1886, Bond *v.* State, 20 Tex. App. 421, 437.

[3] 1899, Roberts *v.* State, 122 Ala. 47, 25 So. 238; 1907, Atlantic & B. R. Co. *v.* Johnson, 127 Ga. 392, 56 S. E. 482 (physician).

In State *v.* Forbes, 1903, 111 La. 473, 35 So. 720, experts were excepted by consent.

[4] *Eng.* 1848, R. *v.* O'Brien, 7 State Tr. N. S. 1, 45 (reporter to seditious speeches; being also engaged to report the evidence for the prosecution at the trial, he was not obliged to leave the court with the other witnesses; Blackburne, C. L.: "There is no stern rule of the kind; they are all subject to be modified by reasonable construction"); *U. S.* 1880, Ryan *v.* Couch, 66 Ala. 244, 248 (a witness who has "acquired such an intimate knowledge of the facts, by reason of having acted as the authorized agent of either of the parties, that his services are required by counsel," should not be excluded; here, the father of the absent plaintiff); 1893, Central R. Co. *v.* Phillips, 91 Ga. 526, 527, 17 S. E. 952; 1908, State *v.* High, 122 La. 521, 47 So. 878 (police officer); 1900, Jacobs *v.* State, 42 Tex. Cr. 353, 59 S. W. 1111 (interpreter excepted); 1921, Freddy *v.* State, 89 Tex. Cr. 53, 229 S. W. 533 (murder; trial Court's discretion here held improperly exercised); 1867, The Bark Havre, 1 Ben. Fed. 295, 308 (master of vessel, being both owner's agent and witness, held improperly excluded by the commissioner taking testimony; "unless his contumacy compelled that course").

[5] 1826, Pomeroy *v.* Baddeley, Ry. & Mo. 430 (Littledale, J., allowed an attorney to remain, "his assistance being in most cases necessary"); 1831, Everett *v.* Lowdham, 5 C. & P. 91 (Bosanquet, J., allowed him "under the circumstances" to remain).

[6] 1841, State *v.* Brookshire, 2 Ala. 303; 1872, Wisener *v.* Maupin, 2 Baxt. 342, 357. *Contra:* 1882, Powell *v.* State, 13 Tex. App. 244, 252 (depends on discretion). The statutes cited *ante*, § 1837, often expressly provide for this point.

expose it are most emphatic for a party who is a prospective witness.[7] On the other hand, the party's aid in the conduct of the cause may be indispensable, and his absence is in any case hardly consistent with his general right to protect his interests by watching the conduct of the trial; in the United States, or in most parts of it, these considerations (looking to the ordinary relations of client and counsel) are probably more forcible than in England, where the counsel has full independence and professional authority. The simple solution, avoiding both horns of the dilemma, would be to exempt the party from the order of exclusion, but to require him to take the stand first of the witnesses on his side; on the principle that, though he has the right to be present, yet he has also the duty to do all that is feasible towards preventing suspicion and subserving the opponent's right to sequestration. This particular solution, however, seems not yet to have been reached by any Court.[8] A few Courts treat the party upon the footing of other witnesses;[9] but others declare him entitled of right to remain, ordinarily or invariably,[10] and the latter view has been generally preferred in legislation.

[7] 1872, Freeman, J., in Wisener *v.* Maupin, 2 Baxt. 342, 357 ("The reason of the rule applies with equal, if not more, force to their case than to the disinterested witness"); 1881, Hargis, J., in Salisbury *v.* Com., 79 Ky. 425, 432 ("He of all others, except the wilfully corrupt, is most obnoxious to the rule").

[8] But it has been suggested: 1874, Trippe, J., in Tift *v.* Jones, 52 Ga. 538, 542 ("It would be a proper rule that such party should be first examined, unless there be reasons to the contrary, in the absence of his other witnesses; this would preserve his right to be present in the court during the whole trial of his case"); and it has once been so decided: 1904, Smartt *v.* State, 112 Tenn. 539, 80 S. W. 586.

Compare the rule of some States that a party must take the stand before his other witnesses (*post*, § 1869). This aims at the same end.

[9] Besides the rulings in this note and the next, the statutes cited *ante*, § 1837, often make express provision: 1876, Penniman *v.* Hill, 24 W. R. 245 (Hall, V. C., said that parties may equally be excluded); 1879, Randolph *v.* McCain, 34 Ark. 696 (Eakin, J.: "It would be dangerous to give him, *as a matter of right*, exceptional advantages, when he of all others, if assailable at all by the temptation to concoct evidence, would have the greatest interest in doing so"); 1874, Tift *v.* Jones, 52 Ga. 538, 540, 542; 1881, Salisbury *v.* Com., 79 Ky. 425, 432 (prosecuting witness); 1905, Greer *v.* Com., — Ky. —, 85 S. W. 166 (the trial Court may in discretion allow one witness to remain, here a prosecuting witness); 1872, Wisener *v.* Maupin, 2 Baxt. 342, 356 (the Tennessee statute cited *ante*, § 1837, was passed to override this decision; see the citation in the next note).

[10] *Eng.* 1853, Charnock *v.* Dewings, 3 C. & K. 378 (Talfourd, J., held "that on constitutional grounds he had no authority to order the defendants to leave the court so long as they behaved with propriety"); 1856, Constance *v.* Brain, 2 Jur. N. S. 1145; 1858, Selfe *v.* Isaacson, 1 F. & F. 194.

Can. 1899, Bird *v.* Veith, 7 Br. C. 31 (parties are not to be excluded, "unless some good reason is shown"); 1879, Sivewright *v.* Sivewright, 8 Ont. Pr. 81 (examiner at chambers; exclusion held improper on the facts); 1885, Culverwell *v.* Birney, 10 Ont. Pr. 575 (exclusion held proper on the facts).

U. S. 1880, Ryan *v.* Couch, 66 Ala. 244, 248; 1880, Chester *v.* Bowen, 55 Cal. 46, 48, *semble;* 1895, Kentucky Lumber Co. *v.* Abney, — Ky. —, 31 S. W. 279 (but the chief officer of a corporation-party is not a party); 1892, Richards *v.* State, 91 Tenn. 723, 724, 20 S. W. 533 (exclusion of one co-defendant during testimony of another, improper); 1897, Lenoir Car Co. *v.* Smith, 100 Tenn. 127, 42 S. W. 879 (an officer of a corporation "charged with the duty of looking after its interests in a pending trial" is within the statute giving parties the right to remain; otherwise "corporations will be excluded from its benefits altogether"); 1899, Heaton *v.* Dennis, 103 Tenn. 155, 52 S. W. 175 (principal beneficiary under a will is a party, under the statute); add the statutes cited *ante*, § 1837.

The party's obedience to an improper order of exclusion does not prevent him from taking advantage of his objection: Heaton *v.* Dennis, *supra*.

§ 1842. **Disqualification as a Consequence of Disobedience.** If the order of exclusion is knowingly disobeyed, the Court unquestionably has the power to refuse to admit the disobedient person to testify; and it ought to exercise this power, in its discretion, whenever there appears any reason to believe that the proposed testimony was important, that the witness had heard the other testimony, and that he wished to know its tenor. It may be assumed that the power should not be exercised unless the witness, as above said, was aware of the order of exclusion;[1] for the burden of causing every witness to be notified, and thus of preventing inadvertent violation, may fairly be placed upon the party demanding the sequestration. But granting this much, it follows that the most appropriate and only effective means of enforcing an order of Court and of securing the right of sequestration is to have it clearly understood that disqualification as a witness may follow disobedience:

1874, TRIPPE, J., in *Bird* v. *State*, 50 Ga. 585, 589 (the counsel for defendant stated when the rule for separation was made that he had no witnesses, and was warned by the Court that if he later brought any they would be excluded; later, he brought two, whom he admitted were known to him when the order was made): "It was said a fine might have been imposed. That would not have vindicated the rule of law involved. . . . Either party would think it but poor compensation for the loss of an important right in a trial to have the other party or counsel fined. Courts should have summary power to enforce the rules of law in such cases, so that by their practical working they may be vindicated in all their integrity. If any right were lost, it was wilfully and defiantly thrown away."

There is, no doubt, something to be said against this rigorous doctrine, at least where the disobedience has occurred without any connivance of the opposing party and solely through the witness' own contumacy:

1840, NAPTON, J., in *Keith* v. *Wilson*, 6 Mo. 435, 441: "Will it be contended that a party is bound to watch his witnesses to prevent their misconduct? . . . If a witness' contumacy be a sufficient ground to warrant the Court in excluding him altogether, notwithstanding it appears that it was through no connivance or default of the party to the suit, an unavailing and reluctant witness might, by wilful and intentional disobedience to the order, at any time deprive the party of the benefit of his testimony."

1849, CALDWELL, J., in *Laughlin* v. *State*, 18 Oh. 99, 102: "When we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials; the questions that may arise on the trial that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify, — these, and other considerations which might be presented, render it difficult and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony for the fair presentation of their cause."

1880, CRAWFORD, J., in *Rooks* v. *State*, 65 Ga. 330: "To exclude him might deny the party of the testimony of the only person in the world by whom he could prove his innocence."

But there are several answers to these arguments. In the first place, the fact that the opposing party would be deprived of valuable testimony is in

§ 1842. [1] And there must of course have been an express order of sequestration; 1883, *R. v. Furley*, 3 State Tr. N. S. 543, 564.

itself no wrong, provided he himself has by connivance invited it. In the next place, it is usually difficult to prove this connivance, and to require it proved might entirely nullify the rule. Again, if the witness is in fact open to the charge of fraudulent evasion, he is an unsafe and untrustworthy witness; a party has no absolute right to the testimony of a trickster, and he cannot complain, even though himself innocent, at the loss of tainted testimony; the argument of some of the judges above quoted assumes erroneously that the party could certainly prove something in his favor by a witness whose conduct has already suggested the strong probability that he will falsify. Furthermore, of two innocent parties, the contingency of suffering should clearly be for him whose witness has been in fault; and this is particularly so where it was also that party's duty, at whatever inconvenience, to secure the obedience of his own witnesses to a plain and simple order of Court. The refusal to admit to testify need of course not be an absolute and peremptory consequence of disobedience. No one has ever contended for this; the trial Court, on all the circumstances, is to determine whether this measure should be taken. But it seems clear that the Court may properly take the measure in its discretion, even where no connivance by the party is made to appear.

The difference of judicial opinion in the precedents arises chiefly over the case of a witness' *wilful disobedience without the party's connivance.* The English and Canadian rulings have fluctuated, and the question seems there not to be settled.[2] In the United States, the great majority of Courts hold in general that *the Court may in discretion disqualify the witness;* some of these Courts, however, making the proviso that the party must have connived.[3] The other Courts seem to forbid in general terms the disqualification

[2] *England:* 1775, Cardigan Case, 3 Doug. El. C., 2d ed., 174, 229 (may be excluded); 1776, Worcester Case, 3 Doug. El. C. 239, 265 (same); 1790, Doe *v.* Cox, Cliff. El. C. 114 (Gould, J., refused to admit the witness, but the Court in banc held this erroneous); 1819, R. *v.* Webb, per Best, J., cited in 3 Stark. Evid. 1733 (may be excluded); 1821, Attorney-General *v.* Bulpit, 9 Price 4 (Exchequer: "It is a sacred and inflexible rule" that the witness shall be rejected); 1829, R. *v.* Boyle, 1 Lew. Cr. C. 325, Bayley, J., and others (must be admitted); 1829, R. *v.* Colley, M. & M. 329 (Littledale & Gaselee, J., held it discretional); 1830, Parker *v.* W. William, 4 Moo. & P. 480, 6 Bing. 683, C. P. (exclusion rests with the judge's discretion; the Exchequer rule being conceded to require exclusion); 1831, Beamon *v.* Ellice, 4 C. & P. 585 (Taunton, J., admitted the witness, with hesitation); 1835, Cook *v.* Nethercote, 6 C. & P. 741 (Alderson, B., refused to exclude the witness); 1836, Thomas *v.* David, 7 C. & P. 350 (Coleridge, J., said that it was "entirely in the discretion of the judge"); 1842, Chandler *v.* Horne, 2 Moo. & Rob. 423 (Erskine, J., said that the rule of discretion formerly prevailed, but now it was settled that the witness could not be excluded); 1852, Cobbett *v.* Hudson, 1 E. & B. 11 (Campbell, L. C. J., said that "the better opinion" was that the judge could not exclude the witness).

Canada: Ont. 1853, Strachan *v.* Jones, 3 U. C. C. P. 253 (a party held improperly excluded); 1853, McFarlane *v.* Martin, 3 U. C. C. P. 64 (party held properly admitted); 1853, Winter *v.* Mixer, 10 U. C. Q. B. 110 (trial Court has discretion); 1885, Mahoney *v.* Macdonnell, 9 Ont. 137 (exclusion held improper; here the witness was a co-party); 1886, Black *v.* Besse, 12 Ont. 522 (exclusion held improper); *P. E. I.* 1854, Young *v.* Young, 1 P. E. I. 98 (the judge has the power to exclude for disobedience; here, a party).

[3] In the following citations the rule is understood to be laid down generally, except where the proviso is expressly noted; but in some of the rulings probably the proviso would have been stated if the facts had called for it; *Federal:* 1893, Holder *v.* U. S., 150 U. S. 91, 14 Sup. 10 (may be excluded in discretion, but not merely and always for violation); *Ala-*

of the witness; though in some of them it can hardly be doubted that a proviso as to the party's connivance would be enforced.[4]

bama: 1841, State *v.* Brookshire, 2 Ala. 303; 1853, Sidgreaves *v.* Wyatt, 22 Ala. 617; 1867, Montgomery *v.* State, 40 Ala. 684, 687; 1870, Bell *v.* State, 44 Ala. 393, 395; 1875, Wilson *v.* State, 52 Ala. 299, 303; 1892, Thorn *v.* Kemp, 98 Ala. 417, 423, 13 So. 749; 1895, Sanders *v.* State, 105 Ala. 4, 16 So. 935; 1903, Hall *v.* State, 137 Ala. 44, 34 So. 681; 1903, Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919; *Arkansas:* 1855, Pleasant *v.* State, 15 Ark. 624; 1858, Golden *v.* State, 19 Ark. 590, 597 ("the right of excluding witnesses for disobedience, though well established, is rarely exercised"; here, not exercised against one who was not known to be needed); *Colorado:* 1903, Behrman *v.* Terry, 31 Colo. 155, 71 Pac. 1118 (in the absence of connivance by the party, the witness cannot be excluded); 1903, Vickers *v.* People, 31 Colo. 491, 73 Pac. 845 (exclusion held improper, where the rule was violated without connivance of the party calling); *Columbia (District):* 1914, District *v.* Flagg, 42 D. C. App. 73 (following Holder *v.* U. S., *supra*); *Georgia:* 1874, Bird *v.* State, 50 Ga. 585, 588; 1881, Butts *v.* State, 66 Ga. 508, 513, *semble;* 1881, Lassiter *v.* State, 67 Ga. 739, *semble* (see the construction of this case in Grant *v.* State, *infra*); 1886, Etheridge *v.* Hobbs, 77 Ga. 531, 534, 3 S. E. 251; 1887, Carson *v.* State, 80 Ga. 170, 5 S. E. 295, *semble;* 1890, Bone *v.* State, 86 Ga. 108, 121, 12 S. E. 205; 1892, Grant *v.* State, 89 Ga. 636, 12 S. E. 1065; 1893, Pergason *v.* Etcherson, 91 Ga. 785, 787, 18 S. E. 29; 1904, Davis *v.* State, 120 Ga. 843, 48 S. E. 305; 1904, Phillips *v.* State, 121 Ga. 358, 49 S. E. 290; 1905, Sharpton *v.* Augusta & A. R. Co., — Ga. —, 51 S. E. 553; 1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724; *Illinois:* 1880, Bulliner *v.* People, 95 Ill. 394, 399; 1896, Goon Bow *v.* People, 160 Ill. 438, 43 N. E. 593; *Indiana:* 1850, Porter *v.* State, 2 Ind. 435; 1860, Jackson *v.* State, 14 Ind. 327; *Iowa:* 1904, State *v.* Pray, 126 Ia. 249, 99 N. W. 1065; *Kansas:* 1875, Davenport *v.* Ogg, 15 Kan. 366 (may be excluded if the party abets the disobedience); *Kentucky:* 1886, Haskins *v.* Com., — Ky. —, 1 S. W. 730; 1901, Gilbert *v.* Com., 111 Ky. 793, 64 S. W. 846; 1903, Crenshaw *v.* Gardner, — Ky. —, 76 S. W. 26 (exclusion of a witness knowingly and without excuse omitted from the order by the party calling him, held proper in discretion); *Louisiana:* 1860, State *v.* Gore, 15 La. An. 79; 1884, State *v.* Watson, 36 La. An. 148; 1886, State *v.* Cole, 38 La. An. 843, 845; 1893, State *v.* Hagan, 45 La. An. 839, 841, 12 So. 929; 1895, State *v.* Jones, 47 La. An. 1524, 18 So. 515; 1906, State *v.* Hogan, 117 La. 863, 42 So. 352; 1908, State *v.* High, 122 La. 521, 47 So. 878 (discretion); *Massachusetts:* 1897, Com. *v.* Crowley, 168 Mass. 121, 46 N. E. 415 (excluded, in the trial Court's discretion, where the counsel was in fault in knowingly allowing the witness to stay); *Michigan:* 1897, People *v.* Piper, 112 Mich. 644, 71 N. W. 175 (not excluded, if party is not conniving); 1904, People *v.* McGarry, 136 Mich. 316, 99 N. W. 147; *Mississippi:* 1852, Sartorious *v.* State, 24 Miss. 602, 608; 1901, Taylor *v.* State, — Miss. —, 30 So. 657 (in discretion); *Missouri:* 1835, Dyer *v.* Morris, 4 Mo. 214, 213; 1840, Keith *v.* Wilson, 6 Mo. 435, 441 (except where the party is not in fault by laches or connivance); 1860, State *v.* Fitzsimmons, 30 Mo. 236, 239; 1888, O'Bryan *v.* Allen, 95 Mo. 68, 74, 8 S. W. 225 (like Keith *v.* Wilson); 1894, State *v.* Gesell, 124 Mo. 531, 536, 27 S. W. 1101 (same); 1895, State *v.* David, 131 Mo. 380, 33 S. W. 28; 1900, State *v.* Sumpter, 153 Mo. 436, 55 S. W. 76 (inadvertent violation without party's connivance, no ground for exclusion); 1900, State *v.* Fannon, 158 Mo. 149, 59 S. W. 75 (exclusion where the party was not conniving, held improper); *Nebraska:* 1901, Mangold *v.* Oft, 63 Nebr. 397, 88 N. W. 507 (exclusion is proper, unless the witness' conduct was "without the knowledge, consent, or connivance" of the party); 1901, Clemmons *v.* Clemmons, — Nebr. —, 96 N. W. 404 (inadvertent disobedience; exclusion held improper on the facts); *North Carolina:* 1915, State *v.* Lowry, 170 N. C. 730, 87 S. E. 62; *Ohio:* 1849, Laughlin *v.* State, 18 Oh. 99, 101; 1883, Dickson *v.* State, 39 Oh. St. 73, 77 (except where there has been no procurement or connivance of the party); *Oregon:* 1879, Hubbard *v.* Hubbard, 7 Or. 42, 47 (unless there is complicity by the party); *Pennsylvania:* 1836, Earls' Trial, pamph., 10; *South Carolina:* 1833, Anon., 1 Hill 251, 255 (except where there is no fault in the party); *Tennessee:* 1880, Smith *v.* State, 4 Lea 428, 430 (the discretion was held improperly exercised to exclude a witness unknown to the party at the time of the order); *Texas:* 1874, Goins *v.* State, 41 Tex. 334, 336, *semble;* 1875, Sherwood *v.* State, 42 Tex. 498, 501; 1878, Ham *v.* State, 4 Tex. App. 645, 673; 1880, Walling *v.* State, 7 Tex. App. 625; Estep *v.* State, 9 Tex. App. 366, 370; 1881, Avery *v.* State, 10 Tex. App. 199, 213; 1886, Hill *v.* State, 22 Tex. App. 579, 3 S. W. 764, *semble;* 1901, Caviness *v.* State, 42 Tex. Cr. 420, 60 S. W. 555 (witness held improperly excluded on the facts, the party not conniving); 1906, Luck *v.* State, — Tex. Cr. —, 98 S. W. 1059; 1921, Shamblin *v.* State, 88 Tex. Cr. 589, 228 S. W. 241 (trial Court's discretion); *Wisconsin:* 1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

[4] *Ala.* 1907, Degg *v.* State, 150 Ala. 3, 43 So. 484 (for an accused's witness); *Cal.* 1862,

On the whole, then, the Courts occupy a common ground where there has been fault in the party; at one extreme stand a few Courts denying disqualification even in that case; at the other extreme stand probably the majority of Courts, permitting disqualification even without the party's fault.

People *v.* Boscovitch, 20 Cal. 436; *Ga.* 1853, Johnson *v.* State, 14 Ga. 55, 61, *semble;* 1880, Rooks *v.* State, 65 Ga. 330; 1895, Cunningham *v.* State, 97 Ga. 214, 22 S. E. 954 (distinguishing Pergason *v.* Etcherson, 91 Ga. 785, 18 S. E. 29); 1903, McWhorter *v.* State, 118 Ga. 55, 44 S. E. 873 (not excluded, on the facts); *Ind.* 1859, Horne *v.* Williams, 12 Ind. 326 (undecided); 1883, Davis *v.* Byrd, 94 Ind. 525 (at least where the party himself is not in fault; repudiating prior intimations to the contrary); 1884, Burk *v.* Andis, 98 Ind. 59, 64 (same); 1887, State *v.* Thomas, 111 Ind. 515, 13 N. E. 35 (same); *Ia.* 1860, Grimes *v.* Martin, 10 Ia. 347, 349; 1900, State *v.* Kissock, 111 Ia. 690, 83 N. W. 724 (mere disobedience of witness, not of itself sufficient); *Ky.* 1899, Parker *v.* Com., — Ky. —, 51 S. W. 573 (a co-indictee remained, the defendant not explaining that he wished to use the other as a witness; disqualification of co-defendant held erroneous on the facts); *Md.* 1887, Parker *v.* State, 67 Md. 329, 331, 10 Atl. 219; *Miss.* 1897, Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603; 1898, Timberlake *v.* Thayer, 76 Miss. 76, 23 So. 767; 1904, Illinois C. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873 (exclusion for disobedience, held improper); *Mo.* 1916, State *v.* Sloan, — Mo. —, 186 S. W. 1002; *Mont.* 1915, State *v.* McDonald, 51 Mont. 1, 149 Pac. 279 (kidnapping); 1922, State *v.* Johnson, — Mont. —, 205 Pac. 661; *Nev.* 1866, State *v.* Salge, 2 Nev. 321, 326; *N. C.* 1819, State *v.* Sparrow, 3 Murph. 487; *Tenn.* 1824, Woods *v.* M'Pheran, Peck 371, *semble;* 1901, Pile *v.* State, 107 Tenn. 532, 64 S. W. 476 (witness inadvertently violating the rule, held improperly excluded); 1916, Pennington *v.* State, 136 Tenn. 533, 190 S. W. 546 (murder); *Va.* 1849, Hopper *v.* Com., 6 Gratt. 684 (obscure); 1879, Hey's Case, 32 Gratt. 946, 948, *semble;* 1894, Com. *v.* Brown, 90 Va. 671, 675, 19 S. E. 447; 1922, Jarrell *v.* Com., — Va. —, 110 S. E. 430; *Wash.* 1893, State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103 (it is erroneous to exclude the witness, unless the party is in fault); 1905, State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873 (State *v.* Lee Doon followed); 1908, Hendelman *v.* Kahan, 50 Wash. 247, 97 Pac. 109 (may be excluded in discretion, if the party is in fault); *W. Va.* 1869, Gregg *v.* State, 3 W. Va. 705, *semble;* 1919, State *v.* Goldstrohm, 84 W. Va. 129, 99 S. E. 248.

SUB-TITLE V: PRELIMINARY NOTICE, OR DISCOVERY, TO THE OPPONENT

CHAPTER LXII.

A. GENERAL POLICY AND PRINCIPLE

§ 1845. **Notice or Discovery of Evidence to the Opponent before Trial;** (1) **At Common Law.** We are here concerned with the question whether the danger of unfair surprise is a ground for excluding unexpected evidence or for furnishing the means of ascertaining before trial the tenor of the opponent's

evidence. The question may be considered from two points of view, first, that of Evidence in general, *i.e.* the ascertaining of the whole truth at the time of trial, and, secondly, that of litigation in general, *i.e.* the just settlement of controversies by the most efficacious and expeditious methods of procedure of all sorts.

(A) So far as concerns the *process of ascertaining truth at the time of the trial itself*, one thing seems clear, namely, that *surprise is in itself no just ground* for showing consideration to the party surprised.

On the supposition that the intended evidence is true, and that its force is all that is claimed for it, the opponent cannot be said to suffer any real harm. The truth can produce no harm.[1] It may overthrow the opponent's claim; but, from the point of view of the administrators of justice, it is no more than right that this should result. The opponent may indeed be surprised to find that the truth has been discovered, or that a truth, unknown to him, bears against his case; but he cannot complain, when the truth has been brought to light, merely on the score that this was unexpected by him. If it was not, then so much the worse for his untrue and unjust claim and so much the better for truth and justice.

It is apparent, then, that surprise can be no just ground for objection, unless we abandon the supposition that the surprising evidence is *true*. Assume, then, that it is *false*. It may be false in two ways, — either in the sense that it is totally untrue, or in the sense that as a bare fact it exists but yet would appear to have a less or different inferential force if other facts could be known (*ante*, § 34). For example, it is proposed to show that the opponent sent a letter, now lost, admitting the correctness of the present claim against him; assume that no such letter was written. Or, it is proposed to show that the accused, shortly after the homicide, left the town at night; assume that this is true, but that in fact he was called away suddenly to the bedside of his dying mother. Of this latter sort of facts are all testimonial statements of witnesses regarded as impeachable by the witness' character (*ante*, § 875); for it is an unquestionable fact that the tribunal has before it on the stand a competent person making assertions which tend to show that certain events took place; but if the mendacious disposition of the witness could be made to appear, the inference that the events occurred as he states would be materially weakened or even totally destroyed.

Let us assume, then, that the data offered in evidence against the opponent are (if the tribunal could only know it) false in one of these two senses. The opponent's situation is now vitally changed. On the former assumption, it would have done him no good to be notified in advance; he could not have altered the truth, and if he had wished to, the law could not lend him aid to that end. But now it is not the truth that he struggles against, but falsity. Had he but known in season that these fabricated facts were to be offered in

§ 1845. [1] "How can a man be catched in the truth?" asked the Earl of Castlemaine (quoted *ante*, § 1002).

evidence against him, he could have exposed the fabrication. He could have secured witnesses to show (in the above examples) that no letter of that date and place could have been written, because he was at the time absent or ill; that his mother was dying and the family had telegraphed for him; that the witness telling such a plausible story was mendacious in character or was seduced by a bribe. All this he was in truth and justice entitled to show: yet for all this some notice of the evidence, obtained in advance, was perhaps essential. Notice might have saved him, through the truth; without notice, he may be overcome by falsities.

It is apparent, then, that any rule requiring notice in order to avoid unfair surprise must rest on the assumption that it is to serve as a prophylactic or protection against possible falsities, and not merely as a warning of evidential verities. It follows, therefore, that notice cannot in itself and always be required for the purposes of doing justice, but that on principle it need be required *only when there is a danger*, more or less probable according to the showings of experience, *of falsities whose details could not otherwise have been anticipated* and prepared against.

Can any precise and practical definition be made of the situations in which this danger can be predicated? It seems to be difficult, if not impossible. Perhaps a few specific and extreme situations can be discovered (*post*, § 1847); but not much more. For evidence of any form or quality whatever, testimonial or circumstantial, documentary or oral, recent or ancient, consisting in human conduct or in material objects, lying in the knowledge of a few persons or of many, situated within the jurisdiction or without it, — for all sorts, it remains equally possible that the specific piece of evidence offered may be absolutely true, or completely or partly fabricated. It is not easy, by any analysis or classification, by experience or by deduction, to enumerate, and to say that this or that class of evidence is in general attended by the feasibility of falsification, while another is not. We seem to be not far from this difficult dilemma, *i. e.* we must either require prior notice as a general rule, or we must decline to require it at all. We must either regard the dangers of falsification as indicating the dominant policy, and require notice (because of our inability to discriminate) even where it might not be needed, in order to do justice in the cases where it would be needed; or, we must regard the danger to innocent opponents as comparatively small and as overbalanced by counter-considerations, and must therefore decline to require notice at all.

Now the common law, in this dilemma, never had any hesitation. It accepted the second alternative, and *declined to require notice at all.* This is so fundamental an assumption in our law of Evidence that express judicial statements of it have rarely been made, even in passing. The following passages will illustrate it:

1826, GARROW, B., in *Preston* v. *Carr*, 1 Y. & J. 175, 179: "It is a very common thing at Nisi Prius to ask 'if such a witness is here'; the answer given on the other side is, 'You will know in good time, when he is called.'"

1850, Lord BROUGHAM, in *Bain* v. *R. Co.*, 3 H. L. C. 1, 16: "The ground of exception stated [for a certain witness] is surprise, and surprise only, — not that the evidence was in itself inadmissible, but that it was inadmissible because the intention to adduce it had not been notified on the record. . . . Surprise is no ground of objection."

1858, CLIFFORD, J., in *U. S.* v. *Holmes*, 1 Cliff. 108, 112, answering an argument of surprisal: "Surprise may often arise out of the offer of evidence strictly competent, and yet that circumstance has never been considered as affecting the question of its admissibility. Embarrassments of that sort, which are more or less incident to every trial, are usually remedied by motion to the Court for a postponement of the trial to a future day in the term or for a continuance." [2]

The common law, however, certainly did not fail to consider the need of protecting innocent opponents; for a keen perception of these possibilities is easily to be seen in other rules of evidence. But it believed that there were counter-considerations which overbalanced this danger. That this was its motive is to be seen with clearness in the circumstance that as soon as a moral change occurred in the community, diminishing the force of these counter-considerations, the balance was tipped in the opposite direction and a change took place in the law, corresponding roughly to the change of opinion towards these considerations. What were, then, these powerful counter-considerations?

(*a*) In the first place, the common law, originating in a community of sports and games, was permeated essentially by the *instincts of sportsmanship*. This has had both its higher aspect and its lower aspect. On the one hand, it has contributed a sense of fairness, of chivalrous behavior to a worthy adversary, of carrying out a contest on equal and honorable terms. The presumption of innocence, the character rule, the privilege against self-crimination, and other specific rules (to name those of Evidence alone), show the effect of this instinct against taking undue advantage of an adversary. The minor rules of professional etiquette (now surviving much more markedly in England than in the United States) illustrate the same tendency even more clearly. On the other hand, it has contributed to lower the system of administering justice, and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance. Some of the effects of this unfortunate tendency have been noted in other places (*ante*, §§ 57, 194, *post*, § 2251). It may be seen also in the rule allowing a new trial for an immaterial error in a ruling upon evidence (*ante*, § 21), and in the general attitude towards rules of procedure as expedients for winning the game of litigation irrespective of the ascertainment of truth. The right to use a rule of procedure or evidence precisely as one plays a trump card, or draws to three aces, or holds back a good horse till the home stretch, is a distinctive result of the common-law moral attitude toward parties in litigation:

1874, Sir *J. Arnould*, Life of Lord Denman, II, 92 (commenting on the failure of justice in Lord Cardigan's Case in 1840): "The only answer . . . is that English criminal pro-

[2] 1921, Dundovich *v.* State, — Ind. — , 131 N. E. 377 (the proper way to meet a case of surprise is to move for a continuance).

cedure does not so much seek the discovery of truth pure and simple, as the discovery of truth according to certain artificial rules. . . . The prisoner must be convicted according to the strict rules of the legal game, or not convicted at all, and that, too, however clear his guilt may be."

1895, Sir *F. Pollock* and Professor *F. W. Maitland*, History of English Law, II, 667: "At one of these [poles or extremes] the model is the conduct of the man of science, who is making researches and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English mediæval procedure is strongly inclined. We are often reminded of the cricket match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?' This passive habit seems to grow upon them as time goes on. . . . Even in a criminal cause, even when the king is prosecuting, the English judge will, if he can, play the umpire rather than the inquisitor."[3]

Now one of the cardinal moral assumptions in a contest of skill or chance is that a player need not betray beforehand his strength of resource, and that the opponent cannot complain of being surprised. The accepted laws and moral standards of whist protect the player from exposing his cards before playing them; the owner of the racing-stable keeps as a valuable secret the time made by his horse in the last private trial before the race; and a chess-player's skill consists largely in concealing from his opponent the far-seeing sequence of moves which he has planned.

It is this feature of games and sports that has influenced powerfully the policy of the common law in the present aspect. 'Nemo tenetur armare adversarium suum contra se.'[4] To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Rather permit you to preserve the secret of your tactics, to lock up your documents in the vault, to send your witness to board in some obscure village, and then, reserving your evidential resources until the final moment, to marshal them at the trial before your surprised and dismayed antagonist, and thus overwhelm him. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenceless ignorance as a fair and irreproachable accompaniment of the game of litigation. There is no accounting for this except as in part a product of a characteristic instinct of the Anglo-Norman community in which our law grew up.

[3] The orthodox attitude even among the most radical reformers may be seen in the following passage of Mr. (afterwards L. C. J.) Denman, in 40 Edinb. Rev. 186 (1824), arguing for the privilege against self-crimination: "The accused's guilt he still has a right to see distinctly proved upon him by legal evidence. . . . Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with clear proof of necessity; 'let us carve him as a feast fit for the gods, not hew him as a carcase for the hounds.'" So also, surprisingly, in a modern Irish judge's deliverance, quoted *ante*, § 21.

[4] 1628, Co. Litt. 36 *a*; 1658, Wingate's Maxims, No. 171, p. 665; 1702, Anon., 3 Salk. 362.

(*b*) A second counter-consideration is found in the *possibilities of abuse by unscrupulous opponents*, if prior notice were required to be given. We have assumed that the innocent opponent must often need such notice, to protect himself against falsities. But reverse the situation, and suppose an honest claimant and a guilty and unscrupulous opponent. If prior notice were to be given in all cases (and there can be, as above noticed, no easy discrimination), the honest claimant would then be exposed to the danger of fraud and chicanery by his opponent. Advised of the prospective witnesses, he would try, perhaps with success, to tamper with them. Warned of the evidential facts to be offered, he would prepare false evidence in denial or in explanation. This danger, then, must equally be reckoned with in fixing upon a general policy. Though experience may vary or its teachings may be difficult to interpret, at least one cannot say that to fear this danger more than the other is to be irrational. The common law may not have attempted to analyze with sufficient care and deliberateness the relative weight of these dangers, and it may have been too ready to emphasize the one here involved. Yet this danger undoubtedly exists, and its existence goes in part to justify the result reached by the common law. Moreover, the later abandonment of the radical common-law doctrine appears to have come about, in the main, only to the extent that this danger has been seen to disappear or has been ignored.

(B) So far as concerns the interests of *litigation in general*, the policy of requiring discovery or notice of evidence before trial is equally urgent, though on larger grounds. Its propriety, moreover, is independent of the truth or falsity of the opponent's evidence; it is, in fact, strongest where the opponent's evidence is assumed to be true. That policy rests on the fact of experience that the parties to controversies are prone to proceed either with a blind faith in the strength of their cause and the truth of its essential propositions of fact, or with the misguided assumption that the facts forming its defects and weaknesses are unknown to the adversaries and that their concealment to the last moment will heighten the chances of success. If these two states of mind could be prevented, a large proportion of litigation would be cut short at the beginning, with advantage to justice; because parties entertaining either belief without foundation would be disabused of it at an early moment, would perceive the uselessness of further contest in court, and would act accordingly. Any requirements of preliminary discovery, designed to lead to such a saving of time and expense, would be well worth imposing in the interests of expeditious litigation and of justice at large.[5]

The objections to the expedient, from this point of view, are of a twofold sort: (*a*) The reduction of litigation to a small compass, in time and expense,

[5] See the remarks of L. C. J. Best, quoted *post*, § 1847. This was a favorite theme of Bentham's, as noticed *post*, § 1856, note 1. The most powerful modern statement is that of Sherman L. Whipple, Esq., of the Boston Bar, in addresses before the Florida Bar Association (1913) and the Connecticut Bar Association (1914).

would diminish the emoluments of the professional men at law, — whether as attorneys or counsellors, or as other officers of court depending upon the number and amount of fees. This is not a consideration which honorable men could entertain as in the least hindering a measure otherwise desirable. But it was in fact undoubtedly a powerful though silent motive, in the resistance, active and inert, with which the efforts towards reform in this respect were met in England in the closing days of Lord Eldon's domination, — and indeed everywhere else, whenever such a reform was needed. The incumbents under a system which gave in perquisites to the Chancellor some eighty-five thousand dollars a year,[6] and to the Chief Justice of the King's Bench some eighty thousand a year,[7] and to the minor officers in proportion, were not likely to be zealous for any expedients which reduced the length and expense of litigation. In particular, the officers of the Chancery (the factory of fees, and the hospital of incurable controversies) would have inclined to oppose any measure by which their own monopolied expedient, the process of discovery before trial, should be made freely available in common-law courts. This objection, then — the reduction of fees — has been historically, though not rightfully, a serious obstacle in carrying out all proposals to minimize litigation by requiring the mutual disclosure of evidence before trial.

(*b*) The second objection is the same as the one already noticed from the point of view of evidence alone, namely, the possibilities of abuse by unscrupulous opponents, if discovery of evidence before trial were required. This danger is always involved in such an expedient; and it would remain for experience to show whether the harm thereby caused in one class of cases would be more than balanced by the advantage gained in other cases in the way of speedy and costless settlement of controversies.

The result is, then, that the common law (in general, and apart from the few specific exceptions to be noted) *recognized no rule requiring prior notice*

[6] Twiss' Life of Lord Eldon, III, 315, Campbell's Lives, X, 68; reduced in 1832 to £10,000 in fixed salary: Arnould's Life of Lord Denman, I, 300. "Lord Eldon, in the returns which he himself made to the House of Commons, admits that in 1810 he received, as Lord Chancellor, a gross income of £22,730, from which sum, after deduction of all expenses, there remained a net income of £17,000 per annum. . . . So long as judges or subordinate officers were paid by casual perquisites and fees, paid directly to them by suitors, a taint of corruption lingered in the practice of our courts. Long after judges ceased to sell injustice, they delayed justice from interested motives; and when questions concerning their perquisites were raised, they would sometimes strain a point for the sake of their own private advantage. . . . Until the reign of Geo. IV, [in 1826,] judges continued to take fees and perquisites": 1867, Jeaffreson, A Book about Lawyers, I, 344, 349; see further details in Holdsworth's Hist. of English Law, vol. I, 3d ed., 1922, p. 441. Lord Eldon's patronage was additionally worth £35,000 annually (Bentham, Works, V, 539). Lord Eldon openly opposed, while Chancellor, in 1809, the bill to prohibit the sale of offices connected with the administration of justice, and defended the existing practice as a source of profit to the Chancellor (14 Hans. Parl. Deb., 1st ser., 1016; Campbell's Lives of the Chancellors, 5th ed., X, 290).

Compare the instances cited *ante*, § 1677, note 3.

[7] Arnould's Life of Lord Denman, I, 185; reduced in 1825 to £10,000, and in 1830 to £8,000, in fixed salary: Ib. 186. The iniquities of the fee system were Bentham's constant thesis; in his Rationale of Judicial Evidence (vol. VII, p. 199, Bowring's ed.) he has some special comments on it in the present connection.

of intended evidence to be given to the opponent or furnishing legal process for obtaining such information; that, nevertheless, the investigation of truth at trials is in decided need of such information for opponents who are in danger of being attacked by false evidence, and that the general process of justly ending controversies is hampered by the lack of such information even where the evidence is assumed to be true; that, on the other hand, a general requirement of such discovery or notice before trial would introduce a new danger of fraud and thus imperil the ascertainment of truth; and that therefore the correct policy to be followed depends upon whether the former or the latter consideration is found in experience to be more weighty, and whether the latter danger can be obviated or reduced in any specific class of cases.

§ 1846. **Same: (2) in Chancery.** It might be supposed that, in the court of Chancery, a bill for discovery served as a means of evading the strict common-law rule, and that thereby a notice could be compulsorily obtained of the evidence intended to be produced by the opponent. But there was here no radical departure from the established doctrine of the common law; it was a policy, not of one Court rather than another Court, but of the whole legal system indigenous to the soil. So marked, indeed, is its feature as a racial product that where a conflict came, as it did in the Chancery court, between the imported procedure of the Roman and ecclesiastical law (which furnished to chancery procedure most of its important characteristics) and the native instincts of the British gentlemen who sat as chancellors and clerks, the racial influence prevailed, and the sportsmanlike rule that no notice need be given competed with marked success against the ecclesiastical and inquisitorial requirement of almost complete disclosure. The former, by virtue of its English birthright, took its natural place in the chancery practice also, as a persistent element in the larger common-law system of justice.

That the recognized objects of a bill for discovery in Chancery did not, on strict principle, include the obtaining of notice of the opponent's intended evidence, sufficiently appears in the following authoritative passages:[1]

1836, Sir *James Wigram*, V. C., Discovery, § 148: "If it were now for the first time to be determined whether in the investigation of disputed facts truth would be best elicited by allowing each of the contending parties to know before the trial in what manner and by what evidence his adversary proposed to establish his own case, arguments of some weight might 'a priori' be adduced in support of the affirmative of this important question. Experience, however, has shown — or, at least, Courts of justice in this country act upon the principle — that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend. And accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged) each party in a cause has thrown upon him the onus of supporting his own case and meeting that of his adversary without knowing beforehand by what evidence the case of his adversary is to be supported or his own opposed."

§ 1846. [1] It has already been noted (§ 4) that no attempt is made in this treatise to deal in detail with the rules of evidence in Chancery; they are referred to here merely as illustrative.

1840, L. C. B. ABINGER, in *Combe* v. *London*, 4 Y. & C. 139, 155: "A party has a right to file a bill of discovery for the purpose of obtaining such facts as may tend to prove *his* case; and if those facts are either in possession of the other party, or, if they consist of documents in possession of the other party, in which he either has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced, and he may file a bill of discovery, in order to aid him in law or in equity, to exhibit those documents in evidence, or compel a statement of those facts. But does it not rest there? Has he a right, as against the defendant, to discover the *defendant's* case? Does any case go the length of that? Sometimes the cases trench very much on those limits; but if you take the question as a matter of principle, has a man a right, or is it consistent with common justice, that he should file a bill to discover the defendant's case? The ground on which he files his bill, is to make the defendant discover what is material to his (the plaintiff's) case; but he has no right to say to the defendant, 'Tell me what *your* title is — tell me what your case is — tell me how you mean to prove it — tell me the evidence you have to support it — disclose the documents you mean to make use of in support of it — tell me all these things, that I may find a flaw in your title.' Surely that is not the principle of a bill of discovery. And if you look at the cases, you will find, however they may occasionally trench on the line of distinction — you will find that is the great line of distinction."

1877, Professor *C. C. Langdell*, Summary of Equity Pleading, §§ 56, 59, 161, 171, 172: "Whatever the plaintiff does not succeed in proving in this way, *i. e.* by compelling the defendant to admit it, he must prove by the testimony of witnesses or by documents. The witnesses are examined in writing, and secretly, and none of the testimony is published until all the witnesses have been examined on both sides. The only information, therefore, that is given to the defendant to enable him either to cross-examine the plaintiff's witnesses, or to meet the plaintiff's evidence by examining witnesses on his own behalf, is what is contained in the bill; except that the defendant is also entitled to be informed of the names and addresses of the witnesses examined by the plaintiff.[2] It seems clear, therefore, that the bill ought to set forth all the evidence in detail which is to be proved by witnesses, as is done in the articles of a libel [in ecclesiastical courts]. . . . Precisely the contrary of this, however, has taken place; for the plaintiff . . . is not required to state specifically what any of his witnesses will swear to, but is permitted to state the facts which he intends to prove by witnesses, as distinguished from the evidence by which they are to be proved; and, as this makes it impossible for him to examine them upon the allegations in the bill, he is permitted to examine them upon written interrogatories, and yet the defendant is not entitled to a copy of the interrogatories. . . . In the ecclesiastical courts, as has been seen, all documentary evidence has to be annexed to the pleadings, so that the adverse party is not only furnished with a copy, but has the fullest opportunity to inspect the originals; and this seems to be correct upon principle; for it is not the policy of the civil law to keep the parties in ignorance of each other's evidence until it is read at the hearing; and it is only to prevent perjury and subornation of perjury that the testimony of witnesses is kept secret until all the witnesses have been examined, — a reason which seems to have little, if any, application to documentary evidence. In equity, however, the parties are never entitled to inspect each other's documents, nor to have copies of them, nor in any way to know their precise contents until they are read upon the hearing. . . . [It is true, that] a plaintiff in equity is entitled to the benefit of all the evidence in the defendant's possession which will aid him in proving the allegations of the bill, whether such evidence consist of the defendant's personal knowledge or be contained in documents or writings; . . . [and] as equity furnishes no direct means by which a suitor can obtain an inspection of his *adversary's* documentary evidence before trial or hearing, attempts have often been made

[2] This partial exception to the general rule was almost nullified by the circumstance that the examination of the witnesses was held in secret by an officer upon written interrogatories prepared beforehand by the parties (*ante*, § 1367).

to accomplish the object indirectly and illegitimately, by means of discovery; and sometimes such attempts have been attended with success. . . . Not only have suitors in equity endeavored to avail themselves of discovery as a means of obtaining an inspection of their adversary's documentary evidence, but they have attempted by the same means to obtain information generally as to their adversary's case or defence, beyond what was disclosed by his pleadings; and these attempts have sometimes received countenance from the Courts, and especially from a much-cited passage in Mitford: 'The plaintiff has a right to a discovery of the case on which the defendant relies, and of the manner in which he means to support it.' But Wigram has shown conclusively that any such right is wholly foreign to the principles of discovery; and his view has been adopted by Lord Romilly in a well-considered judgment."

It is true that, to a limited extent (noticed *post*, § 1856), the result of a bill of discovery would usually be the revelation of some portion of information not before known to the applicant. But the general theory remained, and the rule was strictly enforced, that the adversary's own evidence was not to be revealed on a bill for discovery.

In short, equitable discovery involved no more than the negation of the party's privilege at common-law trials not to testify *against* his own cause, and was not intended to give relief against the common-law principle which refused to exact before trial a disclosure of the tenor of the evidence intended to be given *for* his cause. Moreover, the tediousness of a bill in chancery came ultimately to nullify in great part whatever of effectiveness belongs to it in theory.

§ 1847. **Policy of the Exceptions to the Rule (Accused Persons; Civil Parties; Documents; Circumstantial Evidence of Character, etc.).** It has been seen above (§ 1845) that the common-law doctrine was open to subsequent modification on one of two grounds, namely, either when the overbalancing danger of furnishing an unscrupulous opponent with the opportunity of fraud could be flatly ignored, or when this danger could be found to be of comparatively trifling magnitude. The first ground, it is true, could come to be accepted only by force of some powerful moral sentiment or impulse, which would induce us to act irrespective of immediate experience or of reasoning; while the second ground would be reached in direct experience, with reference to the actual operation of the rule. In both of these ways, then, a change has come about.[1]

(1) *Accused persons.* In the first place, since the close of the 1700s, a general revulsion of sentiment towards accused persons in criminal cases has occurred. This modern attitude, already noticed in other aspects (*ante*, §§ 579, 865), has indeed run its legitimate course, and is now an anachronism. But its marks remain in the inherited law of this present generation. In its present bearings, the effect is to induce us to help at any cost the

§ 1847. [1] 1901, Pound, C., in Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150: "The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock fight, wherein he won whose advocate was the gamest bird with the longest spurs. But we have come to take a more liberal view, and have done away with most of those features which gave rise to that reproach."

accused person, who in theory of law is innocent.[2] The danger that, if guilty, he may be disposed and enabled to tamper with witnesses, to manufacture false evidence in defence, and otherwise to misuse the aid thus furnished, — this danger (unquestionably a real one) we ignore, or at least deliberately risk. The determination to protect the innocent accused has induced us to aid him, at any cost of accompanying dangers, by giving him fair notice of the persons to be called against him as witnesses:

1883, Sir *James F. Stephen*, History of the Criminal Law, I, 225, 398: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warrant, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into Court to be tried. This is set in a strong light by the provisions of [1709, St. 7 Anne, c. 21, § 14, quoted *post*, allowing a list of witnesses in treason]. . . . This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the State trials held under the Stuarts, it did not occur to the Legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favor that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of Parliament that trials for political offences should not be grossly unfair; but they were comparatively indifferent as to the fate of people accused of sheep-stealing or burglary or murder. . . . [The prisoner] was not allowed as a matter of right, but only as an occasional exceptional favor, . . . to see his [own] witnesses or put their evidence in order. When he came into Court, he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him."[3]

All this early attitude has changed, with the spirit of the times; the extent to which the change has affected the law, by establishing an exception to the common-law principle, is later examined in detail (*post*, §§ 1850–1855). That the modern tenderness for accused persons has been the effective motive for the change, and that no disposition has yet appeared to abandon the common-law attitude where this motive does not operate, may be clearly enough seen in two circumstances, namely, that no such aid, by requiring notice of the names of witnesses, has been extended either to the prosecuting officer in criminal cases or to the respective parties in civil cases.

(2) *Civil parties.* In the next place, it has come to be clearly perceived

[2] No doubt, in ultimate analysis, it may be justified on broad grounds of social and political welfare; but in its immediate operation it is an emotion or sentiment only.

[3] This was equally a characteristic of Continental criminal procedure, though it lingered there much later (Esmein, Histoire de la procédure criminelle en France, 153, 163, translated as A History of Continental Criminal Procedure, being vol. V of the Continental Legal History Series; de la Grasserie, La Preuve, cited *ante*, § 1834). In all the history of political oppression, from the English Star Chamber to the Venetian Council of Ten, this seems to be the favorite and powerful weapon. Compare Rev. Sydney Smith's reference to this rule in his scathing denunciation of a related one ("Letter on the Bill to allow Counsel for Prisoners in Felony," Edinburgh Review, 1826, Works, ed. 1869, p. 539).

that the danger of improper tampering with witnesses is totally lacking where the desired witness is the party himself. By requiring him to state in advance his testimonial knowledge to the opponent, we do not expose his testimony to danger, — simply because he is himself not open to tampering as a witness, and because the risk of a manufacturing of counter-evidence is no greater than would otherwise exist in any case. There is therefore no objection to a prior disclosure of his testimony to the opponent.

This much was indeed conceded from the very beginning in the Court of Chancery, by the allowance of bills of discovery; and to that extent the law may be said to have recognized always this exception to the general rule. But this exception failed of recognition in courts of common law, by reason of a distinct principle there obtaining, namely, the privilege of a civil party not to testify against his own cause (*post*, § 2217). When the time came that this principle was abolished and an opponent could be compelled to testify on trial, it was easy to perceive that his intended testimony should also be made available before trial (as it always had been by bill of discovery in chancery). Accordingly the one change was everywhere found accompanying or closely following the other (*post*, § 1856*a*). The desirability, and at the same time the safety, of making this requirement was well expounded by a liberal judge, some twenty years before the change was actually made by legislation in England; his reasoning rests on both of the considerations already noted (*ante*, § 1845, par. *a* and *b*), but especially upon the second of the two:

1830, L. C. J. Best, Second Report of the Common Law Practice Commissioners, 46, 50: "I propose that as soon as any action be brought, even before appearance, either party to the cause may examine on oath the other. . . . After such examinations, in a great number of cases very few if any witnesses will be required. The whole of the cases of each party will be fully disclosed, and nothing will remain for juries to do but to assess damages. In cases which depend on circumstances of which the parties have no positive knowledge and which are to be proved by witnesses, the parties will from these examinations discover the nature of these circumstances, and each side will come prepared to make the best of their respective cases. There will remain no pretence for complaining of surprise. Some persons think that parties should not know each other's cases. Parties know each other's cases in the trial of issues from chancery; and when causes are tried a second time these cases are more easily and satisfactorily tried than any other. Much more mischief is to be apprehended from surprise than from the fullest knowledge of a cause. . . . There are parties who, ignorant of the answer their opponents have to give, think they have good cases; there are some who know that if the whole truth can be got at they have no chance of success, but persevere in litigation in the hope that their adversaries will not discover their weakness or will not be able to take advantage of it for want of proof; others are misled by their attornies, who afterwards excuse themselves from advising their clients to proceed by protesting that their clients deceived them. These are the ways in which parties deceive themselves or are deceived to their own ruin and sometimes the ruin of their unfortunate opponents. The examination of the parties will dispel these delusions. . . . I am persuaded that these examinations will stop many cases and prevent much misery."

1828, Feb. 7, Mr. *Henry Brougham*, Speech on the Courts of Common Law (Hans. Parl. Deb., 2d ser., XVIII, 188): "Whatever brings the parties to their senses as soon as possible, especially by giving each a clear view of his chance of success or failure, and, above all things,

making him well acquainted with his adversary's case at the earliest possible moment, will always be for the interests of justice, of the parties themselves, and indeed, of all but the practitioners. It is the practitioners generally, that determine how the matter shall proceed, and it may be imagined that their own interests are not the last attended to. The seeming interest of two parties disposed to be litigious, in many cases appears to be different from the interests of justice, although their real interest, if strictly examined, will not unfrequently be found to be the same. Now, justice is embarrassed by the disingenuousness of conflicting parties; justice wants the cases of both to be fully and early stated; but both parties take care to inform each other as little as possible, and as late as possible, of their respective merits. One tells as much of his case as he thinks good for the furtherance of his claim and the frustration of the enemy's; so does the other, only as much of his answer as may help him, without aiding his adversary; and the judge is oftentimes left to guess at the truth in the trick and conflict of the two. The interest of the Court of Justice being to make both parties come out with the whole of their case as early as possible, the law should never lend itself to their concealments. This remark extends to the proof as well as the statement of the case; an intimation of what the evidence is may often stop a cause at once. In Scotland, the law in this respect is better than ours, for no man can produce a written instrument on trial without having previously shown it to his adversary. For want of this salutary rule I have often seen the most useless litigation protracted for the sole benefit of practitioners. I was myself lately engaged in a cause, the circumstances of which will give the House an idea of the mischief. I was instructed not to show a certain receipt to the opposite party, as my client, the defendant, meant to nonsuit his adversary in great style, as he would call it. Well, the plaintiff (an executor) stated his case, and called his witnesses to prove the debt. I did not take the trouble to cross-examine, which would have been quite unnecessary. Equally so was it to address the jury. I acknowledged the truth of all that had been sworn on the other side, but added that it was all useless, as I happened to have a receipt for the money, which had been paid to the testator. This, of course, put an end to the case. The sum sought to be recovered did not exceed twenty pounds, and the expenses could not have been less than a hundred."

1853, *Common Law Practice Commissioners*, Second Report, 35: "As to facts within the knowledge of an adverse party, the Courts of law possess no power of compelling discovery; except, indeed, that by the recent change [of 1851] in the law each party may be called as a witness by his opponent; but it is obvious that this course will only be resorted to in the most desperate emergency. It cannot reasonably be expected that a party ignorant of what his adversary may be prepared to swear, shall put so adverse and interested a witness into the box, without having had any opportunity of previous interrogation. For the purpose of discovery, previous to the trial, whether of facts or of documents, the party desiring it has now no alternative but to resort to a court of equity. We have no hesitation in saying that this is altogether wrong. We assert as an indisputable proposition, that every Court ought to possess within itself [4] the means of administering complete justice within the scope of its jurisdiction. . . . This opportunity for examination prior to the trial will be useful, not only for the purpose of discovering facts exclusively in the knowledge of the opposite party, but as the means of sparing the trouble and expense of producing evidence of facts which he may be prepared to admit; while, on the other hand, it will tend to make more clearly manifest the matters which are alone in contest between the parties. In some cases, such a preliminary discovery may even altogether obviate the necessity of any trial, by compelling the one party or the other to admit facts decisive of the case upon the merits, so as to show that proceeding to trial would be a mere abuse of the forms of justice. A power of preliminary discovery would likewise tend to expose the motives of groundless actions brought for vexation, and of unfounded defences set up and persisted in

[4] This measure had already been recommended by the Common Law Practice Commissioners of 1830, Second Report, 30, 70.

for delay. It would, moreover, have a most wholesome effect in preventing false pleas from being put on the record; for as soon as the examination of the party had made manifest the falsehood of the plea, a judge might be applied to to disallow the pleading at the expense of the party pleading it. If the very existence of such a power had not the effect of preventing the necessity of its exercise, it would at least aid the Court in extirpating frivolous and improper litigation. We propose that either party in a cause shall be at liberty to deliver to the opposite party, provided such party would be liable to be called as a witness, or his attorney, written questions on the subjects on which discovery is sought; and to require such party, within a time to be fixed, to answer the questions in writing upon oath, sworn and filed in the same manner and under the same sanction, in case of falsehood, as an affidavit; and that the party omitting to answer within the prescribed time shall be subject to the consequences of a contempt of the Court. But we by no means propose to confine the power of interrogating such adverse party to the written questions above referred to. We think that in many cases an opportunity should be afforded for oral examination. At the same time, care must be taken that the power of personal examination be not abused by being made a means of vexation and oppression, when used against weak or timid persons. We propose, therefore, not to leave it at the option of a party to demand an oral examination, but to give the Court, or a judge, discretion, on the application of either party, in case of an insufficient answer to the written questions before referred to, or in any other case in which it may be made to appear essential to justice, to direct an oral examination of the other party before either a judge or a master of the court."

(3) *Documents, chattels, premises.* In the next place, it has come to be acknowledged that the danger of improper tampering with evidence by an unscrupulous opponent is of comparatively small probability where the evidence in question consists of documents, chattels, or premises, in the first party's own possession. To allow the opponent, under proper safeguards, to have prior inspection of these, and even to take a copy of documents, cannot endanger the integrity of the object. Nor can the warning thus given create any substantial danger of procuring perjured testimony against the execution of the document or other facts. All the justice of assisting an innocent opponent may be attained, without any appreciable risk of furnishing the means of fraud to an unprincipled one:

1831, *Common Law Practice Commissioners*, Third Report, 45: "The present practice of profert and oyer, though in its present form chargeable with many defects, is in its principle of the highest importance. It is manifestly essential to the interests of justice that a party against whom his own written instrument or the instrument of another person is pleaded should have the means of inspection, and, if necessary, of procuring a copy before he is called upon to answer. He may wish to ascertain its genuineness, and, if genuine, whether it has sustained any material alteration since it was executed. He may wish to know the names of the subscribing witnesses and to ascertain from them what testimony they are prepared to give as to the circumstances under which it was executed. He may propose to found his defence upon some parts of the instrument which his adversary has not chosen to set forth and which may either show its invalidity in point of law or provide him with an answer in point of fact. . . . We can see no good reason why, in every case in which profert would be required of a bond or other deed, it should not also be made of any other instrument of whatever description, which is either alleged to be or which may be presumed to be in writing. Such an alteration of the law would prevent the delay, expense, and uncertainty which attends an application to the Court or a judge, and would place the whole practice on this subject on a more simple and uniform as well as a more equitable footing."

The germ of this exception for documentary evidence already existed in the common-law rule of profert and oyer (*post*, § 1857). Not until the general change of attitude towards the common-law doctrine of concealment of evidence was the rule of oyer allowed to be extended to its proper scope. Since the middle of the 1800s, legislation has almost universally provided, in some form or other (*post*, §§ 1859, 1862), that where the opponent has requested this opportunity of protecting himself against unfair surprise, it is to be granted him; and such an inspection is usually made the indispensable condition to the possessor's subsequent use of the document in evidence on the trial. This result seems to have come about through a distinct perception of the true balance of danger; but it also signifies (in spite of the frequent judicial emasculation of these statutes) that to a certain extent our communities have deliberately abandoned the sportsman's theory of litigation.

Two further modifications of the general common-law rule remain to be noticed, both already existing in the original common-law period and before the changes of opinion above-mentioned had come about.

(4) *Documents at the trial.* One of these rests, as does the statutory rule (3) just mentioned, on an appreciation that in a certain condition there is practically no danger of abuse by an unscrupulous opponent, and that furthermore the first party, even on the sportsman's theory, is losing no real advantage. Where a *document* is *brought* by the first party *to the trial*, and is about to be used before its close, he may attempt to use it without allowing the opponent to inspect it. This might easily lead to abuse by the party using the document; moreover, to require it to be shown neither gives the opponent any opportunity for fraud, nor compels the first party to lose any advantage of concealment, since it is to be used in any event before the close of the trial. Accordingly, the opponent's right to inspection is conceded. The details of the rule are later examined (*post*, § 1861).

(5) *Circumstantial evidence of conduct.* It has been noticed already (§ 1845) that a necessary assumption, in the common-law principle declining to require notice, is that no discrimination is easily feasible and that the rule must ordinarily be invariable, *i.e.* that, though there is just ground for notice where the intended evidence is false, yet the situations in which the evidence is probably false cannot be well discriminated by any definition from the situations in which it is probably true, and therefore the requirement must be either for notice in all cases or for notice in none; and the common law chose the latter alternative. If this assumption is erroneous, and if any such situation can be definitely ascertained and marked off, then there is sufficient reason for making an exception to the general rule and for requiring notice. Now there is at least one such situation, namely, where evidence to impeach a witness consists of *particular acts of misconduct* or *particular falsities*. Here it is obvious that there is the fullest opportunity of falsification, with an absolute impotence for the opponent to expose it. For example, if a witness' character could be attacked in this way, the witnesses

might on the trial falsely place the misconduct in New York or Texas; they might falsely date it in the past month or five years ago, and they might falsely specify it as forgery or murder or larceny; and against these fabrications of place, date, and conduct the opponent is totally defenceless, because he cannot even guess beforehand, in the wide range of space, time, and criminality, what the tenor of these falsities will be. Such an absolute immunity for falsehood would not fail to be availed of by unscrupulous parties, and the consequences would be monstrous. This was long ago perceived by the common-law judges. That is the way, said Chief Justice Scroggs, "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." [5]

It might have been supposed that the consequence of this policy would be a rule permitting such misconduct to be offered in evidence when notice of time, place, and conduct had been given beforehand; and such a rule would probably be more desirable. But, instead of this, the simpler measure of absolute prohibition was adopted, — a result due clearly enough to the fact that other reasons had also a bearing on the impropriety of receiving such evidence.[6]

§ 1848. **Distinction between a Rule of Evidence and a Rule of Procedure or Pleading.** The sole question here for the law of Evidence is whether, because of surprise or lack of notice, certain evidence will be excluded. If no such effect is given, then it is to be said that the rules of evidence are no longer involved. But the policy of guarding against unfair surprise may lead to other rules, not of Evidence; and such rules are without the present purview. These are of two general sorts:

(1) Where evidence unfairly surprises the opponent, the Court may in its discretion grant a *continuance* and postpone the trial.[1] It may also, after verdict, grant a new trial, though this ground alone will rarely suffice.

(2) To avoid unfair surprise, the claimant's *pleadings* may be required to state with greater particularity the facts upon which his claim is based. For example, in many jurisdictions, by statute, the plaintiff, in an action for a sum of money made up of several items incurred on *an account*, is required to deliver before trial to the defendant or to annex to the declaration an *itemized statement* of the particulars, on penalty of being forbidden to prove the account.[2] But this is no more than a rule of Pleading; the distinction being that by a rule of Evidence he could have proved his case by other evidence

[5] 1680, Castlemaine's Trial, 7 How. St. Tr. 1067, 1081, 1107; quoted *ante*, § 1102.

[6] This class of rules is further examined *post*, § 1849.

§ 1848. [1] See Clifford, J., quoted *ante*, § 1845, for the rule in jury trials; for Chancery, see Langdell, *ubi supra*, § 60.

[2] The following are merely examples: *Cal.* C. C. P. 1872, § 454 (account stated; a copy must be delivered to the opponent five days after demand in writing, in order to be admissible); *Ida.* Comp. St. 1919, § 6709 (a party, on failure to deliver to the opponent a copy of an alleged account within ten days after demand in writing, will "be precluded from giving evidence thereof"); *Minn.* Gen. St. 1913, § 7777 (similar); *Miss.* Code 1906, § 734; *Mo.* Rev. St. 1919, § 1258; *N. M.* Annot. St. 1915, § 4149 (similar); *Utah:* Comp. L. 1917, § 6598.

if he failed to give the notice, while by this rule of pleading he is confined to the particulars stated, which thus become virtually allegations of his declaration. The same expedient is sometimes resorted to for other kinds of claims.[3] Occasionally, also, a statute requires a *copy of a contract*, or other document forming the basis of the claim, to be filed with the declaration;[4] and it would seem that such a rule produces a similar effect, *i. e.* makes the terms of the copy a part of the allegations, and thus does something more than the statutes later noted (*post*, § 1859), which either require the filing of the original, or require the prior delivery of a copy in order to use the original in evidence, but leave the party at liberty to refuse and to prove his case otherwise.

B. SPECIFIC RULES

1. Circumstantial Evidence

§ 1849. **Notice of Evidential Facts, in general; Particular Acts to evidence Character, etc.** (1) To the general rule allowing the use of all circumstantial facts without giving prior notice, and refusing to recognize unfair surprise as a ground for the exclusion of evidence, there seems to be but one generally recognized exception, at common law. There is, as already noticed (*ante*, § 1847), a special and palpable danger of undetectible fraud in allowing the *moral character* of an opposing *party* or *witness* to be evidenced by *particular acts of misconduct*, or *particular falsities*, when attempted to be proved otherwise than by cross-examination of the party or witness himself or by record of conviction for crime. Other reasons of policy, however, combined to oppose such evidence; and accordingly it was not merely prohibited unless after notice given, but prohibited unconditionally.

The reasoning by which this result was reached has been already fully set

[3] *Ala.* Code 1907, § 227 (contract made by an unlicensed dentist is void; but two days' notice must be given if proof of authority is to be required); § 461 (certain contested elections; "no testimony must be received of any illegal votes," etc., unless prior notice is filed of "the number of illegal votes and by whom given and for given," etc.); § 486 (analogous provisions for other elections); *Cal.* Civ. C. 1872, § 1115 (on trial of an election contested on the ground of illegal votes received, "no testimony can be received of any illegal votes," unless the contestant deliver to the opponent, "at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list"); *Colo.* Comp. St. 1921, C. C. P. § 170 (on a hearing for an injunction, only testimony of the character stated in a prior notice is to be admitted, with certain modifications); *Mo.* Rev. St. 1919, § 1270; *Nev.* Rev. L. 1912, § 40 (election contests; notice of illegal votes to be proved must be given beforehand by list of voters); *Tex.* Rev. Civ. Stats. 1911, §§ 7743–7746 (in trespass to try title, an abstract of title must be given to the opponent on written demand, etc., and the documentary evidence of title shall be confined to the matters therein specified).

The following seems to be of this sort: *Fla.* Rev. Gen. St. 1919, § 2740 (no claim for credit is to be allowed in actions between the State and individuals, unless previously exhibited to the comptroller and disallowed; unless the defendant is at trial in possession of vouchers "not before in his power to produce," and was prevented by unavoidable accident from prior exhibition).

[4] *Ark.* Dig. 1919, § 1223 (original or copy of any document upon which a party "shall rely," must be filed with his pleading); *Fla.* Rev. Gen. St. 1919, § 2647; *Ind.* Burns' Ann. St. 1914, § 1368; *Miss.* Code 1906, § 734; *Pa.* St. 1887, Pub. L. 271, May 25; 1893, Malone *v.* R. Co., 157 Pa. 430, 443, 27 Atl. 756.

forth in judicial utterances quoted *ante*, §§ 194, 979, 1002, and need not be rehearsed here. The rules that depended upon it prohibited the proof, by the above mode, of particular acts of misconduct of a witness (§ 979), or of a party (§ 194) except when the party's character was a part of the issue (§ 202), or of a witness' collateral errors (*ante*, § 1002). But the influence of those rules has been so powerful that they have often been extended, by analogy, to prohibit such a mode of proof of other qualities than moral character (§ 225 ff., 992 ff.).

(2) In a few *specific classes of litigation*, experience has shown special need, and statute has in some jurisdictions provided, for a rule of prior *notice of the particular* instances to be offered; *e. g.* in *patent-infringement* [1] and in *election contests*.[2] For *criminal cases* in general no such rule has been adopted (*ante*, §§ 300–367).

2. Testimonial Evidence

§ 1850. **Criminal Cases; Listing or Indorsing the Prosecution's Witnesses;** (I) **Common-law Rule.** In the orthodox common-law practice, no notice was required to be given to the accused, in any criminal prosecution, of the name or testimony of any witness intended to be produced on behalf of the prosecution.[1] This absence of any requirement was complete, *i. e.* (*A*) it neither required the notice as a *rule of preliminary procedure* irrespective of any evidential effect; (*B*) nor did it impose a *rule of evidence* excluding witnesses whose names had not been furnished. The operation of this practice led unquestionably to great injustice; but the law was plain and unquestioned:

1873, CHRISTIANCY, C. J., in *Hill* v. *People*, 26 Mich. 496, 497: "The common law did not require the names of any of the witnesses to be indorsed upon the indictment for any purpose connected with the trial. But, as the witnesses who were to testify before the grand jury were sworn in open court before they were sent to the grand jury, a list of the witnesses intended to be examined before that jury was required to be indorsed on the back of the bill as drawn up to be laid before them. This was required for two purposes, first, that the crier or other officer whose duty it was to swear the witness might know who were to be called and sworn and that he might certify to their being sworn, which he did by adding after their names 'sworn in court'; and, second, that the grand jury might know what witness to call and who had been sworn. In this mode, it is true, a defendant indicted for a misdemeanor incidentally got the benefit of a list of the witnesses who had testified before the grand jury, because in cases of misdemeanor he was entitled to a copy of the indictment. But in cases of felony he failed to receive even this incidental benefit, as in such cases he was not entitled to a copy of the indictment." [2]

§ 1849. [1] Cases cited *post*, § 1856c.

[2] Cases cited *ante*, § 1848, n. 3.

§ 1850. [1] Except so far as a deposition was taken and thus the accused was necessarily notified in order to permit an opportunity of cross-examination (*ante*, § 1378). This was secured afterwards in England, by statute, independently of those provisions: 1836, St. 6 & 7 W. IV, c. 114, § 4 (accused allowed to inspect depositions at the trial); 1849, St. 11 & 12 Vict. c. 42, § 27 (accused allowed a copy of depositions before trial); so also in some of the American statutes cited *post*, § 1851. But under these American statutes the accused (except perhaps in New York) obtains no right to *inspect* before trial the *contents* of the testimony given before the grand jury. Cases cited *infra*, note 5.

[2] Compare also the passage from Sir J. Stephen, quoted *ante*, § 1847, and Lord Erskine's speech, in Queen Caroline's Trial, in 1820, favoring a motion to furnish the accused

It follows that, apart from the express or implied requirement of some statute, there was at common law no rule of evidence *excluding witnesses whose names have not been furnished* to the accused;[3] nor was there any rule of preliminary procedure permitting the accused to *obtain such a list by motion* before trial.[4]

Much less might the accused obtain before trial an inspection of the *notes of testimony* taken before the *grand jury;*[5] or the disclosure of *any other evidence.*[6] Often, however, statutes have so provided (*post*, § 1855*a*).

with a list of the prosecution's witnesses (2 Hansard Parl. Deb., 2d ser., 304–318. 428–436, 470, 472, 574; quoted in part in Campbell's Lives of the Chancellors, 5th ed., X, 52).

[3] *Eng.* 1825, R. *v.* Hollingberry, 6 Dowl. & R. 345, 348 (conspiracy; witness not produced before grand jury may be used); *U. S.* 1895, Thiede *v.* Utah, 159 U. S. 510, 515, 16 Sup. 62 (murder; quoted *post*, § 1852, n. 4); 1904, Balliet *v.* U. S., 129 Fed. 689, 692, 64 C. C. A. 201 (fraud in the mails); 1906, Ball *v.* U. S., 147 Fed. 32, 36, C. C. A.; 1901, State *v.* Robinson, 61 S. C. 108, 39 S. E. 247; 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

This rule therefore equally applied to witnesses *not on the grand jury list*, where (as in Massachusetts, note 4, *infra*) this list was exceptionally given without statutory enactment: 1858, Com. *v.* Phelps, 11 Gray 73 (illegal sale of liquor; evidence is not restricted to sales testified to before the grand jury; Shaw, C. J.: "Suppose his shop is in a large street, and a hundred people go in and each buys liquor; must the Government call the whole hundred before the grand jury, in order to call them before the jury of trials?").

In South Carolina, a statute expressly denies any list: S. C. St. 1731, C. Cr. P. 1922, § 938 (the accused in a capital offence "shall have a true copy of the whole indictment, but not the names of the witnesses," three days before trial).

The Irish practice seems to have varied: 1855, R. *v.* Petcherini, 7 Cox Cr. 79, 82 (Ireland; O'Hagan, Q. C., objected to a witness who had been examined by the committing magistrate: "There is a rule on the Munster Circuit that, unless a witness appears unexpectedly, . . . it is not fair to an accused person that a witness should lie by or be kept back without making an information, and thus deprive a prisoner of means of cross-examination or of making inquiries"; Crampton, J.: "I have been acting on a contrary rule for twenty-one years").

[4] *Eng.* 1792, R. *v.* Holland, 4 T. R. 690 (information against an officer of the East India Company; inspection not allowed of the report of a board of inquiry, examining witnesses in India, on which the information was founded; "if we were to grant this motion, it would subvert the whole system of criminal law"); 1820, The Queen's Case, cited *supra*, note 2; *U. S. Fed.* 1907, Barrington *v.* Missouri, 205 U. S. 483, 27 Sup. 582 ("The right of the accused to the indorsement of names of witnesses does not rest on the common law, but is statutory"); *Fla.* 1906, Baker *v.* State, 51 Fla. 1, 40 So. 673 (neither under Rev. St. 1892, § 2901, allowing a copy of the indictment, nor otherwise, is the accused entitled to a list of witnesses before trial); *Ind.* 1910, Porter *v.* State, 173 Ind. 694, 91 N. E. 340.

But in *Massachusetts*, exceptionally, the practice changed without statute: 1830, Com. *v.* Knapp, 9 Pick. 496, 498; 1833, Com. *v.* Locke, 14 Pick. 485 (motion for a list of grand-jury witnesses, granted, "on the general principles of justice and sound policy"); yet this allowance did not extend to any but grand-jury witnesses: 1835, Com. *v.* Walton, 17 Pick. 403.

[5] 1910, Porter *v.* State, 173 Ind. 694, 91 N. E. 340; 1898, Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986; 1904, Howard *v.* Com., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704; 1910, State *v.* Rhoads, 81 Oh. 397, 91 N. E. 186 (accused held not entitled to inspect minutes of evidence taken before the grand jury and in possession of prosecutor; cases collected); 1920, Taylor *v.* State, 87 Tex. Cr. 330, 221 S. W. 611 (signed testimony of witnesses before the grand jury; inspection not demandable); 1922, Mohler *v.* Com., — Va. —, 111 S. E. 454 (murder; but here the attorneys for prosecution and for accused were held mutually bound to give access at the trial to the transcript of that part of evidence at prior proceedings possessed by each); 1905, Havenor *v.* State, 125 Wis. 444, 104 N. W. 116 (here applied to a defendant desiring to peruse the grand jury's record of testimony in order to plead immunity for testimony there given by him).

This would also perhaps be a consequence of the privilege rule (*post*, § 2363, n. 8). Compare the cases cited *post*, § 1859*g* and § 1863.

[6] 1912, State *v.* Steele, 117 Minn. 384, 135 N. W. 1128 (copy of the accused's preliminary examination). *Contra:* 1888, Daly *v.* Dimock, 55 Conn. 579, 12 Atl. 405 (indictment for murder; the accused held entitled to inspect the coroner's report of testimony at an inquest, required by law to be filed with the clerk of court; the argument of Mr. Case for the accused is a valuable summary of authori-

The accused's right to *consult with his own witnesses* before trial would seem not to be affected by the present principle, either at common law or by statute, but rather to be a corollary of his right to have compulsory process "to produce the witnesses in his favor" (*post*, § 2191).

The accused's right to inspect *premises* or *chattels* before trial is considered under that special head (*post*, § 1862).

§ 1851. **Same: (II) Statutory Rule of Procedure allowing List of Witnesses.** But the injustice of the common-law rule began to be corrected by statute early in the 1700s. The policy of this change has already been examined (*ante*, § 1847). The effect of the change upon the rules of Evidence has been important and complicated.

A. The original English statute, and all but a few of the American statutes, purport in terms to make nothing more than a rule of procedure, of the type already denominated (*A*) (*ante*, § 1850); that is, they require the proper officer to deliver to the accused, with or without demand, a list of witnesses, at a specified time before the trial begins. This requirement would ordinarily be enforced by a *motion*, made *before trial* or *at the trial's opening*, on behalf of the accused, demanding the list. In this aspect, the statute merely makes a *rule of criminal procedure*, possibly affecting the indictment's validity or the trial's postponement, but not involving the admissibility of evidence; as such, it is without the present purview, but is further noticed, in making certain discriminations (*post*, § 1854).

B. But the further question naturally arises, whether by implication the statute has also affected the law of Evidence by making a *rule of evidence* of the type already termed (*B*) (*ante*, § 1850); *i. e.* whether a failure to observe the rule of procedure, in not delivering the list or in omitting a name therefrom, is to result in the *exclusion of witnesses not named in the list.*

Now, in respect to this consequence, the statutes differ in their terms, and fall into three classes:[1] they require the delivery of a list:

ties); 1903, Jenkins *v.* State, 45 Tex. Cr. 173, 75 S. W. 312 (murder; the accused held entitled to inspect the proceedings before the magistrate; "if these proceedings were authorized by law and the testimony taken down, it was a public document").

§ 1851. [1] ENGLAND: 1709, St. 7 Anne, c. 21, § 14 (treason; the Act was so conditioned as not to come into practical effect till 1781, at Lord Gordon's trial; it provided for a delivery to the accused, ten days before trial, and in the presence of two or more witnesses, of "a list of the witnesses that shall be produced on the trial for proving the said indictment," "mentioning the names, profession, and place of abode"; compare the later statutes cited *ante*, § 1850, note 1).

CANADA: *Dominion:* Rev. St. 1906, c. 146, Crim. Code § 876 ("the name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment," and the foreman shall initial the name of every witness examined); §§ 894, 896 (inspection and copy of the depositions filed may be had on demand); § 897 (in treason, a list of witnesses "to be produced on the trial" must be delivered ten days before arraignment); 1896, R. *v.* Townshend, 28 N. Sc. 468, 474 (the provision for initialling, construed); 1902, R. *v.* Holmes, 9 Br. C. 294 (rule for indorsing the names of witnesses, construed).

UNITED STATES: *Federal:* St. 1790, Apr. 30, § 29, Rev. St. 1878, § 1033, Code 1919, § 1507 (a list "of the witnesses to be produced on the trial for proving the indictment, stating the place of abode," is to be delivered "at least three entire days" before trial, for treason, and "at least two entire days" before, for other capital offences);
Alaska: Comp. L. 1913, § 2139 (like Or. Laws 1920, § 1429);
Arizona: Rev. St. 1913, P. C. § 930 ("the

(1) of the witnesses *examined before the grand jury* (or the prosecuting attorney) either by indorsing their names and abodes on the indictment (or

names of the witnesses examined before the grand jury, or whose depositions may have been read before them," must be inserted or indorsed before presentment);
Arkansas: Dig. 1919, § 3010 ("When an indictment is found, the names of all witnesses who were examined must be written at the foot of or on the indictment");
California: P. C. 1872, § 943 ("the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment or indorsed thereon before it is presented in court");
Colorado: Comp. L. 1921, § 7070 (the information shall be indorsed by the district attorney with "the names of such witnesses as are known to him at the time of filing the same," and also "the names of such other witnesses as may become known to him before the trial, at such time as the Court may by rule or otherwise prescribe; but this shall not preclude the calling of witnesses whose names or the materiality of whose testimony are first learned by the district attorney upon the trial"); § 7067 (like Ill. Rev. St. c. 38, § 421, omitting "treason");
Delaware: Rev. St. 1915, § 3975 (committing magistrate shall indorse on commitment and recognizance "the names of the State's witnesses");
Georgia: Const. 1877, Art. I, par. 5, Rev. C. 1910, § 6361 ("every person charged with an offense against the laws of the State . . . shall be furnished on demand with a copy of the accusation and a list of the witnesses on whose testimony the charge against him is founded"); P. C. 1895, § 8 (same); § 970 (same; the former Code read: "the witnesses who gave testimony before the grand jury"); 1871, Dean *v.* State, 43 Ga. 218 (the constitutional clause "on demand" controls the statute, and a failure to deliver the list without demand is no ground for arrest of judgment); 1874, Bird *v.* State, 50 Ga. 585, 587 (following Dean *v.* State); 1884, Inman *v.* State, 72 Ga. 269, 276 (the language of the Constitution is equivalent to that of the Code, and is not broader, as to the class of names to be listed);
Idaho: Comp. St. 1919, § 8810 (like Wash. R. & B. Code 1909, § 2043, adding "the witnesses called by the State in rebuttal need not be indorsed upon the information"); § 8820 (like Cal. P. C. § 943);
Illinois: Rev. St. 1874, c. 38, § 421 ("Every person charged with treason, murder, or other felonious crime shall be furnished, previous to his arraignment, with a copy of the indictment and a list of the jurors and witnesses. In all other cases he shall, at his request or the request of his counsel, be furnished with a copy of the indictment and a list of the jurors and witnesses"; note that this statute, which is reproduced in Colorado, in form belongs to this third type, but in judicial construction is dealt with as of the first type);
Indiana: Burns' Ann. St. 1914, § 1983 ("When an indictment is presented by the grand jury, the names of all the material witnesses must be indorsed upon the indictment; but other witnesses may afterward be subpœnaed by the State, but unless the names of such witnesses" were thus indorsed on presentment, no continuance can be granted the State on their account); § 1990 (on an information shall be indorsed "the names of all the material witnesses"; with a proviso for other witnesses as in the case of indictments);
Iowa: St. 1911, c. 188, Code 1919, § 9283 (the county attorney on filing an information shall indorse "the names of the witnesses whose evidence he expects to introduce and use on the trial," and also "a minute of the evidence" to be given by each; if on the trial "witnesses in addition to those whose names are so indorsed" are desired, the procedure is to be the same as for indictments); § 9339 (indictment; the names "of all witnesses on whose evidence it was found" must be indorsed);
Kansas: Gen. St. 1915, § 8013 ("When an indictment is presented by the grand jury, the names of all the material witnesses known at the time to the public prosecutor must be indorsed upon the indictment, but the names of other witnesses may afterwards be indorsed on said indictment before or during the trial, as the Court may by rule or otherwise prescribe"; but unless the names known are so indorsed before trial, the prosecution cannot have a continuance for such witnesses); § 7976 (the prosecuting attorney on filing an information shall "indorse thereon the names of the witnesses known to him at the time of filing the same. He shall also indorse thereon the names of such other witnesses as may afterwards become known to him, at such times before the trial as the Court may by rule or otherwise prescribe");
Kentucky: C. Cr. P. 1895, § 120 ("When an indictment is found, the names of all the witnesses who were examined must be written at the foot of or on the indictment");
Louisiana: Rev. St. 1870, § 992 (person indicted for a capital crime or a crime punishable with seven years' hard labor is entitled to a copy of the indictment);
Maine: Rev. St. 1916, c. 136, § 6 (grand jury foreman shall file with clerk's records a list of "all witnesses who are to testify before them");
Maryland: Ann. Code 1914, Art. 27, § 498 (false pretences; the defendant before trial "shall be entitled to the names of the witnesses and a statement of the false pretences intended to be given in evidence");

information) and giving the accused a copy of the indictment (or information), or (in some jurisdictions) by filing in court the minutes of their testimony; or

Massachusetts: Gen. L. 1920, c. 277, § 9 (the foreman shall return "a list of all witnesses sworn before the grand jury during the sitting, which shall be filed of record with the clerk"); § 65 (on an indictment for murder, the defendant in custody shall be served with a copy of the indictment); § 67 (on an indictment for a felony, the defendant in custody or under recognizance may on demand have a copy of the indictment "and of all indorsements thereon");
Michigan: Comp. L. 1915, § 15710 (the foreman shall return to court or deliver to the prosecuting attorney "a list of all the witnesses sworn before the grand jury," when an indictment is found); § 15720 (the indictment, "with the names of the complainant and all the witnesses indorsed on the back thereof," is to be filed); § 15761 (the prosecuting attorney, on filing an information, shall "indorse thereon the names of all the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the Court may by rule or otherwise prescribe, he shall also indorse thereon the names of such other witnesses as shall then be known to him");
Minnesota: Gen. St. 1913, § 9126 (the grand jury shall return into court the testimony of the witnesses examined before them, or the minutes of the testimony); § 9127 (within two days after demand, the clerk shall furnish a copy of the depositions to the defendant); § 9132 ("the names of the witnesses examined before the grand jury" shall be inserted or indorsed before presentment); § 9174 (at the arraignment, the clerk shall deliver to the defendant a copy of the indictment "and of the indorsements thereon, including the list of witnesses indorsed on it or appended thereto");
Mississippi: Code 1906, § 2711, Hem. § 2204 (the foreman shall certify and return into court "the names of all witnesses sworn before the grand jury");
Missouri: Rev. St. 1919, § 3889 ("When an indictment is found by the grand jury, the names of all the material witnesses must be indorsed upon the indictment; other witnesses may be subpœnaed or sworn by the State," but no continuance shall be granted for their absence unless on affidavit showing cause); § 3849 ("the names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments");
Montana: Rev. C. 1921, § 11836 ("When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or indorsed thereon before it is presented to the Court"; but no indictment may be quashed for failure to do this, "if the indorsement is made before the motion to quash is disposed of"); § 11891 (indictment may be set aside for failure to do this); § 11805 ("The county attorney must indorse upon the information at the time of filing the same, the names of the witnesses for the State, if known"; information may be set aside for failure to do this);
Nebraska: Rev. St. 1922, § 10087 (like Kan. Gen. St. § 7976);
Nevada: Rev. L. 1912, § 7045 ("the names of the witnesses examined before the grand jury" shall be inserted or indorsed before presentment); § 7086 (like Minn. Gen. St. § 9174); § 7090 (when the names of witnesses examined or of deponents are not inserted or indorsed, the indictment shall be set aside);
New Hampshire: St. 1901, c. 104, § 1 (every person indicted for murder "shall be entitled to a list of witnesses to be used . . . to be delivered to him twenty-four hours before the trial"); § 5 ("in the trial of murder cases, witnesses may be called in behalf of the State to rebut or explain any evidence of new matter offered by the defendant or to discredit his witnesses, though the names of such witnesses have not been furnished to the defendant; but time may be allowed the defendant to answer such evidence, if in the opinion of the Court justice requires it");
New Jersey: Comp. St. 1910, Crim. Proc., § 54 (a person indicted for treason shall have a list of "the witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such jurors and witnesses, delivered unto him at least three entire days before the trial; and in murder, misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury, or subornation of perjury . . . two entire days at least before the trial");
New Mexico: Annot. St. 1915, § 3142 ("the names of the witnesses examined before the grand jury must in all cases" be inserted or indorsed on presentment); § 4453 (no subpœna shall issue "unless the name of such witness be indorsed on the indictment or the district attorney shall order the same");
New York: C. Cr. P. 1881, § 271 ("the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, as provided in § 255, must be indorsed upon the indictment before it is presented to the Court. If not so indorsed, the Court must, upon the application of the defendant, at any time before trial, direct the names of such witnesses as they appear upon the minutes of the grand jury to be furnished to him forthwith");
North Carolina: Con. St. 1919, § 4608 (when a grand jury's presentment is made "upon the knowledge of any of their body or upon the testimony of witnesses, the names of such

(2) of the witnesses *known to the prosecuting attorney*, by filing a list in court or by delivering a copy; this provision being specially appropriate to

grand jurors and witnesses shall be indorsed thereon"); § 2336 (grand jury foreman shall mark on indictment "the names of witnesses sworn and examined");
North Dakota: Comp. L. 1913, § 10631 (the State's attorney shall indorse on the information "the names of all witnesses for the prosecution known to him at the time of filing the same; but other witnesses may testify on the trial of such cause in behalf of the prosecution on the trial of said action the same as if their names had been indorsed on the information"); § 10680 ("the names of the witnesses examined before the grand jury must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the Court"); § 10728 (it may be set aside for failure to do this);
Oklahoma: Const. 1907, Art. II, § 20 (the accused; "in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post-office addresses"); Comp. St. 1921, § 2550 ("the names of witnesses examined before the grand jury must be indorsed thereon before the same is presented to the Court"; but a failure to do so shall not be sufficient reason for setting aside the indictment, if within a reasonable time, fixed by the Court, the indorsement of the witnesses for the prosecution is made; at any time the Court may direct the indorsement of additional witnesses); § 2511 (on all informations shall be subscribed the names of the witnesses known to the county attorney at the time of filing; and those of such others as may afterwards become known to him shall be indorsed "at such time before the trial as the Court may by rule prescribe");
Oregon: Laws 1920, § 1429 ("the names of the witnesses examined before the grand jury" must be inserted or indorsed before presentment); 1902, State *v.* Warren, 41 Or. 348, 69 Pac. 679 (statute held not applicable to witnesses examined before a coroner's jury);
Pennsylvania: St. 1860, Mar. 31, § 35, Dig. 1920, § 8097 (like U. S. St. 1790, but limited to treason);
Porto Rico: 1906, People *v.* Román, 10 P. R. 532 ("There is no provision whatsoever forbidding the fiscal or the accused to present . . . such witnesses as they may deem proper"); 1912, People *v.* Román, 18 P. R. 217, 222 (though there is no law requiring indorsement of known witnesses, the Court may give relief in case of surprise); 1912, People *v.* Almestico, 18 P. R. 314, 329 (same); 1912, People *v.* Román, 18 P. R. 352 (U. S. Rev. St. §§ 1033, 1034, as to a list of witnesses, held not applicable in the Territories);
South Carolina: St. 1731, C. Cr. P. 1922, § 938 (the accused in a capital offence "shall have a true copy of the whole indictment, but not the names of the witnesses," three days before trial);
South Dakota: Rev. C. 1919, § 4712 ("When an indictment is found, the names of the witnesses examined before the grand jury must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the Court"); § 4702 (the prosecuting attorney on filing an information shall "indorse thereon the name of the witnesses known to him at the time of filing the same");
Tennessee: Shannon's Code, 1916, § 7054 (the foreman shall indorse "the names of the witnesses so sworn by him," but the omission to do so shall not invalidate the indictment or presentment); § 7057 ("When presentment is made upon the evidence of witnesses sent for by the grand jury, the names of the material witnesses for the State, examined before the grand jury, shall in all cases be indorsed thereon before it is presented to the Court");
Texas: C. Cr. P. 1895, § 444 (the State's attorney shall "indorse thereon [the indictment] the names of the witnesses upon whose testimony the same was found");
Utah: Comp. L. 1917, § 8822 (like Cal. P. C. § 943); § 8879 (indictment may be set aside for failure to do this); § 8782 (information; "the names of the witnesses testifying for the State on such examination [before the committing magistrate] must be indorsed thereon"); § 8878 (information may be set aside for failure to do this);
Virginia: Code 1919, § 4860 ("the names of the grand jurors giving the information, or of the witnesses, shall be written at the foot of the presentment or indictment");
Washington: Const. 1889, Art. I, § 22 (the accused is entitled "to have a copy" of "the accusation against him"); R. & B. Code 1909, §§ 2043, 2050 ("When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or indorsed thereon," and the clerk must furnish or permit a copy "within one day after demand made"; the prosecuting attorney on filing an information shall "indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the Court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him");
West Virginia: Code 1914, c. 157, § 8 ("When a presentment or indictment is so made [on the information of grand jurors themselves], or on the testimony of witnesses called on by the grand jury, or sent to it by the Court, the names of the grand jurors giving the information, or of the witnesses, shall be written at

a prosecution upon information, where there is no grand-jury indictment; or

(3) of all *witnesses intended to be produced*, — these last statutes thus being much wider in scope than the preceding two classes and not attended by their peculiar limitations; or

(4) rarely, but in addition to the foregoing, an *inspection of the depositions* or testimonial transcripts themselves.

The statutes of the first sort are the most numerous. The statutes of the third sort are few, but they include the earliest instances, namely, those of England and the Federal Congress. The statutes of the first and second sort often co-exist in the same jurisdiction, but obviously those of the first and third or the second and third are not needed in the same statute book.

The operation of three types of statutes may now be considered in order. But it will be noticed that under each of the first and second types, the question arises for two distinct sorts of witnesses, namely (*a*) the *specified class* of witnesses (*i.e.* grand-jury witnesses or witnesses known to the prosecuting officer), and (*b*) the *remaining witnesses* (*i.e.* not having appeared before the grand jury or not having been known to the officer).

§ 1852. **Same: (1) List of Grand-Jury Witnesses.** (*a*) Where the statute requires the names and abodes of witnesses examined before the grand jury to be indorsed upon the indictment, so that the accused can obtain them on his copy of the indictment, may a witness testify on the trial who *was examined*, if his name was *not thus indorsed?*

There is some reason for taking the statute by implication to require the exclusion of such a witness:

1848, KINNEY, J., in *Ray* v. *State*, 1 G. Gr. 316, 318: "The names of the witnesses upon the indictment will inform him [the accused] of the authors of the prosecution, and thus enable him to prepare for his defence. For his benefit, the crime charged in the indictment is required to be clearly and distinctly stated, that he may know with certainty the nature and character of the offence; and that he may not be taken by surprise on the trial, it is quite as necessary that he should know who the witnesses are by whom it is expected the indictment is to be sustained."

1853, GREENE, J., in *Smith* v. *State*, 4 id. 189, 190: "Inconvenient as this rule may at times appear, still in justice to the accused, it should perhaps be maintained. There is certainly great fairness in advising a prisoner of those witnesses who may appear against him, in time to guard against false or tainted testimony."

the foot of the presentment or indictment"); *Wisconsin:* Stats. 1919, § 2549 (the foreman shall return to the Court "a list under his hand of all witnesses who shall have been sworn before the grand jury during the term, and the same shall be filed by the clerk"); § 4642 (a person accused of an offence punishable by imprisonment in the State prison shall be entitled to a copy "of the indictment or information and of all indorsements thereon"); *Wyoming:* Comp. St. 1920, § 7426 (the prosecuting attorney shall indorse on the information the "names of the witnesses known to him at the time of filing," and afterwards of such as "may thereafter become known to him, at such times before the trial as the Court may by rule or otherwise prescribe"); § 7427 (a failure to request such indorsement to be made shall be deemed a waiver by defendant; "and such endorsement may be made before, at, or after any trial").

This result has been occasionally accepted.[1] But the majority of Courts have preferred to believe that the statute bears no such necessary implication, and that the purposes of fairness are sufficiently attained by leaving the trial judge to postpone the trial where a real and unfair surprise has in fact been caused.[2] It would seem, having regard to the possibilities of abuse which are propagated in criminal procedure by an arbitrary and unyielding rule, that this is the sound view to take.

It must be added that, of course, where the ground of objection is the *failure to indorse any names at all* (not merely the omission of one or more names), the proper remedy is to move before trial to quash the indictment or to postpone trial, because the failure was then plainly ascertainable by the accused.[3]

(*b*) Is there, furthermore, to be any exclusion of witnesses who were *not examined* before the grand jury and therefore were not indorsed because not required to be by the statute? To carry the implication of the statute thus far would be to do violence to its spirit as well as to its words; and no such rule of exclusion seems to be adopted by any Court, except perhaps to the extent of allowing the trial judge in discretion to prevent, by this method or by postponement, an unfair surprise:

1841, DOUGLASS, J., in *Gardner* v. *People*, 4 Ill. 83, 89: "The list of witnesses which is required to be furnished to the prisoner prior to the arraignment is to be composed of the witnesses endorsed on the indictment by the foreman of the grand jury. . . . The question

§ 1852. [1] 1848, Ray *v.* State, 1 G. Gr. 316, —, 231 S. W. 619 (rape; defendant must move to quash or ask for a continuance);
Neb. 1886, Ballard *v.* State, 19 Nebr. 609, 615, 28 N. W. 271 (see citation *post*, § 1853 *a*);
Nev. 1921, State *v.* Rothrock, — Nev. —, 200 Pac. 525;
Okl. 1913, Herrell *v.* State, 10 Okl. Cr. App. 131, 134 Pac. 1139;
Utah: 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

But in any event an *actual knowledge* of the prospective witness, or such knowledge as removes *unfair surprise* to the accused, obviates any objection: 1900, People *v.* Quinn, 127 Cal. 542, 59 Pac. 986 (name not initialled); 1901, Cross *v.* People, 192 Ill. 291, 61 N. E. 400 (witness, not indorsed, but notified to defendant in due season, admitted); 1903, People *v.* Hammond, 132 Mich. 422, 93 N. W. 1084; 1882, State *v.* Anderson, 16 Or. 448, 452; 1893, State *v.* Townsend, 7 Wash. 462, 35 Pac. 367; 1896, State *v.* Everitt, 14 Wash. 574, 45 Pac. 150 (misspelling of name; "[the defendant] had really had notice that these witnesses would testify, and that . . . is the only object of the statute").

[2] 1919, Snow *v.* State, 140 Ark. 7, 215 S. W. 3; 1863, People *v.* Symonds, 22 Cal. 348, 354; 1845, McKinney *v.* People, 7 Ill. 540, 552, *semble;* 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235.

Compare the same result reached under the third sort of statute, *post*, § 1854.

[3] *Cal.* 1863, People *v.* Symonds, 22 Cal. 348, 354 (no exclusion ensues; perhaps a postponement, but this is not "a matter of right");
1864, People *v.* Lopez, 26 Cal. 112 (there is no exclusion because grand-jury witnesses are not indorsed; the only remedy is a motion to quash, at the arraignment);
Ida. 1907, State *v.* Barber, 13 Ida. 65, 88 Pac. 418 (unindorsed witness, called in rebuttal, excluded, for lack of a proper showing; but it does not here appear whether the witness had been examined before the grand jury);
Ill. 1845, McKinney *v.* People, 7 Ill. 540, 551;
1886, Andrews *v.* People, 117 Ill. 195, 199, 7 N. E. 265, *semble;*
Ky. 1895, Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661 (motion to quash, not made in season); 1905, Thompkins *v.* Com., — Ky. —, 90 S. W. 221 (a motion to quash is the proper remedy);
Mo. 1884, State *v.* Roy, 83 Mo. 268 (motion to quash; point not decided); 1885, State *v.* Griffin, 87 Mo. 608, 612, *semble;* 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (if some names are purposely omitted, to obtain undue advantage, the remedy is quashing or postponement); 1921, State *v.* Lee, — Mo.

is now presented whether the prosecuting attorney is to be confined to the list of witnesses endorsed on the back of the indictment. . . . If such a construction were placed upon this statute as would exclude all witnesses whose names were not endorsed on the indictment, many offenders would go unpunished, not on account of their own innocence, nor of the negligence of the State's attorney, but by a defect in the law itself, or a narrow and illiberal construction of it not sanctioned by reason or justice. We think, therefore, that the prosecution is not confined to the list of witnesses endorsed on the indictment and furnished previous to arraignment; but that the Circuit Court, in the exercise of a sound discretion, and having a strict and impartial regard to the rights of the community and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require."

1858, WOODWARD, J., in *State* v. *Abrahams*, 6 Ia. 117, 121: "The question is whether the prosecution is confined to the witnesses upon whose testimony the charge is founded and whose names are indorsed. We think it is not. Such a rule would greatly embarrass the administration of justice in the punishment of offences. It would make it necessary for the State to search for all possible evidence before it presented an indictment, and thus favor the escape of the guilty; or it would deprive of much evidence and even of that which is the best and the most satisfactory. There is no principle of law or of natural right which entitles a defendant to a previous knowledge of all the witnesses to be called against him. Our statute has gone sufficiently far, probably, in giving him the knowledge of those upon whose information the charge is based, by requiring their names to be indorsed upon the indictment. . . . This may be supposed to give the accused the knowledge of all the witnesses known to the prosecution, and it is difficult to consider him entitled to more than this."

Some Courts appear disposed to make this rule an absolute one, denying any force to the objection.[4] Others allow a desirable flexibility, by conceding to

[4] *Fed.* 1895, Thiede *v.* Utah, 159 U. S. 510, 515, 16 Sup. 62 ("in the absence of some [express] statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial");
Ga. 1855, Keener *v.* State, 18 Ga. 194, 216 (so that the State is not limited "to any particular set of witnesses"); 1884, Inman *v.* State, 72 Ga. 269, 276;
Ida. 1902, State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849;
Ill. 1872, Scott *v.* People, 63 Ill. 508, 510, *semble;*
Ind. Ter. 1903, Binyon *v.* U. S., 4 Ind. T. 642, 76 S. W. 265 (defendant is not entitled, under Annot. Stats. 1899, § 1446, being § 2103 of Mansfield's Ark. Dig., to a list of witnesses who had not been examined before the grand jury); 1906, Leftridge *v.* U. S., 6 Ind. T. 305, 97 S. W. 1018 (Arkansas statute applied);
Ky. 1905, Underwood *v.* Com., 119 Ky. 384, 84 S. W. 310;
Mich. 1873, Hill *v.* People, 26 Mich. 496, 498 (the statute "would not prevent the calling of any other witnesses [than those sworn before the grand jury], though their names were not so indorsed");
Mo. 1879, State *v.* Nugent, 71 Mo. 136, 144 ("the only consequence of a failure to indorse their names [of other witnesses] upon the indictment is that no continuance will be granted the State on account of the absence of such witnesses," unless for good cause); 1881, State *v.* Patterson, 73 Mo. 695, 699; 1884, State *v.* Roy, 83 Mo. 268, *semble* (under a statute expressly providing that "other witnesses [than those testifying before the grand jury] may be subpœnaed and sworn by the State"); 1886, State *v.* O'Day, 89 Mo. 559, 1 S. W. 759; 1887, State *v.* Pagels, 92 Mo. 300, 310, 4 S. W. 931; 1891, State *v.* Steifel, 106 Mo. 129, 17 S. W. 227; 1897, State *v.* Shreve, 137 Mo. 1, 38 S. W. 548; 1897, State *v.* Smith, 137 Mo. 25, 38 S. W. 717; 1900, State *v.* Tate, 156 Mo. 119, 56 S. W. 1099; 1905, State *v.* Henderson, 186 Mo. 473, 85 S. W. 576 (but here the Court intimates an exception for cases of surprise); 1905, State *v.* Bailey, 190 Mo. 257, 88 S. W. 733 (similar); 1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (similar; reviewing the cases); 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235; 1912, State *v.* Lawson, 239 Mo. 591, 145 S. W. 92 (but here a flexibility is provided for);
Okl. 1904, Cochran *v.* U. S., 14 Okl. 108, 76 Pac. 672;
Or. 1903, State *v.* Belding, 43 Or. 95, 71 Pac. 330 (information);
Utah: 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

the trial Court the discretion, in case of a real and unfair surprise, either to postpone the trial or to exclude the witness.[5] The result of the latter rule is in effect to create, under the statute's inspiration, a common-law doctrine of discretionary exclusion. It may be added that the accused's actual knowledge of the prospective witness negatives unfair surprise, and is thus often mentioned as a specific reason nullifying his objection.[6]

§ 1853. **Same: (2) List of Witnesses Known to Prosecuting Attorney.** (*a*) Under the statutes requiring the prosecuting attorney to indorse on the information the names and abodes of prospective *witnesses then known to him*, may a witness thus *known but not indorsed* be afterwards excluded? The statute does not expressly direct this; and it seems clear that the spirit of the statute is sufficiently preserved by leaving the exclusion of such witnesses to the trial judge's discretion in case of a real and unfair surprise; having regard, here also, for the possibilities of abuse that would be produced by a technical rule to the contrary:

[5] *Cal.* 1856, People *v.* Freeland, 6 Cal. 96, 98 ("any witness may be introduced upon the trial, by consent of the Court, notwithstanding he was not before the grand jury, subject only to the right of the prisoner to a postponement in case such evidence should operate as a surprise upon him"); 1866, People *v.* Jocelyn, 29 Cal. 562;
Colo. 1877, Wilson *v.* People, 3 Colo. 325, 329 (like the Perry case, in Illinois); 1885, Minich *v.* People, 8 Colo. 440, 445, 9 Pac. 4 (later Illinois cases followed); 1896, Boykin *v.* People, 22 Colo. 496, 45 Pac. 419 (actual notice removes any ground for objection); 1897, Askew *v.* People, 23 Colo. 446, 48 Pac. 524 ("the witnesses contemplated by the statute are those which have testified before the grand jury or who were known by the prosecution to be material witnesses at the time of the arraignment"; yet the prosecution, on learning of others, must notify the defendant "in time to prepare his defence"; if it does not, the defendant must show surprise and the necessity of further time to prepare);
Ill. 1841, Gardner *v.* People, 4 Ill. 83, 89 (see quotation *supra*); 1853, Gates *v.* People, 14 Ill. 433, 436 (Gardner case approved); 1853, Perry *v.* People, 14 Ill. 496, 498 (admissible where no surprise is caused or preparation made necessary); 1873, Perteel *v.* People, 70 Ill. 171, 175 ("This Court has repeatedly held that the People are not restricted" to the indorsed names); 1874, Smith *v.* People, 74 Ill. 144, 147 (allowable "in the exercise of a sound discretion"); 1879, Logg *v.* People, 92 Ill. 598, 600 (same); 1880, Bulliner *v.* People, 95 Ill. 394, 402 (same); 1891, Kota *v.* People, 136 Ill. 655, 658, 27 N. E. 53; 1893, Gifford *v.* People, 148 Ill. 173, 178, 35 N. E. 754 (same); 1894, Trask *v.* People, 151 Ill. 523, 529, 38 N. E. 248 (same); 1896, Gore *v.* People, 162 Ill. 259, 265, 44 N. E. 500 (same); 1897, Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465 (same); 1900, Bolen *v.* People, 184 Ill. 338, 56 N. E. 408 (same); 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416; 1909, People *v.* Lutzow, 240 Ill. 612, 88 N. E. 1049 (same); 1909, People *v.* Williams, 240 Ill. 633, 88 N. E. 1053 (same); 1910, People *v.* Steinhauer, 248 Ill. 46, 93 N. E. 299 (same); 1914, People *v.* Strosnider, 264 Ill. 434, 106 N. E. 229 (same);
Ia. 1858, June 10, State *v.* Abrahams, 6 Ia. 117, 120 (but this case is no longer law, by a statute passed immediately thereafter, and quoted *post*, § 1855);
Ky. 1905, Thompkins *v.* Com., — Ky. —, 90 S. W. 221, *semble;*
Md. 1906, Schaumloeffel *v.* State, 102 Md. 470, 62 Atl. 803 (rule of Gardner *v.* People, Ill., *supra*, approved);
Mich. 1903, People *v.* Hammond, 132 Mich. 422, 93 N. W. 1084 (admissible, if there was no real surprise);
S. D. 1888, Terr. *v.* Godfrey, 6 Dak. 46, 50 N. W. 481, *semble;* 1894, State *v.* Boughner, 5 S. D. 461, 59 N. W. 736; 1894, State *v.* Church, 6 S. D. 89, 60 N. W. 143 (citing the Gardner case, in Illinois); 1895, State *v.* Reddington, 7 S. D. 368, 64 N. W. 170 (State *v.* Church said to be law; "having no statute, as some States have, [expressly] requiring notice to a defendant as a condition precedent" to the calling of unindorsed witnesses, the rejection of such witnesses "ought to be left largely to the wise discretion of the trial Court"; here the prosecution knew of the witnesses beforehand); 1895, State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430 (witnesses admitted, of whom notice had been given in open court before trial begun); 1905, State *v.* Cambron, 20 S. D. 282, 105 N. W. 241 (foregoing cases approved).

[6] But the right to have a list of the names does not include the right to *inspect the testimony*. Cases cited *ante*, § 1850, note 5.

1883, HORTON, C. J., in *State* v. *Cook*, 30 Kan. 82, 84, 1 Pac. 32: "The Court, in the furtherance of justice, ought to have the power, and in our opinion does have the power, to permit the name of any witness to be indorsed upon the information at any time, even after the trial has actually commenced. Said § 67 [requiring the district attorney to indorse before trial the names of witnesses known to him] is not a condition to the qualification of a witness. As a general rule, the Court should allow the names of the witnesses of the State to be indorsed upon the information after the commencement of the trial, if it be important so to do; but of course, if the defendant is taken by surprise thereby, the Court should extend to him all possible facilities for a fair, full, and impartial trial, and, if necessary, may delay or even continue the hearing of the case until he has ample opportunity to prepare to meet the evidence of the witnesses indorsed upon the information after the commencement of the trial. . . . If the Court shall be convinced that the county attorney had purposely failed to indorse on the information the names of the witnesses known to him at the time of filing the same, to render it difficult for the defendant to prepare his defense, the Court may under such circumstances within its discretion refuse to grant the request of the county attorney to indorse on the information the names of the additional witnesses. But in all cases where the request . . . is made in good faith and to promote justice, the Court has authority to grant the same, keeping in view the just administration of the criminal laws and the right of the defendant for reasonable time to prepare to meet unexpected evidence."

Such is the rule adopted in a majority of the Courts that have considered the question.[1] One or two, however, with undue technicality, take the opposite view and require the exclusion of the witness;[2] yet even these Courts

§ 1853. [1] *Ida.* 1904, State *v.* Crea, 10 Ida. 88, 76 Pac. 1013;
Ia. 1917, State *v.* Nolan, 31 Ia. 71, 169 Pac. 295;
Kan. 1883, State *v.* Cook, 30 Kan. 82, 83, 1 Pac. 32 (quoted *supra*); 1883, State *v.* Teissedre, 30 Kan. 476, 483, 2 Pac. 650; 1884, State *v.* McKinney, 31 Kan. 570, 577, 3 Pac. 356; 1887, State *v.* Taylor, 36 Kan. 329, 336, 13 Pac. 550; 1888, State *v.* Dowd, 39 Kan. 412, 415, 18 Pac. 483; 1889, State *v.* Reno, 41 Kan. 674, 680, 21 Pac. 803; 1890, State *v.* Adams, 44 Kan. 135, 24 Pac. 71; 1893, State *v.* Sorter, 52 Kan. 531, 534, 34 Pac. 1036; 1915, State *v.* Roberts, 95 Kan. 280, 147 Pac. 828; 1917, State *v.* Howland, 100 Kan. 181, 163 Pac. 1071;
Mich. See the citations in the next note;
Mo. 1916, State *v.* Ferguson, — Mo. —, 183 S. W. 336; 1920, State *v.* Kehoe, — Mo. —, 220 S. W. 961 (collecting the cases); 1921, State *v.* Howerton, — Mo. —, 228 S. W. 745; 1921, State *v.* Dougherty, 287 Mo. 82, 228 S. W. 786; 1922, State *v.* Shannon, — Mo. —, 237 S. W. 466;
Mont. 1894, State *v.* Black, 15 Mont. 143, 151, 38 Pac. 674 (witness known but not indorsed may be admitted if no prejudice is shown); 1900, State *v.* Calder, 23 Mont. 504, 59 Pac. 903; State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927; 1915, State *v.* McDonald, 51 Mont. 1, 149 Pac. 279; 1918, State *v.* Inich, 55 Mont. 1, 173 Pac. 230.
N. D. 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052 (admissible, where the defendant in fact knows of the witness; as here, where a former trial had been had);
Okl. See the citations in the next note;
Wash. 1903, State *v.* Lewis, 31 Wash. 515, 72 Pac. 121, *semble*.

[2] It will be noticed that in Michigan the final choice of views has probably not yet been made:
Col. 1912, Hardesty *v.* People, 52 Colo. 450, 121 Pac. 1023 (the opinion does not inquire at all whether the defendant was surprised, and cites no authority; why was not Askew *v.* People, *supra*. § 1852, n. 5, considered?);
Mich. 1882, People *v.* Hall, 48 Mich. 482, 487, 12 N. W. 665 (inadmissible); 1885, People *v.* Quick, 58 Mich. 321, 322, 25 N. W. 302 (intimating that "cases may sometimes arise" for admission; declaring however that no distinction exists, for known witnesses, between those to be used for rebuttal and others); 1889, People *v.* Price, 74 Mich. 37, 41, 41 N. W. 853 ("the statute is imperative; . . . it is no sufficient excuse for not doing so that the whereabouts of the witness is not known, or that the prosecutor does not know that he can secure his attendance"; the trial Court has no discretion); 1890, People *v.* Howes, 81 Mich. 396, 400, 45 N. W. 961 (similar); 1893, People *v.* Mills, 94 Mich. 630, 638, 54 N. W. 488 (here admitted, there being no real surprise; no precedent cited); 1895, People *v.* Burwell, 106 Mich. 27, 30, 63 N. W. 986 (similar; no precedent cited); 1900, People *v.* Casey, 124 Mich. 279, 82 N. W. 883 (witness in rebuttal, excluded, because not indorsed

allow in discretion the indorsement of additional witnesses *before trial begun.*[3]

(*b*) May a witness *not known* at the time of filing the information by the prosecuting attorney, and therefore not indorsed thereon, nor required to be, suffer exclusion because of the lack of prior indorsement? Here clearly the implication of the statute forbids such an exclusion, nor would any considerations of fairness require it under any circumstances:

1870, SAFFORD, J., in *State* v. *Dickson*, 6 Kan. 209, 219: "It is the [statutory] duty of the prosecuting attorney to indorse upon such information the names of the witnesses known to him at the filing of the same. . . . These provisions are no doubt wise and salutary in their aims and effects. But, as we understand it, there is nothing in them or in any other statute which would have the effect of prohibiting a witness from testifying whose name had become known to the prosecution after the commencement of the trial and without his name being indorsed upon the information at all. Nor do we think that such a prohibition, if it did exist, would as a rule be calculated to promote justice. Cases (as is well known to every practitioner at the bar) often occur, where during the progress of the trial a necessity arises for the introduction of certain kinds of testimony which could not have been known or anticipated on the part of the prosecution before the commencement of the trial, [for example, in the impeachment of opposing witnesses]. . . . In such a case the universal practice has been to call and examine witnesses without regard to their having been previously named and summoned or even thought of. Other instances in which the adoption of a rule such as is contended for might operate to defeat the ends of justice will readily be suggested; and it is not seen how injustice would be likely to result from allowing such witnesses to be examined in any case."

1873, CHRISTIANCY, C. J., in *Hill* v. *People*, 26 Mich. 496, 499: "We can discover no reason, founded on justice or common sense, for requiring the indorsement of such as the prosecutor during the progress of the trial shall happen to discover to be important witnesses, or for the exclusion of such witnesses upon such ground; and we think it would be exceedingly pernicious in the administration of the criminal law to recognize such an objection. Should a criminal go unpunished because all the evidence of his guilt has not come to the knowledge of the prosecuting attorney before the commencement of the trial,

and no excuse given); 1920, People *v.* Blazenzitz, 212 Mich. 675, 180 N. W. 370 (failure to indorse two eyewitnesses of a robbery, here held material);
Nebr. 1886, Stevens *v.* State, 19 Nebr. 647, 649, 28 N. W. 304 (the trial Court has no discretion to permit indorsement on an information after trial begun); 1886, Ballard *v.* State, 19 Nebr. 609, 615, 28 N. W. 271 (same, but *contra*, for an indictment); 1886, Parks *v.* State, 20 Nebr. 515, 517, 31 N. W. 5 (like Stevens *v.* State); 1898, Carroll *v.* State, 53 Nebr. 431, 73 N. W. 939 (but a mistake of name is immaterial, if not misleading); 1899, Sweenie *v.* State, 59 Nebr. 269, 80 N. W. 815; 1906, Reed *v.* State, 75 Nebr. 509, 106 N. W. 649 (like Carroll *v.* State, *supra*);
Okl. 1910, Steen *v.* State, 4 Okl. Cr. 309, 111 Pac. 1097; 1911, Hawkins *v.* State, 6 Okl. Cr. 308, 118 Pac. 607 ("Steen's case is based on an arbitrary statute"); but the foregoing cases apply to misdemeanors only, under Snyder's Comp. L. 1909, § 6644; for felonies, the rule is that other witnesses may be indorsed in the trial Court's discretion under Snyder's Comp. L. 1909, § 6691; 1909, Vance *v.* Terr., 3 Okl. Cr. 208, 105 Pac. 307; 1911, Stockton *v.* State, 5 Okl. Cr. 510, 114 Pac. 626; 1921, Thomas *v.* State, — Okl. Cr. —, 201 Pac. 662 (cattle theft); 1921, Davenport *v.* State, — Okl. Cr. —, 202 Pac. 18;
Wash. 1896, State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20, *semble* (writing them in the body of the document suffices).

[3] *Colo.* 1920, Bush *v.* People, — Colo. —, 187 Pac. 528; *Mich.* 1888, People *v.* Perriman, 72 Mich. 186, 188, 40 N. W. 425 (it is not "an absolute requirement"); 1888, People *v.* Evans, 72 Mich. 367, 371, 40 N. W. 473 ("some discretion is left with the Court");
Nebr. 1896, Fager *v.* State, 49 Nebr. 439, 68 N. W. 611; 1896, Barney *v.* State, 49 Nebr. 515, 68 N. W. 636.

But the Court's consent to the indorsement is necessary: 1882, People *v.* Moran, 48 Mich. 639.

when it is always the interest of criminals to conceal all knowledge of this kind and when the guilt of the prisoner can be proved beyond a doubt by evidence which the prosecuting attorney has discovered during the progress of the trial? This would be a new feature in the administration of the criminal law, which no court ought ever to adopt without the express requirement of the Legislature, and which we cannot suppose any intelligent Legislature will be likely to adopt with reference to an honest administration of justice."

This result is generally accepted;[4] moreover, all courts taking the view presented in (*a*), *supra*, in the passage from Chief Justice Horton, would also agree in this result.

It should be added that a witness brought *in rebuttal* may nevertheless be a witness originally known, and therefore does not necessarily fall within the present class.[5] Moreover, the status of a witness in rebuttal under the present type of statute may be different from his status under the variety of statute dealt with in the next section, which often applies in terms to those only who are brought "for proving the indictment."

Where *no list at all* is furnished, the same principle would apply as in the case of the grand-jury statutes (*ante*, § 1852).[6]

[4] *Colo.* 1922, Stone *v.* People, — Colo. —, 204 Pac. 896; *Ida.* 1902, State *v.* Wilmbusse, 8 Ida. 608, 70 Pac. 849; 1904, State *v.* Crea, 10 Ida. 88, 76 Pac. 1013 (but such an indorsement made at the time of trial, without showing any reason for the tardy indorsement, is insufficient); 1904, State *v.* Rooke, 10 Ida. 388, 79 Pac. 82 (indorsement before trial, held proper on the facts); *Kan.* 1870, State *v.* Dickson, 6 Kan. 209, 219 (quoted *supra*); 1872, State *v.* Medlicott, 9 Kan. 257, 282; *Mich.* 1873, Hill *v.* People, 26 Mich. 496, 499; 1889, People *v.* Price, 74 Mich. 37, 41, 41 N. W. 853 (here, however, declaring that a continuance was proper); 1894, People *v.* Machen, 101 Mich. 400, 404, 59 N. W. 664; 1897, People *v.* Baker, 112 Mich. 211, 70 N. W. 431 (in discretion); 1899, People *v.* McArron, 121 Mich. 1, 79 N. W. 944 (same; here for a witness in rebuttal); 1901, People *v.* Luders, 126 Mich. 440, 85 N. W. 108 (same); 1918, People *v.* Powers, 203 Mich. 40, 168 N. W. 938; *Mo.* 1921, State *v.* Howard, — Mo. —, 231 S. W. 255 (witnesses heard of just before trial, and no continuance asked by defendant); 1922, State *v.* Pinson, — Mo. —, 236 S. W. 354; *Mont.* 1894, State *v.* Black, 15 Mont. 143, 151, 38 Pac. 674; 1912, State *v.* Biggs, 45 Mont. 400, 123 Pac. 410; 1912, State *v.* Lawson, 44 Mont. 488, 120 Pac. 808 (following Kelly *v.* State, Nebr.; one judge diss.); *Nebr.* 1886, Parks *v.* State, 20 Nebr. 515, 517, 31 N. W. 5, *semble;* 1888, State *v.* Huckins, 23 Nebr. 309, 36 N. W. 527, *semble* (here, for character witnesses); 1895, Fager *v.* State, 49 Nebr. 439, 442, 68 N. W. 611 (allowed for certain rebutting testimony); 1897, Kelly *v.* State, 51 Nebr. 572, 574, 71 N. W. 299 (allowable for testimony "obviously and purely rebuttal in its nature"; but this seems to ignore that the statute applies only to "known" witnesses, and a witness used in rebuttal may still be a "known" witness, and 'vice versa'; see the distinction *infra*, § 1854, which is here by confusion adopted); 1899, McVey *v.* State, 57 Nebr. 471, 77 N. W. 1111 (same); 1899, Kastner *v.* State, 58 Nebr. 767, 79 N. W. 713 (same); 1901, Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844; 1910, Ossenkop *v.* State, 86 Nebr. 539, 126 N. W. 72 (trial Court's discretion approved); 1910, Wilson *v.* State, 87 Nebr. 638, 128 N. W. 38 (on the facts, excluded); *N. D.* 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052; 1908, State *v.* Matejousky, 22 S. D. 30, 115 N. W. 96; 1915, State *v.* Kilmer, 31 N. D. 442, 153 N. W. 1089; *Okl.* 1910, Steen *v.* State, 4 Okl. Cr. 309, 111 Pac. 1097 (the prosecutor must show that the witness was not known); *S. D.* 1897, State *v.* King, 9 S. D. 628, 70 N. W. 1046; 1920, State *v.* Morgan, — S. D. —, 176 N. W. 35; *Wash.* 1893, State *v.* Lee Doon, 7 Wash. 308, 34 Pac. 1103; 1894, State *v.* Regan, 8 Wash. 506, 36 Pac. 472 (in discretion); 1895, State *v.* Holmes, 12 Wash. 170, 40 Pac. 735, *semble* (same); 1896, State *v.* Bokien, 14 Wash. 403, 44 Pac. 889 (same); 1896, State *v.* Kelly, 14 Wash. 702, 45 Pac. 38 (same); 1900, State *v.* Phelps, 22 Wash. 181, 60 Pac. 134 (same); 1904, State *v.* Van Waters, 36 Wash. 358, 78 Pac. 897.

[5] The rulings in Nebraska, cited in the preceding note, ignore this distinction; compare the Michigan rule, in People *v.* Quick, *supra*, note 2.

[6] 1919, State *v.* Ferguson, — Mo. —, 212 S. W. 339 (motion to quash or to continue must be made, for invoking the rule); 1921, Davenport *v.* State, — Okl. Cr. —, 202 Pac. 18.

§ 1854. **Same: (3) List of All Prospective Witnesses.** Under the third type of statute described (*ante*, § 1851), namely, requiring the delivery of a list of "the witnesses to be produced," there is usually but one class to be considered, under the statutory wording; *i.e.* the distinction already noted (*ante*, §§ 1852, 1853, par. *a* and *b*) between the specified class and the remaining witnesses — grand-jury witnesses and other witnesses, known and not known witnesses — disappears from the statute.

Only one question is raised, *i.e.* whether by implication the statutory rule of procedure creates also a rule of Evidence excluding witnesses not so listed. Most of these statutes are so narrow in regard to the classes of offences involved — being confined to prosecutions for treason or for capital offences in general [1] — that there has been but little judicial interpretation. Thus far the accepted results seem to be as follows:

1. Where a particular witness is *not upon the list*, or is *misdescribed* by name or by abode so as in effect to mislead the accused, the witness will be excluded, because the only mode of protecting the accused and enforcing the statute is to employ this measure.[2]

2. But where *no list at all* has been delivered, the rule of procedure could have been enforced by motion before or at the opening of the trial, and hence there is no necessity for creating a rule of Evidence and excluding the witnesses; the accused's virtual waiver of the rule of procedure prevents him from asking afterwards that it be turned into a rule of Evidence.[3]

§ 1854. [1] Of course U. S. Rev. St. § 1033 does not apply to a prosecution for a misdemeanor: 1877, U. S. *v.* Butler, 1 Hughes 457, 466 (conspiracy to obstruct an election; the defendant's application for the names of prosecutor and witnesses was refused); 1897, Shelp *v.* U. S., 26 C. C. A. 570, 81 Fed. 694; 1917, U. S. *v.* Pierce, D. C. E. D. N. Y., 245 Fed. (Espionage Act; names, etc., of witnesses sworn before the grand jury, not furnished, the offense not being capital).

[2] 1817, R. *v.* Watson, 32 How. St. Tr. 1, 69 (residence misdescribed); 1840, R. *v.* Frost, Gurney's Rep. 77, 188, 778, 4 St. Tr. N. S. 85, 172, 303, 9 C. & P. 129 (residence misdescribed).

U. S. Fed. 1851, U. S. *v.* Hanway, 2 Wall. Jr. 139, 165, 168 (here the testimony, though offered in rebuttal, was held to have been properly due in chief; the implication was that the rule did not apply to genuine rebuttal-testimony); 1891, Logan *v.* U. S., 144 U. S. 263, 306, 12 Sup. 617 (not decided; but Lord *v.* State apparently approved); 1902, Bird *v.* U. S., 187 U. S. 118, 23 Sup. 42 (not decided; witness held properly named in the list delivered); 1895, Thiede *v.* Utah, 159 U. S. 510, 515, 16 Sup. 62 (murder; quoted *ante*, § 1852, n. 4); 1904, Balliet *v.* U. S., 129 Fed. 689, 692, 64 C. C. A. 201 (fraud in the mails; the U. S. statute held not applicable); *D. C.* 1899, Horton *v.* U. S., 15 D. C. App. 310, 319 (notice naming an incorrect abode, held not insufficient, when the accused was not in fact misled); 1904, Shaffer *v.* U. S., 24 D. C. App. 417, 432 (accused held not to have been misled on the facts by an ambiguous description); *Ill.* 1921, People *v.* Hobbs, 297 Ill. 399, 130 N. E. 779, *semble*; *N. H.* 1846, Lord *v.* State, 18 N. H. 173, 175 ("Undoubtedly it is competent to the respondent, when a witness is called in such a case to be examined against him, to except that such witness is not named in the list furnished to him, for the purpose of excluding the testimony of that witness"); 1902, State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38 (State *v.* Lord followed).

Contra: 1906, Schaumloeffel *v.* State, 102 Md. 470, 62 Atl. 603; 1906, Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105 (Schaumloeffel *v.* State approved).

Note that in *Illinois* the statute of this form is treated by the Courts as one of the first sort (*ante*, § 1852).

[3] *Eng.* 1840, R. *v.* Frost, *supra* (by nine to six, it was held that an objection taken at the time of calling the first witness was not good, because, if it had been taken earlier, the trial might have been postponed and a good delivery made); *U. S.* 1795, U. S. *v.* Stewart, Wharton's St. Tr. 172, 2 Dall. 343 (trial postponed to allow reasonable time, after list furnished, for investigation; present point not decided); 1891, Logan *v.* U. S., 144 U. S. 263, 304, 308, 12 Sup. 617 (failure to deliver a

3. Under the peculiar wording in some statutes of this type, requiring a list of the witnesses that are to be produced "for proving the indictment," a witness offered *in rebuttal* is wholly without its scope, and therefore need not be named on the list.[4] In the statutes which do not contain this qualifying clause, it would seem proper to construe them as meaning only the witnesses "intended to be produced," and thus a witness not known beforehand to be needed would be without their scope, and the distinctions accepted under other statutes (*ante*, § 1853, par. *b*) would become applicable. But this point seems not yet to have been judicially decided.

4. As a rule of procedure, the requirement of these statutes, and its judicial interpretation, is without the present purview.[5]

§ 1855. **Same**: (III) **Statutory Rule of Evidence expressly excluding Unlisted Witnesses.** The foregoing statutes in terms provide merely a rule of preliminary procedure; any rule of Evidence arising out of them rests solely on implication, and therefore is more or less in the hands of the Courts to form. But in one jurisdiction (Iowa), later imitated by another (Oregon), a statute has expressly laid down a rule of Evidence (additional to those of the usual type, *ante*, § 1851), prescribing the precise terms upon which witnesses may be excluded.[1]

list under the statute, and refusal to grant postponement, held error, where objection was made when the case was called for trial; but whether the error sufficed alone to require a reversal was not decided); 1906, Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105; 1846, Lord *v.* State, 18 N. H. 173, 176 (objection must be taken when the case is called; so also where the objection of insufficient description of residence applies in common to the whole list; but an objection to the description of residence of a single witness may be taken when he is produced); 1912, People *v.* Román, 18 P. R. 352 (defendant "should request a list of the witnesses in time").

[4] U. S. *v.* Hanway, 2 Wall. Jr. 139, 165, 168, *semble* (cited *supra*); 1895, Goldsby *v.* U. S., 160 U. S. 70, 16 Sup. 216 (under an Arkansas statute requiring delivery of a list of the witnesses "to be produced on the trial for proving the indictment," witnesses in rebuttal need not be indorsed; in this opinion the cases in the Courts of Iowa, Illinois, Kansas, Nebraska, and Michigan are cited indiscriminately, without regard to the radical differences of the statutes under which the rulings were given; such a treatment is inexcusable, and serves only to confuse).

The same conclusion is reached under the similar words of the Iowa statute dealt with in the next section.

[5] The following rulings, however, may be placed here as being of service in the present relation; they seem to be all that have hitherto been made in regard to the witness-list: *Eng.* 1839, R. *v.* Frost, *supra*, 4 State Tr. N. S. 85, 461 (examining at length the history of the English statute; the jury-list and witness-list must be delivered at the same time); *Can.* 1915, R. *v.* McClain, 23 D. L. R. 312, Alta. (Can. Cr. C. § 876, held not applicable to a charge signed by the Attorney-General's agent in Alberta under Cr. C. § 873A; though "as a measure of fairness and justice, the Crown ought to furnish to the accused in some form the names of the witnesses intended to be called"; the trial Court's discretion controls); *U. S. Fed.* 1795, U. S. *v.* Insurgents, 2 Dall. 335, 342 (statute applied in general); 1826, U. S. *v.* Curtis, 4 Mason 232, 235 (the latter limit of the period is "before the cause is tried by the jury, and not before the party is arraigned," because the arraignment is here not the beginning of the "trial"); 1840, U. S. *v.* Dow, Taney C. C. 34, 35 (the "two entire days" must be exclusive of the day of delivery and day of arraignment); 1906, Ball *v.* U. S., 147 Fed. 32, 36, C. C. A. (U. S. Rev. St. 1878, § 1033, does not apply to territorial courts; here in Alaska); 1908, Jones *v.* U. S., 9th C. C. A., 162 Fed. 417 (conspiracy to defraud); *Okl.* 1921, Goben *v.* State, — Okl. Cr. —, 201 Pac. 812 (murder; rule of Const., Art. II, § 30, applied; denial of a motion for continuance, held error).

Note that (on the principle of § 6, *ante*) in trials in *Federal courts* the Federal statute applies, and not the statute of the State where the trial is held: 1908, Jones *v.* U. S., 9th C. C. A., 162 Fed. 417 (collecting prior cases); and Federal cases cited *ante*, § 1850, note 3.

§ 1855. [1] *Iowa:* Code 1897, § 5373, Rev. C. §§ 9435, 9436 ("The county attorney, in offering the evidence in support of the indictment in the order prescribed in the last section,

This statute, originally passed shortly after the ruling in State *v.* Abrahams,[2] has been radically amended in order to avoid the arbitrary operation of its original terms;[3] but it still remains an example of the evils of over-technicality in favor of an accused. Its adoption by other jurisdictions is not to be recommended. The judicial rulings in this State since 1858, resting as they do upon the express evidential commands of a unique statute, cannot be employed in other Courts. The purely local nature of the profuse rulings upon the words of this statute renders it impracticable to deal with them here; except to point out that the statute is held not to apply to witnesses offered in rebuttal[4] or to documentary evidence,[5] nor to exclude witnesses named erroneously without misleading effect[6] or witnesses not material.[7]

§ 1855*a*. **Same: (IV) Statutory Rule of Procedure allowing Inspection of Witnesses' Testimony.** The foregoing methods provide merely for a *list* of witnesses, to be furnished to the defendant. But may he obtain also the *tenor of their testimony; i.e.* supposing them not to tell him their story voluntarily on request, is there any legal rule enabling him to get it from them? There are two such rules, introduced by statute:

(1) In a few jurisdictions (*e.g.* England, Minnesota), the statute providing for a list of witnesses gives also the right to *inspect the reported testimony* or the depositions of the witnesses before the grand jury.[1]

(2) In jurisdictions allowing *depositions to be taken unconditionally* by an

shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of said witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the Court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit; whereupon, if the Court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with the same effect as though four days' notice had been given the defendant as hereinbefore provided, except [that] the county attorney in the examination of said witness shall be strictly confined to the matters set out in his motion"); 1907, State *v.* Johnson, 133 Ia. 38, 110 N. W. 170.

Oregon: St. 1899, p. 100, § 5 ("the name of each witness examined on oath or affirmation by a district attorney in support of any information" shall be inserted or indorsed before filing; "otherwise the testimony of such witness cannot be heard against the defendant at the trial of such information"). But the Oregon statute no longer appears in the law.

[2] Cited *supra*, § 1852, par. (*b*), note 5.

[3] St. 1858, c. 109, Code 1860, § 4786, Code 1873, § 4421, contained substantially the enactment *supra*, as far as the proviso; St. 1876, c. 168, § 3, Code 1880, § 4421, added the proviso.

[4] 1859, State *v.* Gillick, 10 Ia. 98, 100; 1867, State *v.* Parish, 22 Ia. 284, 285.

[5] 1894, State *v.* Farrington, 90 Ia. 681, 57 N. W. 606; 1897, State *v.* Boomer, 103 Ia. 106, 72 N. W. 424 (clerk producing records; notice of their contents unnecessary); 1907, State *v.* Bennett, 137 Ia. 427, 110 N. W. 150.

[6] 1899, State *v.* Dale, 109 Ia. 97, 80 N. W. 208; 1902, State *v.* Dunn, 116 Ia. 219, 89 N. W. 984; 1904, State *v.* Trusty, 122 Ia. 82, 97 N. W. 989.

[7] 1903, State *v.* Hasty, 121 Ia. 507, 96 N. W. 1115.

§ 1855*a*. [1] Statutes cited *ante*, § 1851, and cases cited in notes 4, 5 to § 1850.

accused (*ante*, § 1401), such a deposition is virtually also a discovery before trial.[2]

§ 1856. **Civil Cases**: (I) **Discovery from Party-Opponent**; (1) **in Equity.** The common law in civil cases required no notice to be given in advance to the opponent as to the names of witnesses intended to be produced (*ante*, § 1845). Nor have the reasons that produced a change in the law for criminal prosecutions (*ante*, § 1847, par. 1) had any bearing on the policy applicable to civil litigation. Mr. Bentham long ago proposed some such a modification,[1] but this remains as one of the few important suggestions of his that has not had palpable results in legislation. Probably our indifference to the need of improvement and our disinclination to attempt any solution of the problem is due to two reasons, first, the extreme difficulty of framing a fair practical rule which shall not be cumbrous and merely obstructive, and, secondly, the sufficient general acquaintance ordinarily possessed by each party with the possible range of persons whose testimony might be material, by reason of which no actual hardship occurs except in occasional instances.

By statute, however, several exceptions have been created. Only one of these is expressly intended to furnish compulsory notice of the opponent's evidence; in the other instances, the notice results rather as an incident of some other purpose. As these statutes originally were designed to confer on common-law trials the benefit already possessed in chancery proceedings, it is necessary to notice first the scope of the chancery rule.

(1) *Discovery in chancery.* In chancery practice, a party to a suit at law has always been entitled, by a *bill of discovery*, to ascertain before trial the tenor of his opponent's knowledge and belief upon all the facts in issue — in other words, to obtain disclosure of his testimony before trial. The soundness of this policy rests upon reasons already examined (*ante*, § 1847, par. 2). But the tenor of this discovery was strictly limited to the *opponent's own testimony*, that is, his own admissions resting on his knowledge and belief. It is true that the bill required from the opponent an answer under oath stating all that he claimed in opposition; but to this extent what was obtained was no more than a sworn pleading, stating such material facts as would be alleged in any pleading. But of the evidence which he was to bring forth (except so far as he himself could testify) in support of those facts — the names of his witnesses and the circumstances to which they would testify — he was required to betray nothing in advance.[2] In answering as a witness

[2] 1911, Welborn *v.* Faulconer, 237 Mo. 297, 141 S. W. 31 (applying Rev. St. 1909, § 5173; able opinion by Blair, C.).

§ 1856. [1] 1827, Bentham, Rationale of Judicial Evidence, b. IX, c. 7, Bowring's ed., vol. 7, p. 368 (called an "anticipative survey of the contents of the budget of evidence").

Under the name of "*settlement of issues*," a similar expedient in the way of preliminary procedure was strongly urged by L. C. J. Denman, during Mr. Bentham's lifetime and as a result of his teachings (Arnould's Life of Lord Denman, I, 201); and analogous measures have since come to form part of the English procedure. The subject is elaborately examined in Mr. Samuel Rosenbaum's valuable Studies in English Civil Procedure (1915) and in his monograph on the Rule-Making Authority in the English Supreme Court.

[2] 1826, Preston *v.* Carr, 1 Y. & J. 175; 1863, Ingilby *v.* Shafto, 33 Beav. 675.

to facts, it was no excuse for him that his testimony would incidentally reveal his witnesses' names;[3] but this did not impugn the general principle that he was entitled to keep to himself all evidential data except his own testimony.

This principle, which obtained equally for documentary evidence (*post*, § 1858), was applied in scores of cases to a great variety of arguable situations, but as a guiding doctrine was not open to dispute:[4]

1836, Sir *James* WIGRAM, V. C., Discovery, §§ 31, 32: "Proposition I: It is the right, as a general rule, of a plaintiff in equity to examine the defendant as to all matters of fact which, being well pleaded in the bill, are material to the proof of the plaintiff's case and which the defendant does not by his form of pleading admit. Proposition II: Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which or the evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence."

§ 1856*a*. **Same: (2) Statutory Discovery in Common Law Cases.**

(*a*) **Interrogatories to Party-Opponent.** This equitable practice of requiring discovery of the opponent's own testimony before trial was, as an exception to the general rule, a doctrine of clear wisdom, open to no objection (*ante*,

[3] 1836, Storey *v.* Lord Lennox, 1 Keen 341, 357 (Lord Langdale, M. R.: "In telling the truth, as he is bound to do, the defendant may incidentally disclose to the plaintiff that which may enable the plaintiff to learn the names of the witnesses and the nature of the evidence; and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the courts of equity would be lost").

[4] Compare the quotations *ante*, § 1846, and the following: 1838, Story, Equity Pleading, 6th ed., § 572.

There was, to be sure, one settled exception, but apparent only, to the rule that notice of the opponent's own case could not be obtained beforehand, namely, the rule for using a party's *written admissions*. If A produced at the trial an admission of liability by B, not specified beforehand in the pleadings, the trial might be postponed for B's benefit. This rule, however, in its orthodox form, was not a rule excluding such evidence, but merely refusing to act upon it until time had been given to answer it: 1837, Austin *v.* Chambers, 6 Cl. & F. 1, 38 (admissions not put directly in issue by the pleadings, so as to give an opportunity of contradicting or explaining, are not to be given binding effect); 1838, Attwood *v.* Small, 6 Cl. & F. 232, 319, 350, 488, 516 (similar doctrine); 1838, Copland *v.* Toulmin, 7 Cl. & F. 349, 373; 1843, Malcolm *v.* Scott, 3 Hare 39, 63 (letters not charged in the bill; Wigram, V. C., held that "if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence without first giving the party to be affected by it an opportunity of controverting it"); 1846, M'Mahon *v.* Burchell, 1 C. P. Cooper, 457, 477 (L. C. Cottenham approved the preceding doctrine; at pages 480–509 other cases are collected). But the rule seems never to have been accepted in the United States: 1837, Smith *v.* Burnham, 2 Sumner 612, 623 (a learned opinion by Story, J., pointing out that the reasons for the English rule are not satisfactory, and denying its validity in the United States); 1846, Brandon *v.* Cabiness, 10 Ala. 155, 162 ("[From Austin *v.* Chambers] it would seem that the rule is founded upon the secrecy with which evidence in chancery is taken, as it is there put upon the fact that the party would be deprived of the power of cross-examining the witness, if the name of the person was not stated in the bill, to whom the admissions were made; this objection could not apply in this State, where the party must always have the power of cross-examination"; but the rule was held in any case inapplicable to admissions used in rebuttal of the defendant's own case); 1870, Story, Equity Pleading, 8th ed., by Redfield, § 265*a*.

As to that exquisite question of antique chancery porcelain, viz. whether discovery can be compelled at all when the complainant *waives answer under oath*, there is a collection of exhumed learning in the following modern opinion: 1918, Swann *v.* State, 23 Ga. App. 105, 97 S. E. 564, per Sims, J.

§ 1847, par. 2); and it was accordingly engrafted by statute upon the practice in common-law Courts, without the cumbrous appurtenances of a bill for discovery. This reform came about in England in 1854,[1] after nearly a generation of agitation, and has been since adopted by statute in most American jurisdictions.[2] These statutes provide for the submission before

1856a. [1] ENGLAND: Rules of Supreme Court, 1883, Order XXXI, Rule 1 ("In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness"); Rule 2 ("A copy of the interrogatories proposed to be delivered shall be delivered with the summons or notice of application for leave to deliver them at least two clear days before the hearing thereof (unless in any case the Court or Judge shall think fit to dispense with this requirement) and the particular interrogatories sought to be delivered shall be submitted to and considered by the Court or Judge"); Rule 5 ("If any party to a cause or matter be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly"); Rule 11 ("If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by 'viva-voce' examination, as the judge may direct").

CANADA: *Alberta:* Rules of Court 1914, Nos. 234–250; *British Columbia:* Rules of Court 1912, Rules 343–370*t*; *Manitoba:* Rev. St. 1913, c. 46, Rules 398–423; *New Brunswick:* Consol. St. 1903, c. 127, § 3, c. 111, § 240, c. 112, § 44; *Newfoundland:* Consol. St. 1916, c. 83, Order 25; *Northwest Terr.* Consol. Ord. 1898, c. 21, Rules 201–225; *Nova Scotia:* Rules of Court 1900, Order 30; *Ontario:* Rev. St. 1914, Rules of Court 1914, Rules 271, 275, 327–337; *Prince Edward Isl.* St. 1873, c. 22, §§ 244–248; *Yukon:* Consol. Ord. 1914, c. 48, Rules 211–235.

[2] The statutes vary in style, particularly as to the number of details regulated. Typical forms are given from California, Indiana, and Massachusetts. The statutes quoted *ante*, § 488 (parties' qualifications) and § 1382 (depositions) often include this subject, with provisions of the sort mentioned in par. (1) of the text. *Federal:* Equity Rules 1912, Rule 58 ("evidence material to the cause of action or defense of his adversary" is compellable); *Alabama:* Code 1907, §§ 4049–4057; *Arizona:* Rev. St. 1913, § 1680; *Arkansas:* Dig. 1919, §§ 1248–1260; *California:* C. C. P. 1872, § 2021 (deposition may be taken "at any time after the service of summons," etc., "1, when the witness is a party to the action," etc.); § 2032 (a deposition may be used on proving that a witness is deceased, etc., but this condition does not apply to depositions taken under sub-section 1 of § 2021, *supra*); § 2055, as added by St. 1917, April 5 ("A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness 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"); *Connecticut:* Gen. St. 1918, §§ 5764–5769, 5741 (covers matters "material to the support or defense of the suit"); *Florida:* Rev. Gen. St. 1919, §§ 2734–2735; *Georgia:* Rev. C. 1910, §§ 4550–4553; *Illinois:* Rev. St. 1874, c. 51, § 6; *Indiana:* Burns' Ann. St. 1914, § 365 ("Either party may propound interrogatories, to be filed with the pleadings, relevant to the matter in controversy, and require the opposite party to answer the same under oath. And corporations, through their proper officers, agent, or agents, shall be required to answer interrogatories as natural persons"); § 533 ("A party to an action may be examined as a witness concerning any matter stated in the pleading, at the instance of the adverse party, or of any one of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally,

trial of *interrogatories to the opponent* to be answered by him, — usually in writing, but sometimes also (or alternatively) orally before an officer of Court.

The interpretation of these statutes [3] raises several important questions of

or upon commission"); § 534 ("The examination, instead of being had at the trial, may be had at any time before the trial, at the option of the party claiming it, before any officer authorized to take depositions, on a previous notice to a party to be examined and any other adverse party of at least five days, unless, for good cause shown, the court order otherwise. But the party to be examined before the trial shall not be compelled to attend in any other county than that of his residence"); *Iowa:* Code 1919, § 7247; *Kansas:* Gen. St. 1915, § 6420 (anti-trust law); § 7241 (in civil cases, any party may take the deposition of "the adverse party, his agent or employee," or of any "officer, director, agent, or employee" of a corporation, etc., when such adverse party, etc., "is without the jurisdiction of the court or cannot be reached by the process of the trial court"); *Kentucky:* C. C. P. 1895, §§ 143, 151, § 606, par. 4; *Louisiana:* C. Pr. 1900, §§ 347–356; St. 1908, No. 126 (quoted *ante*, § 916); *Massachusetts:* Gen. L. 1920, c. 231; § 61 (Interrogatories; any party, after the entry of an action at law or the filing of a bill in equity, "may interrogate an adverse party for the discovery of facts and documents admissible in evidence at the trial of the case"; word "party" defined); § 62 (answers to be in writing, etc.); § 63 (filing, etc.; "No party interrogated shall be obliged to answer a question or produce a document tending to criminate him or to disclose his title to any property the title whereof is not material to an issue in the proceeding in the course of which he is interrogated, nor to disclose the names of witnesses, except that the court may compel the party interrogated to disclose the names of witnesses and their addresses if justice seems to require it, upon such terms and conditions as the court may deem expedient. . . ."); § 64 (refusal to answer); § 65 (examination of corporate and municipal officers or minors); § 66 (costs); § 67 (protection of immaterial matter); *Michigan:* Comp. L. 1915, §§ 12022–12028 (general power in Court); § 12552 (quoted *ante*, § 488); § 12560 (judgment by default, etc., on refusal); *Mississippi:* Code 1906, §§ 1938, 1939, Hem. §§ 1598, 1599; *Montana:* Rev. C. 1921, §§ 10645, 10652; *Nevada:* Rev. L. 1912, §§ 5454, 5420, 5421; *New Hampshire:* Pub. St. 1901, c. 225, § 11; *New Jersey:* Comp. St. 1910, Practice, §§ 140–148; St. 1911, c. 279, p. 491 (rules for interrogatories in the district court); St. 1914, April 1, c. 96 (amending Gen. St., Practice, § 144); *New Mexico:* Annot. St. 1915, § 2171; *New York:* C. P. A. 1920, §§ 288–302; St. 1920, May 21, c. 926 (amending C. P. A. §§ 288, 291); *North Carolina:* Con. St. 1919, §§ 899–907; *North Dakota:* Comp. L. 1913, §§ 7862–7869; *Ohio:* Gen. Code Ann. 1921, §§ 11348–11350, §§ 11497, 11555; *Oregon:* Laws 1920, §§ 837, 851; *Pennsylvania:* St. 1887, May 23, Dig. 1920, § 10291 ("In any civil proceeding the testimony of any competent witness may be taken by commission or deposition"); *Porto Rico:* here discovery is obtained by the Spanish procedure: 1902, Kuinlan *v.* Melendez, 3 P. R. 119 (form and time of notice); *South Carolina:* C. C. P. 1922, §§ 667–674; *South Dakota:* Rev. C. 1919, §§ 2713–2716; *Tennessee:* Shannon's Code, 1916, §§ 5684–5693 (either party may have such discovery as the rules of equity allow); *Texas:* Rev. Civ. St. 1911, §§ 3663, 3679–3684; *Virginia:* Code 1919, §§ 6225, 6226, 6236, 6238; *Washington:* R. & B. Code, 1909, §§ 1225–1230, 1903, 1906; *West Virginia:* Code 1914, c. 130, § 33; *Wisconsin:* Stats. 1919, §§ 4096–4098, 4068; *Wyoming:* Comp. St. 1920, §§ 5808, 5859, 5689.

[3] The following citations will be referred to in the ensuing notes:

ENGLAND: The practice under this statute may be seen in the following cases: 1878, Eade *v.* Jacobs, L. R. 3 Exch. D. 335; 1882, Attorney-General *v.* Gaskill, L. R. 20 Ch. D. 519; 1883, Lyell *v.* Kennedy, L. R. 8 App. Cas. 217; 1921, Re La Société Les Affréteurs Réunis, 3 K. B. 1 (discovery by the Crown).

CANADA: *Alberta:* 1916, McLean *v.* Canadian Pacific R. Co., 28 D. L. R. 550 (number of persons examinable under Rules 225, 234); 1916, Medicine Hat Wheat Co. *v.* Norris Commission Co. Ltd., 29 D. L. R. 379 (partnership parties); 1917, Lea *v.* Medicine Hat, 35 D. L. R. 109 (party's employee); 1918 R. *v.* Williams, 19 D. L. R. 706, Alta. (discovery for breach of trust in a stock syndicate agreement; Rule 571 applied);
Ontario: 1915, Menzies *v.* McLeod, 25 D. L. R. 777, Ont. (action to establish a will; Ont. Rules 1913, No. 327, considered, as to "party adverse in interest"; here, a legatee);
Saskatchewan: 1916, Proby *v.* Erratt Co., 31 D. L. R. 342 (necessity of subpœna under Rule 503).

UNITED STATES: *Federal:* For a valuable collection of rulings on the scope of interrogatories of discovery under the Federal Equity Rules, 1912, see the article of Mr. Wallace R. Lane, "Federal Equity Rules," Harv. L. Rev., XXXV, 276;
Georgia: 1919, Creech *v.* Ossep, 149 Ga. 577, 101 S. E. 576 (under Civ. C. § 5910, provid-

principle in respect to *party's liability to interrogation* (apart from the further questions considered in §§ 1856*b*, 1856*c*, 1856*d*, *post*):

(1) Even where no statute exists explicitly modelled upon equitable discovery by interrogatories, the same purpose is attainable by using one of two *other types of statutes* primarily dealing with other principles, viz.: (a) a statute declaring all parties in civil cases "competent and *compellable* to testify 'viva voce' or *by deposition*"; (b) a statute providing that "either party may take the *deposition of any person* as witness *before* trial." Under both of these types of statutes the party-opponent is assimilated into the class of ordinary witnesses, and accordingly his deposition may be compelled before trial. In some jurisdictions these statutes have been liberally interpreted as introducing discovery by interrogatories, oral or written:[4]

1874, BREWER, J., in *Re Abeles*, 12 Kan. 451: "The single question in this case is whether a party to an action can compel a witness, residing in the county where the action is pending, to give his deposition prior to the trial? or must he, if he desires his testimony, compel his personal attendance at the trial by subpœna and attachment? That the witness whose testimony is sought is the adverse party does not affect the question, for, by section 321 of the Civil Code, either party can compel the adverse party 'at the trial, or by deposition, to testify as a witness, in the same manner, and subject to the same rules, as other witnesses.' By section 346 of the Code the deposition of a witness may be used when the witness is absent from the county at the time of trial, or when from age, infirmity, or imprisonment,

ing that either party may take the deposition of a witness before trial, a party opponent is a witness);
Idaho: 1922, Mabbett *v.* Mabbett, — Ida. —, 202 Pac. 1057 (mother in custody of minor children; on habeas corpus by father, the mother is examinable as an adverse party under Comp. St. § 8035);
Illinois: 1916, Schmidt *v.* Cooper, 274 Ill. 243, 113 N. E. 641 (under Rev. St. c. 51, § 24, a deposition may be taken before a master by a complainant in chancery before answer is filed or issue formed, regardless of the consent of the witness; here the deponent was a defendant, and the proceeding was virtually for discovery; the witness' liability before a master to answer the interrogatories in general is distinguished from his specific claim of privilege, which must be referred to the Court for a ruling); 1921, Brandenburg *v.* Buda Co., 299 Ill. 133, 132 N. E. 514 (discovery in aid of suit at law on a contract for services; demurrer on the ground that Rev. St. c. 51, § 9, superseded the jurisdiction to give discovery in aid of law, overruled);
Iowa: 1914, Meikle *v.* Hobson, 167 Ia. 666, 149 N. W. 865 (the party-opponent's deposition may not be taken before trial; Code sections construed);
Massachusetts: 1920, Cutter *v.* Cooper, 234 Mass. 307, 125 N. E. 634 (scope of St. 1913, c. 815, quoted *supra*, note 2, as removing prior limitations, expounded, in an action for alienation of affections where the defendant's interrogatories to the plaintiff had not been answered; a new trial on exceptions may be ordered, even after trial had on the issues, where the refusal to answer before trial has resulted in the non-disclosure of material facts, to the party's injury);
Nebraska: 1904, Olmsted *v.* Edson, 71 Nebr. 17, 98 N. W. 415 (parties compelled to give depositions before trial; "taking the deposition of a party is the only substitute we have for a bill of discovery under our practice");
New York: 1920, People ex rel. Lewis *v.* Fowler, 229 N. Y. 84, 127 N. E. 793 (order for examination of will-proponent before trial, held proper under C. C. P. §§ 870–886, 2770, in surrogate proceedings); 1922, Bell *v.* Gilbert Paper Co., N. Y. Sup., 193 N. Y. Suppl. 26 (under C. P. A. 1920, § 140, the opponent of discovery now has the burden of showing that the discovery is not necessary);
Oklahoma: 1920, Gainan *v.* Readdy, 79 Okl. 111, 191 Pac. 602 (discovery from plaintiff, refused where no reason for needing it was shown);
South Dakota: 1917, Niblo *v.* Ede, 39 S. D. 338, 164 N. W. 109 (under St. 1913, c. 162, amending C. C. P. § 480, a party-opponent's examination on discovery may be had without showing special necessity, etc.; New York and Wisconsin practice compared; McCoy, J., diss.); 1920, Milwaukee Corrugating Co. *v.* Flagge, 170 Wis. 492, 175 N. W. 777 (Stats. § 4096 held to be a provisional remedy, and rulings under it not to be appealable).

[4] Cases cited *supra*, note 3.

the witness is unable to attend court, or is dead. Giving a right to use a deposition under the contingencies named gives the right to prepare for those contingencies. It cannot, of course, have been contemplated that the contingency must exist before the deposition can be taken; for in one of the cases at least the happening of the contingency would destroy the power to obtain the testimony. If the deposition of a witness can be used in case of his death, the party must have a right to take that deposition beforehand. So of the other contingencies named in the statute. Now the giving of testimony, whether on the trial or by deposition, is not a privilege of the witness, but a right of the party. He need not solicit; he can compel. It seems to us, therefore, that under our statutes a witness may be compelled to give his deposition, although he reside in the county where the action is pending. It is said this power is liable to abuse, and that a witness may be compelled to give repeated depositions, and still be present at the trial. Courts will see that this power is not abused, or the time of a witness unnecessarily taken. It is also said that large amounts of costs will be accumulated. This will not injure the adverse party, for a party taking depositions which he does not use must himself pay their cost. It is also said that this permits one to go on a 'fishing expedition' to ascertain his adversary's testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's testimony."

Practically, however, different limitations may apply under such statutes, viz. 1, the *procedure* and the *scope of inquiry* may be different;[5] 2, the rule about *impeaching one's own witness* (*ante*, § 916), may cause obstruction, though under genuine discovery statutes (*supra*, n. 2) that rule is commonly declared inapplicable; 3, the rule about *cross-examining to one's own case* (*post*, § 1891) may also cause obstruction, though under genuine discovery-statutes it may not; 4, a deposition in the strict sense cannot be used on the trial unless the *deponent* is *deceased or otherwise unavailable* (*ante*, § 1402), whereas a genuine discovery-answer is of course free from this condition (*ante*, § 1416); but here the California Code and others (*supra*, n. 2) expressly make an exemption for the party-opponent's (so-called) deposition.

(2) In the *Federal Courts*, the general question whether the rules of Evidence in the *State of trial should apply* has been the subject of complicated statutory development and judicial interpretation, affecting both the principle of conflict of laws (*ante*, § 6) and the method of taking Federal depositions (*ante*, §§ 1381, 1411). In its bearing on the present question, viz. whether by any method a discovery before trial can be obtained from the opponent, this development has left the judicial rulings in a deplorably complicated condition.[6]

[5] Illustrated in the following: 1898, Matthews *v.* R. Co., 142 Mo. 645, 669, 44 S. W. 802.

[6] The statutes here cited will be found quoted in full *ante*, §§ 6, 1381; 1885, Ex parte Fisk, 113 U. S. 713, 5 Sup. 724 (N. Y. C. C. P. §§ 870 ff., providing for discovery before trial, is inconsistent with U. S. Rev. St. § 861, U. S. Code, § 1360, providing that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court," and the latter must prevail: clearly unsound, since the process of extraction by discovery is merely a process of learning what the opponent's testimony is or will be and is in its very nature not "a mode of proof in the trial"); 1901, Flower *v.* MacGinniss, 50 C. C. A. 291, 112 Fed. 377 (a deposition cannot be taken, under R. S. § 863 and Sup. Ct. Rule 68, until the cause is at issue); 1903, Hanks Dental Ass'n *v.* Tooth Crown Co., 194 U. S. 303, 24 Sup. 700 (the defendant took the deposition of the plaintiff's president before trial, under N. Y. C. C. P. 1877, § 870; held (1) that it was inadmissible under U. S. Rev. St. 1878, §§ 861, 863, 866,

(3) Under some types of statutes, literally construed, discovery is obtainable *unconditionally*. But in orthodox chancery practice there were numerous restrictions. Hence, under the statutes the question is sometimes presented whether the discovery sought from the opponent is *necessary*, *e. g.* whether the facts are equally well known to the party interrogating, whether the opponent's testimony later at the trial would not answer all purposes, whether the discovery is sought merely for annoyance or delay, and the like.[7]

(4) The question is constantly presented, *who is a party-opponent*, the measure being essentially aimed to secure discovery from parties only, not from third persons who are mere witnesses (*post*, § 1856*d*).[8] With the modern development of *corporations* in industry and commerce, a special question is thus presented as to the liability to discovery of *stockholders*, *officers*, *agents* and *employees*, of a corporation. Modern statutes have usually amended the earlier ones so as to include such persons by express definition.[9]

867, following Ex parte Fisk, *supra*; (2) that under St. 1892, Mar. 9, c. 14, quoted *ante*, § 1381, note 3, providing that in Federal courts an additional "mode of taking the depositions of witnesses" may be "the mode prescribed by the laws of the State," etc., the deposition was equally inadmissible, since the word "mode" in St. 1892 does not have "a broader significance" than in Rev. St. § 861; yet it would seem that if the Court in Ex parte Fisk held the word "mode" in Rev. St. § 861 to include discovery before trial and thus to conflict with N. Y. C. C. P. § 870, it is inconsistent here to hold that the word "mode" in St. 1892 does *not* include discovery before trial); 1905, Blood *v.* Morrin, 140 Fed. 918, C. C. (under U. S. Rev. St. §§ 863, 876, providing for depositions 'de bene' of witnesses residing more than one hundred miles away, a party may take the deposition of his opponent, so residing, before trial; Ex parte Fisk distinguished); 1907, Smith *v.* International Mercantile Co., C. C. N. J., 154 Fed. 786 (Hanks Dental Ass'n *v.* Tooth Crown Co., followed, refusing to allow interrogatories to opponent under N. J. Pub. L. 1903, § 140, p. 537); 1909, Frost *v.* Barber, C. C. S. D. N. Y., 173 Fed. 847 (following Hanks Dental Ass'n *v.* Tooth Crown Co.); 1919, Levinstein *v.* Dupont de Nemours & Co., D. C. Mass., 258 Fed. 667 (commission to take testimony of an officer of the defendant; held that under U. S. Rev. St. § 863, issue must first be joined; and that under U. S. Rev. St. § 866, "to prevent a failure or delay of justice," this section "should not be invoked merely for the purpose of a preliminary examination before trial of an adverse party," and that such a commission could not issue ex parte).

[7] Cases cited *supra*, note 3; and the passage quoted from Mr. Justice Daly, in the text, par. (6).

[8] Cases cited *supra*, note 3.

As to discovery from *infants* and their *next friends*: 1907, Vano *v.* Canadian C. C. Mills Co., 13 Ont. L. R. 421.

[9] The following cases deal specifically with the scope of such statutes:

England: 1900, Welsbach Incand. G. L. Co. *v.* New Sunlight I. Co., 2 Ch. 1; for the earlier English cases, there is a good collection and a careful study of them in an article by Mr. Alex. McGregor, "What Persons in the Service of a Litigating Corporation are examinable for Discovery on its Behalf," Canadian Law Review, II, 254 (1902).

Canada: Alta. 1912, Nichols & S. Co. *v.* Skedanuk, 6 D. L. R. 115 (member of an agency firm, as "officer"); 1919, McDougall and Secord *v.* Merchants' Bank, 46 D. L. R. 672 (practice reviewed by Harvey, C. J.); *Ont.* 1902, Morrison *v.* Grand T. R. Co., 4 Ont. L. R. 43, 5 Ont. L. R. 38 (a locomotive engineer is not an officer of a corporation); 1904, Kircher *v.* Imperial L. & I. Co., 7 Ont. L. R. 295 (discovery granted against a manager who had resigned); 1904, Cantin *v.* News Pub. Co., 8 Ont. L. R. 531 (discovery against a "former servant of the defendants," not granted); 1905, Clarkson *v.* Bank of Hamilton, 9 Ont. L. R. 317 (the corporation should suggest the officer or agent best qualified to give the due information); 1904, McWilliams *v.* Dickson Co., 10 Ont. L. R. 639 (whether the answer of a party corporation may be struck out, for refusal of its officer to give discovery); 1906, Davies *v.* Sovereign Bank, 12 Ont. L. R. 557 (a member of a municipal council, not being its head, is not examinable as an officer or servant of the corporation); 1912, Ontario & W. C. F. Co. *v.* Hamilton G. & B. R. Co., Ont. H. C. J., 1 D. L. R. 485 (former employee); *Sask.* 1912, Toronto G. T. Co. *v.* Municipal C. Co., 1 D. L. R. 552 (former employee).

United States: Fed. 1903, Bock *v.* International Nav. Co., 124 Fed. 711 (interrogatories in admiralty to the officers of a corporation).

(5) The statutes usually provide, as against a party improperly refusing to answer interrogatories, that his *pleading may be struck out*, or that *judgment may be taken by default*, or that both measures may be resorted to. This consequence, being the same as provided for a refusal to produce documents, is considered under that head (*post*, § 1859*e*).

(6) Further details of this statutory interpretation are not within the present purview; but the following passage will illustrate the operation of the statute in a single State:

1900, Mr. Justice DALY, "Preparation for Trial," The Brief, II, 299: "In preparing for the trial of your action, it may be necessary to take the deposition of the adverse party with the expectation of having to use it as evidence. The Code contemplates the use of the deposition upon the trial, and the examination is not allowed for the mere purpose of enabling the applicant to prepare for trial. The examination is in every case of very great benefit to the party applying for it, and for that reason is almost invariably resisted with vigor, the conflict giving rise to a vast amount of litigation, producing decisions not always easy to reconcile and not always adhered to. In my experience no remedy has been more warmly contested, and it is hardly possible to-day to make an application for it without a fatiguing study of a vast number of cases. The reason for this is due to the resistance naturally to be expected to an assumed inquisitorial investigation, which may disclose the case of an adversary and discover its weakness, and to the disposition of the Courts to limit the privilege of examination for fear of abuse.

"The remedy first made its appearance in our practice with the Code of Procedure in the middle of the century now drawing to a close. The language of the old Code ('No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed; nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter,') led the Courts at first to consider the examination as a mere substitute for the former bill of discovery and thus, logically, in administering the remedy, to hold that parties availing themselves of it were bound to conform as near as might be to the rules and practice governing bills of discovery. Under the present Code, in which the examination of a party before trial, at the instance of his adversary, the examination of a witness 'de bene esse' and the taking of depositions for the perpetuation of testimony in anticipated litigations are all grouped in one article, it is held that the proceeding is purely statutory, to be governed by the provisions of the Code, and not to be controlled by the former practice.

"This clearing away of former restrictions did not, however, tend to diminish litigation upon the subject, and there is yet much to perplex the practitioner in the very fine distinctions which have been favored by the Courts. The tendency of the Courts is not yet toward liberality, in permitting examinations of parties at the instance of their adversaries, and a very wide discretion is exercised in determining whether the facts set forth in the applicant's affidavit show that the testimony is material and necessary. A perusal of the statute might reasonably lead to the conclusion that the Legislature intended to afford a very broad and general remedy; but a review of the great array of decisions upon the article would lead to the conviction that the Courts, in the conscientious discharge of duty, have made a deal of work and trouble for themselves which might have been avoided, without special injury, by a less conservative construction, by permitting the examination except where it is obviously intended to annoy and harass and by confining the examination strictly to the issues, or limiting it to particular matters as the statute expressly permits. . . . In favor of a liberal extension of the right to examine an adversary, may be urged the disposition which led to the invention of bills of discovery in the past, and the great progress made in substituting for them the oral examination. Pleadings themselves are but one form of

extracting from an adversary in advance of the trial admissions or answers to the charge against him. . . .

"If the examination is allowed by the Court it need not be limited to the affirmative cause of action or defense of the party desiring the examination, but may be a general examination, the same as if it were had at the trial. . . . [The examination has been refused] where there is no proof that the facts are not as well known to the party seeking the examination as to the adversary whom he wishes to examine; where it is not shown that an examination of the adversary could not be had at the trial and it does not appear that an examination before trial is necessary or important; where it is made to appear that the examination is sought merely for the purpose of annoyance or delay; where the information sought can be obtained from records or documents; where it cannot be ascertained on what issue the party desires the examination or where a defendant sought to examine a plaintiff before service of a complaint in order to frame an answer; where it is not alleged that the facts exist which are sought to be proved by the examination; and, generally, where the Court is not satisfied that the examination of the adversary is either material or necessary. The instances under this head are too numerous to cite; and it may be suggested that each case will be judged upon its own facts and that the practitioner, in groping his way through the maze of adjudications on this division of the subject, will find common sense a not untrustworthy guide."

(7) From the operation of the present principle, with its corollaries (*post*, §§ 1856*b*, 1856*c*, 1856*d*) must be distinguished certain *other rules of Evidence* which constantly come into operation in resorting to statutory interrogatories of discovery to a party-opponent:

(a) The rule about *impeaching one's own witness* (*ante*, § 916) may set limits to interrogatories seeking to discredit the opponent's character.[10]

(b) The rule requiring that a *deponent* must be *deceased* or otherwise unavailable does not apply to a party offering his opponent's discovery-answers (*ante*, § 1416). It does apply to the opponent himself, and prevents him from using them in his own behalf. But if he is deceased or otherwise unavailable, his *successor in interest* should be allowed to introduce the answers (*ante*, § 1389).

(c) The rule permitting the *whole of an utterance* to be offered by an opponent, to explain a part only which the first party has introduced (*post*, § 2122) has a special application to a party-opponent's answers of discovery (*post*, § 2124).

(d) The rule privileging a *client's communications to his attorney* may sometimes limit discovery (*post*, § 2318).

§ 1856*b*. **Same: (2) Statutory Discovery; (*b*) Opponent's Own Case not Disclosable.** In the interpretation of these statutes, it seems to be generally held that their purpose was merely to extend to all Courts the expedient that formerly existed in chancery alone (*ante*, § 1846), that therefore the principle is not changed, and that the discovery is limited to the extraction of the *party's own testimony* and cannot be asked merely to ascertain his other

[10] *N. Sc.* Rules of Court 1900, Ord. 30, R. 1; *B. C.* 1900, Bank of British Columbia *v.* Trapp, 7 Br. C. 354 (on examination for discovery, the opponent may be treated as if on cross-examination, under the Rules of Court); 1903, Hopper *v.* Dunsmuir, 10 B. C. 23 (similar; good opinion by Hunter, C. J.).

evidence to support *his own case.* So that the common law in this respect (*supra*, par. 1) remains unchanged for civil cases: [1]

1895, LINDLEY, L. J., in *Re Strachan*, 1 Ch. 439, 445: "[The applicant] wants to see how her opponent hopes to prove his case, and what she wants to see is the evidence he has procured to prove the insanity which he alleges and she disputes. In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before the trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side-issues, and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous. It is very true that an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the reverse."

In a few of the statutes this limitation is preserved in express words.

But it may be questioned whether this result is a wise one. Some advances

§ 1856b. [1] Besides the following cases, some of the rulings cited *ante*, § 1856a, note 3, and *post*, § 1856c, deal with this topic. The ensuing citations include some adopting the more liberal rule: ENGLAND: 1914, Osram Lamp Works *v.* Gabriel Lamp Co., 1 Ch. 699, 2 Ch. 129 (discovery allowed of facts relevant to facts in issue).

CANADA: 1913, Carney *v.* Carney, 15 D. L. R. 267, Sask. (execution of a will; "all matters relevant to any issue raised in the pleading" may be covered).

UNITED STATES: *Federal:* 1918, Marquette Mfg. Co. *v.* Oglesby Coal Co., D. C. N. D. Ill., 247 Fed. 351 (mining trespass; under Equity Rule 58, discovery is demandable on a matter which relates both to plaintiff's and to defendant's case); 1919, Quirk *v.* Quirk, D. C. S. D. Cal., 259 Fed. 597 (under Eq. Rules 1912, No. 58, the interrogatories are no longer limited to matters supporting the plaintiff's case; enlightened opinion by Trippet, J., quoted *supra*);
Massachusetts: 1910, Grebenstein *v.* Stone & Webster Eng. Co., 205 Mass. 431, 91 N. E. 411 (Rev. L. 1902, c. 173, § 57, construed to limit the discovery to matters supporting the applicant's own case); 1912, Looney *v.* Saltonstall, 212 Mass. 69, 98 N. E. 698 (under St. 1909, c. 225, quoted *ante*, § 1856a, the discovery is not limited to the party's own case);
New York: 1920, Scheff *v.* Lewis, Sup. App. Div., 180 N. Y. Suppl. 831 (breach of contract for sale of goods, brought by the assignee; party may not examine an opponent on matters forming only part of opponent's case); 1922, Shaw *v.* Samly Realty Co., Sup. App. Div., 194 N. Y. Suppl. 531 (personal injury; interrogatories to the defendant amounting to a general examination not allowed; Clarke, P. J.: "We have allowed specific or limited examinations when ownership or control has been denied. The power to permit a general examination undoubtedly exists, but the matured judgment of the court is that it should not ordinarily be exercised in this class of cases. No new situation has resulted from the passage of the Civil Practice Act [1920] and the adoption of the new rules of practice"); 1922, Re Groothaert, Sup. App. Div. 194 N. Y. Suppl. 577 (damages for breach of contract of hiring);
Wisconsin: 1884, Kelly *v.* R. Co., 60 Wis. 480, 19 N. W. 521 (careful opinion; "the object of our statute, as it now stands, is to elicit a full and complete disclosure of whatever may be relevant to the controversy"); 1886, Whereatt *v.* Ellis, 65 Wis. 639, 27 N. W. 630, 28 N. W. 333.

In *England* and *Canada*, the rule for discovery in *libel* seems to give special difficulty: 1905, White *v.* Credit Reform Ass'n, 1 K. B. 653 (libel by a mercantile agency; certain inquiries as to the source of information, etc., passed upon); 1905, Edmondson *v.* Birch, 2 K. B. 523 (similar); 1906, Plymouth M. C. & I. Soc'y *v.* Traders' P. Ass'n, 1 K. B. 403 (similar); 1906, Massey-Harris Co. *v.* DeLaval S. Co., 11 Ont. L. R. 227, 591 (libel; discovery of information concerning defendant's plea of privilege); 1906, McKergow *v.* Comstock, 11 Ont. L. R. 637 (libel; discovery of matters relevant to defendant's good faith in exercising a qualified privilege); 1918, Hays *v.* Weiland, 43 D. L. R. 137, Ont. (libel; question as to the names of the persons to whom copies of the libel were given, held relevant, and the answer not refusable because it would disclose the names of the party's witnesses); 1918, Fitzgerald *v.* Watson, 2 Ir. R. 411 (libel; to the plaintiff's interrogatory, "From whom did you obtain the information, etc.?" the defendant answered, refusing, "The information was received by me confidentially while I occupied a responsible and confidential position"; discovery was compelled, but it was conceded that the practice had been different in actions for libel by newspapers; the opinions fully collect prior rulings).

ought to be conceded (*ante*, § 1847) towards the abandonment of the rigid common-law doctrine of secrecy. As the matter now stands, many Courts are in their rulings exhibiting the inherent practical difficulties and inconsistencies which arise from the attempt to reconcile the antiquated limitations of the bill of discovery with the spirit of these statutes and of modern progress. The following opinion expresses a liberal attitude worthy of imitation and full of promise for the future:

1919, TRIPPET, J., in *Quirk* v. *Quirk*, U. S. D. C. S. D. Cal., 259 Fed. 597 (applying U. S. Equity Rule 58 of 1912): "Since the Equity Rules were reformed for expediting and simplifying the practice and the attainment of the ends of justice, they should have a liberal interpretation and enforcement to that end. Some of the Courts seem inclined to throw difficulties in the way of discovering the truth as provided by the rule under discussion, and oppose the evident purpose of it. The old rules are abolished. There is no reason why the procedure now should be hampered by restrictions imposed by any previous rules or procedure. The truth should always be sought after, and the Courts should eagerly enforce any method of securing the truth.

"It makes no difference whether the facts are as much within the knowledge of the plaintiff as of the defendant. The facts have to be proven, and if the plaintiff can get an admission from the defendant, it saves the necessity of proving the facts, except by such admission of the defendant. The rule expressly provides that the plaintiff may propose interrogatories to elicit facts material to the support or defense of the case. To say that the plaintiff shall not inquire about the facts that may relate to the defense is to construe the rule in plain derogation of its language and purpose.

"The provision giving the plaintiff 21 days after the joinder of issue to file interrogatories was inserted in the rule for the evident purpose of allowing the plaintiff to inquire concerning the defense. The plain object of this rule is to dispose of issues in advance of the trial by compelling the parties to make admissions. This rule, properly enforced, will compel the parties to be honest concerning their pleadings, and parties to litigation ought to be compelled to be honest by putting them on oath and requiring them to be specific concerning the facts at issue. There is no reason why the parties should wait until the day of trial, and then bring in witnesses to prove facts that the parties may be compelled to admit under oath prior to the trial. The truth is always the truth; and telling the truth will not hurt any one, except in so far as he ought to be hurt.

"The only protection that should be afforded any litigant from answering any interrogatories, which call for material facts for the plaintiff or the defendant, is to protect him in his constitutional rights, such as to be compelled in a criminal case to be a witness against himself, and in matter of public policy, where the statute prohibits disclosures, such as confidential communications, etc.

"Such a practice as here indicated would tend to shorten trials and materially aid the administration of justice and that is the very purpose of the rule under discussion."

The same conflict between orthodox rule and liberal tendencies, as to scope of discovery, appears in the practice for discovery of *documents* (*post*, § 1859*c*).

§ 1856*c*. **Same: (2) Statutory Discovery; (*c*) Names of Witnesses not Disclosable.** As a corollary of the foregoing limitation, the opponent cannot be asked to disclose the *names of the witnesses to his own case*.[1] This restric-

§ 1856*c*. [1] The following citations include those of a few jurisdictions which have abandoned the restriction:

ENGLAND: 1878, Eade *v.* Jacobs, L. R. 3 Exch. D. 335; 1886, Marriott *v.* Chamberlain, L. R. 17 Q. B. D. 154, 163 ("It is not

tion is open to the same doubts of policy as the foregoing. The practice can afford to be much liberalized in this aspect. Occasionally a Court or a Legislature is found definitely taking a step to remove the restriction.[2]

permissible to ask the names of persons merely as being witnesses whom the other party is going to call and their names not forming any substantial part of the material facts"; but Storey *v.* Lord Lennox, quoted *ante*, § 1856, n. 3, was also approved); 1888, Humphries *v.* Taylor D. Co., L. R. 39 Ch. D. 693; 1895, Re Strachan, 1 Ch. 439, 445; 1895, Kennedy *v.* Dodson, 1 Ch. 334; 1911, Nash *v.* Layton, 2 Ch. 71 (Marriott *v.* Chamberlain approved, and its apparent contradictions explained); 1913, Wootton *v.* Sevier, 3 K. B. 499 (names of witnesses to be given, on the facts); 1914, Osram Lamp Works *v.* Gabriel Lamp Co., 2 Ch. 129 (infringement of patent; approving Marriott *v.* Chamberlain on the point that the scope of discovery "is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue"). In practice there is more or less exchange of information, voluntarily between counsel, before trial, as to names of witnesses and substance of testimony expected.

CANADA: *Br. C.* 1897, Jones *v.* Pemberton, 6 B. C. 69;
Man.: 1903, Gibbins *v.* Metcalfe, 14 Man. 364 (names of witnesses);
N. Sc. 1904, Wood *v.* Dominion L. Co., 37 N. Sc. 250;
Ont. 1899, Coyle *v.* Coyle, 19 Ont. Pr. 97; 1905, Garland *v.* Clarkson, 9 Ont. L. R. 281 (range of discovery discussed; discovery from a beneficial party; powers of a referee); 1918, Hays *v.* Weiland, 43 D. L. R. 137 (libel; cited *ante*, § 1856*b*).

UNITED STATES: *Federal:* 1876, Storm *v.* U. S., 94 U. S. 76, 84 (in examining on the stand, parties "cannot complain if the Court excludes questions propounded merely to ascertain the names of persons whom they may desire to call as witnesses to disprove the case of the opposite party");
Alabama: 1916, Montgomery L. & T. Co. *v.* Harris, 197 Ala. 358, 72 So. 619 (personal injury);
Florida: 1903, Volusia Co. Bank *v.* Bigelow, 45 Fla. 638, 33 So. 704;
Maryland: 1906, Cairnes *v.* Pelton, 103 Md. 40, 63 Atl. 105 (a bill of particulars need not include the names of witnesses);
Massachusetts: Pub. St. 1882, c. 167, § 28 ("No party shall be required to state evidence, or to disclose the means by which he intends to prove his case"); §§ 49–56 ("no party shall be obliged to disclose the names of the witnesses by whom or the manner in which he proposes to prove his own case"); Rev. L. 1902, c. 173, §§ 35, 57–63 (same); 1901, Robbins *v.* R. Co., 180 Mass. 51, 61 N. E. 265; 1905, Spinney *v.* Boston Elev. R. Co., 188 Mass. 30, 73 N. E. 1021 (the demandant is entitled to the opponent's oath that the matters asked for are within the statute; here a report of the conductor upon a railroad accident, giving the names of persons present, etc.); 1909, Carroll *v.* Boston Elev. R. Co., 200 Mass. 527, 86 N. E. 793 (names not disclosable); 1912, Looney *v.* Saltonstall, 212 Mass. 69, 98 N. E. 698 (*semble*, under St. 1909, c. 225, this limitation is not abolished). But in 1911 the progressive step was taken of removing this limitation as to names of witnesses; St. 1911, c. 593 (the Court may compel either party, upon terms, to disclose the names and addresses of his witnesses "if justice seems to require it, . . . where the names of witnesses are in the exclusive possession of one party to the action"); 1913, Delaney *v.* Berkshire St. R. Co., 215 Mass. 591, 102 N. E. 901 (St. 1911, c. 593, incidentally referred to, in suppressing improper argument by counsel); St. 1913, c. 815, now Gen. L. 1920, c. 231, § 63, recasting the whole chapter, Rev. L. c. 173, on discovery, retained this advance; quoted in full *ante*, § 1856*a*. It has been interpreted as follows: 1919, McNeil *v.* Middlesex & B. St. R. Co., 233 Mass. 254, 123 N. E. 676 (injury to personalty; plaintiff's request for names and addresses of witnesses, left to the trial Court's discretion);
Missouri: 1912, State ex. rel. Evans *v.* Broaddus, 245 Mo. 123, 142, 149 S. W. 473 (personal injury; defendant's claim agent held not bound to disclose the names of persons on the car as passengers and known to him as possible witnesses; citing the above text with approval);
Nebraska: 1909, Ex parte Button, Ex parte Hammond, 83 Nebr. 636, 120 N. W. 203 (not decided);
New Hampshire: Pub. St. 1901, c. 224, § 14 ("No party shall be compelled, in testifying or giving a deposition, to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his case," unless in taking his own deposition); 1862, Carter *v.* Beals, 44 N. H. 408, 412 (statute applied); 1865, Eaton *v.* Farmer, 46 N. H. 200, 202 ("If it reasonably appears that the answer of the party will disclose the names of his witnesses and the manner of proving his case, and he states that it will do so, he ought not to be required to state fully how it will have that effect"; other clauses of the statute in-

[2] *E. g.*, England and Massachusetts, cited *supra*, note 1.

In *patent-infringement* suits, an early statute leaves the subject still in the course of development.[3]

§ 1856*d*. **Same: (II) Statutory Discovery from Third Persons not Parties.** The principle of a bill of discovery was never considered to be applicable to *third persons not parties* so as to secure from them before trial a disclosure of possible evidence; just as it was not available against such persons to secure an inspection of documents (*post*, § 1857).

But under the modern deposition statutes (*ante*, § 1382) permitting parties more or less freely to take depositions before trial, may not such discovery be effectually sought? It would be a sound extension of the principle to permit it; the chancery practice was too cautious; modern policy tends to acknowledge this.[1] The obstacle, however, is that the statutes, aiming merely to preserve for the trial testimony in danger of being lost, impose usually as a condition that the witness shall be ill or about to leave the State, etc. This restricts the opportunity of getting discovery to a narrow class of witnesses.

But where the statute does not expressly impose such a condition for *taking* the deposition (but only for *using* it), may not the trial Court in discretion decline to impose these traditional limits, and grant an order to take where he deems it wise? It would seem so. The contrary has been laid

terpreted and applied); 1879, Penniman *v.* Jones, 59 N. H. 119 (statute applied); 1906, Noyes *v.* Thorpe, 73 N. H. 481, 62 Atl. 786, 787 (cases collected, but the point not decided);
New Jersey: 1913, Watkins *v.* Cope, 84 N. J. L. 143, 86 Atl. 545;
Ohio: 1906, Ex parte Schoepf, 74 Oh. 1, 77 N. E. 279 (street-car injury);
Oregon: 1908, Armstrong *v.* Portland R. Co., 52 Or. 437, 97 Pac. 715 (here the Court refused to strike out the defendant's answer where its secretary had refused to obey a subpœna calling for disclosure of the names of defendant's witnesses);
Wisconsin: 1887, Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301; 1913, Horlick's Malted Milk Co. *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272; and Wisconsin cases cited *ante*, § 1856*b*.

Compare the rule for names and testimony of *witnesses as disclosed to the attorney* under a privilege (*post*, § 2319).

Distinguish discovery to obtain the names of *other parties:* Ia. Code 1919, § 7072.

[3] 1847, Wilton *v.* Railroads, 1 Wall. Jr. 192 (under St. July 4, 1836, 5 Stats. 123, substantially identical with Rev. St. 1878, § 4920, cl. 7, U. S. Code, § 6163, providing that a defendant in a patent-infringement suit, who pleads previous invention or use, shall give notice thirty days beforehand of the names and residences of the persons alleged to have made prior invention or use, it is held that no notice is required of the names of witnesses by whom the specified prior use or invention is to be proved; construing the ambiguous language of Mr. J. Story in Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. 448, 459, and correcting the contrary statement in Greenleaf on Evidence, II, § 501, founded on Mr. J. Story's language); 1870, Seymour *v.* Osborne, 11 Wall. 516, 539 (assimilating the practice in equity, as to the names of users); 1878, Bates *v.* Coe, 98 U. S. 31, 33; 1879, Planing-Machine Co. *v.* Keith, 101 U. S. 479, 493 (like Wilton *v.* Railroads).

§ **1856*d***. [1] In a few of the following rules and rulings a more liberal rule was applied, in the direction above noted in the text:
CANADA: *Alta.* Rules of Court 1914, Nos. 383, 384 (a witness may be examined as for discovery); *B. C.* Rules of Court 1912, No. 487 (any person may be summoned for examination); *Ont.* Rules of Court 1913, No. 271 (the Court may order the examination of "any person" before trial).
UNITED STATES: *Fed.* 1907, Kurtz *v.* Brown, 152 Fed. 372, C. C. A.; 1908, Brown *v.* Huey, C. C. E. D. Pa., 166 Fed. 483 (stockbroker purchasing for another's account, here held not a third person); 1909, Griesa *v.* Mutual Life Ins. Co., 8th C. C. A., 169 Fed. 509 (discovery held allowable, in litigation between an insurance company and legatees, against the widow as legal custodian of the insured's body, the issue being as to suicide);
Cal. 1906, Union Coll. Co. *v.* Superior Court, 149 Cal. 790, 87 Pac. 1035, *semble* (discovery from a third person as to the whereabouts of certain defendants, so as to be enabled to serve them with process, refused; but the ruling is absurd as regards the ground stated in the opinion, that the parties' whereabouts

down, in an opinion which deserves notice for the inadequacy of the reasons put forward:

1906, *International Coal Mining Company* v. *Pennsylvania Railroad Co.*, 214 Pa. 469, 63 Atl. 877. Assumpsit to recover rebates; from the record it appeared that while an action was pending, plaintiff entered a rule to take depositions on John Lloyd on eight days' notice. At a meeting held in pursuance of the rule, Lloyd was asked whether any officer or director of the Pennsylvania Railroad Company was a stockholder in the Columbia Coal Company. The witness refused to answer the question. The Court subsequently made an order directing him to answer the question propounded to him.

BROWN, J.: "For cause existing, courts of equity permit testimony to be taken for its perpetuation. . . . When, in view of the condition, circumstances or conduct of a witness, his testimony may be lost to the party needing it, if not taken in advance of the trial, it ought to be so taken, but as courts of equity have not gone beyond this, it is the limit for courts of law. By the rule in the court below, under which the appellee insists that it has a right to examine the appellant outside of court and in advance of the trial, either party to a pending action may at any time, as a matter of course, with no cause existing for doing so, proceed to examine any witness in advance of the trial, though he be neither aged, infirm nor going, and there be no reason for supposing that he will not appear in court when subpœnaed to do so. The rule is: 'A rule may in like manner be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm or going witnesses, stipulating, however, eight days' notice to the adverse party; subject, nevertheless, in all other respects to the existing rules and regulations.'

"In the regular and orderly trial of a cause witnesses appear in open court, and jurors, from seeing, as well as hearing them, pass upon their credibility. Exception to this wise rule of the common law must be based upon some necessity requiring it to be disregarded in the interest of justice. But under the rule in the court below, for no reason and with no necessity for taking the deposition of a witness in advance of a trial, either party to the action, upon a mere whim or caprice, may compel the examination of every one of his witnesses before a magistrate or notary public in advance of the trial, and require the opposite party, with his counsel, to appear as often as such an examination takes place. In this disorderly innovation upon trial before a jury, licensed by the rule below, the rights of witnesses are not to be overlooked. As a rule, it is inconvenient for anyone to be interrupted in his business or vocation in life by being compelled, in obedience to a subpœna, to appear in court to testify on the trial of a cause; but every member of society must expect at times to be subjected to this inconvenience, because the administration of justice and his duty as a citizen require him to submit to it. This, however, is not the case when he is com-

"cannot be said to be material"; such reasoning is not fit logic for judicial officers having responsibilities to the life and property of the community; the opinion, moreover, refers to the question of compelling "the defendant or a stranger" to make discovery as if there were no distinction between the two, and it does not appear what was the precise status of the person summoned); *Ky.* 1914, Willis *v.* Bank of Hardinsburg, 160 Ky. 808, 170 S. W. 188 (allowing the witness to be made to depose, under Civ. C. §§ 554, 557, 558); *Mass.* 1887, Post *v.* R. Co., 144 Mass. 341, 348, 11 N. E. 540 ("It is clear that Courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses; and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendants"); 1917, American Security & T. Co. *v.* Brooks, 225 Mass. 500, 114 N. E. 732 (defendant a collection agency); *Oh.* 1906, Ex parte Schoepf, 74 Oh. 1, 77 N. E. 276, 279 (street-car injury); *Pa.* 1906, International Coal M. Co. *v.* Pennsylvania R. Co., 214 Pa. 469, 63 Atl. 877; *W. Va.* 1902, Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421 (good opinion, with a full citation of cases).

The following case further illustrates this question: 1910, Boston & Maine R. Co. *v.* State, 75 N. H. 513, 77 Atl. 996.

In these cases the problems that arise concern often the *magistrate's or notary's power to rule on the relevancy* of the questions (*post*, §§ 2195, 2210).

pelled to appear before a commissioner to testify in advance of the trial upon the mere whim or caprice of a plaintiff or defendant, and in the absence of any necessity requiring him to so appear. There having been no reason shown why the appellant should have been subjected to the inconvenience and annoyance of being called before a notary public to testify as a witness for the plaintiff in advance of the trial, he has a right to complain of the unwarranted calling of him away from his business, especially as he is liable to be called into court by the very party taking his deposition, to testify on the trial of the cause. It is of this that he complains, and his complaint is just. . . . We are informed that the learned court below has indicated its own view in this regard by rescinding the rule and adopting in its place one by which, 'upon notice and cause shown,' witnesses may be examined without regard to their being aged, infirm or going."

Now the real ground of opposition here was the witness' dislike to disclose the fact as to the holding of stock. It was not an annoyance at being summoned from his business. It seldom is. The learned Court's labored exposition of this annoyance to witnesses puts forward a conventional ground which is not the real ground. There is no propriety in shielding thus the true controversy over the policy of this kind of discovery. Cant reasons had better be abandoned. The real issue is, Can not discovery be properly extended, leaving to the trial Court to control the possibilities of abuse?

§ 1856*e*. **Sundry Rules affecting Prior Disclosure of Testimony.** Apart from the foregoing statutory adoption of chancery discovery for common-law cases, a few other methods of limited scope are found:

(1) A statutory exception to the common-law rule is in fact created wherever the prior filing of *affidavits* is required.[1]

(2) In a few jurisdictions a party *appealing case from a magistrate* may not use at the second trial any testimony *not produced* before the magistrate.[2] A similar measure is often applied to administrative tribunals whose decisions are subjected to review by the Courts.

(3) In all cases of *depositions* taken by the opponent, the *notice* required by the rule exacting an opportunity of cross-examination (*ante*, § 1378) results practically in advising the other party of the evidential facts desired to be proved by the opponent, and thus amounts to an exception under the present principle.

(4) So, also, the requirement that depositions be *filed* with the clerk of court a specified number of days before trial [3] accomplishes the same purpose, even where the other party did not attend the taking.[4] Whether an express notice

§ 1856*e*. [1] *Example:* Mo. Rev. St. 1919, § 5384 (affidavits as to indorsement, partnership, protest by notary, etc., must be filed a specified time before trial). Compare § 1710, *ante*.

[2] *Md.* Annot. Code 1914, Art. 75, §§ 83, 84 (in cases of disputed boundaries, documents and witnesses not used at the survey may, on certain conditions, be excluded at the trial); *N. J.* Gen. St. 1896, Justices' Courts, §§ 86, 137, 160 (on appeal from justice's judgment, notice required on certain conditions for evidence not produced below; apparently abolished by the last clause in 1894). But the object of this measure seems mainly to be, not to protect against unfair surprise, but to diminish lengthy litigation and increase respect for magistrates' justice by compelling parties to treat it as a real trial and not merely as an empty formality preceding the actual contest.

[3] See the statutes cited' *ante*, §§ 1380–1383.

[4] The following case illustrates this application of such a statute: 1885, Searle *v.* Richardson, 67 Ia. 170, 172, 25 N. W. 113.

must be given under the present rule, where a deposition taken for a former trial is desired to be used at a *second trial*, depends more or less on the wording of these statutes.[5]

In no other respect does statute seem yet to have made any inroad upon the common-law rule.

3. Documents

§ 1857. **Inspection by Discovery in Equity.** Just as in chancery practice the party-opponent lacked a privilege as party to withhold his testimony and was compellable to disclose all his testimonial knowledge and belief, so he was compellable *at the trial* or hearing to produce documents in his possession which were serviceable as evidence (*post*, § 2219). It was therefore not difficult for the Court of Chancery to sanction the policy of obliging the opponent to exhibit such documents to the other party *before the hearing*, in order that the latter might inspect and copy them. Conceding no privilege of ultimate suppression, it was easy to require an earlier disclosure. Hence in chancery practice there was an apparent exception, as already noted (*ante*, § 1846), to the general rule denying the right of inspection before trial. Moreover, since the auxiliary jurisdiction of chancery was available to secure such discovery in aid of an action at common law, as well as in aid of bills for relief in chancery, this right of inspection was available, through a separate proceeding in chancery, for the purposes of a suit at law.

The 'modus operandi' was as follows:

1877, Professor *C. C. Langdell*, Equity Pleading, § 166: "[The plaintiff applies] to the Court for an order that the defendant produce the documents described in the answer and leave them with the clerk in court, and that the plaintiff have leave to inspect the same and take copies thereof. If the order is made, the documents produced pursuant to the order are treated as part of the answer; the effect of the production being the same as if the documents produced had been set forth verbatim in the answer. Indeed, by the ancient practice, documents were thus set forth in the answer, instead of being merely described. . . . By the modern practice, when documents have been left with the defendant's clerk in court, pursuant to an order, if the plaintiff wishes to have them produced before an examiner or at the hearing of the cause or on a trial at law, he does not subpœna the defendant as formerly, but the defendant's clerk in court attends with them upon request and upon being paid his usual fees. A production of documents may be wanted for three distinct purposes, first, that they may be inspected and a copy of them taken, secondly, that they may be exhibited to witnesses for the purpose of proving their execution or any other fact connected with them, thirdly, that they may be read in evidence at the hearing or trial of the cause. All of these purposes are perfectly accomplished by the modern practice; while the ancient practice failed to accomplish perfectly the first purpose, for it gave the plaintiff no opportunity to inspect the document till after the cause was at issue."

[5] Illustrations: *Notice required:* 1852, Samuel *v.* Withers, 16 Mo. 532, 535, 541 (under an early statute for chancery practice; "notice of its intended use should be given, or it should be filed anew in the suit, so that the party against whom it was intended to be read may have knowledge thereof"); 1853, Gitt *v.* Watson, 18 Mo. 274 (decree in a former chancery suit, not required to be filed); 1860, Cabanné *v.* Walker, 31 Mo. 274, 279, 286 ("The rule . . . is not an inflexible one, and may be dispensed with when the ends of justice require it").

Contra: 1869, Shaul *v.* Brown, 28 Ia. 37, 50.

But this right of inspection in chancery was an exception in superficial appearance only to the general rule (*ante*, § 1845) that a party is not entitled to ascertain before trial the tenor of his adversary's evidence. The strict limitation of this right of inspection was that it should include only those documents which contained *the evidence of the applicant*, and not those which contained the adversary's own evidence. If, for example, A sued B to enforce a contract, and the instrument was in B's possession, A could obtain inspection of that instrument, but not of a release which B might also possess. It is true that A might sometimes be unaware of the precise contents or even of the existence of documents evidencing his own case but possessed by B, and to this extent the discovery and inspection would relieve him from the risk of unfair surprise and would thus in spirit be an exception to the general rule and a decided improvement over his situation under common-law procedure. But this would be merely an accidental result in a given case; in theory of law he was inspecting merely that which was in a sense already his own. The strict and invariable rule, already briefly noted (*ante*, § 1846), in harmony with the rule already examined for witnesses (*ante*, § 1856*b*), was that no inspection in advance could be demanded of those documents which were to serve merely as the adversary's own evidence.

In short, there was in chancery no exception to the broad principle of the common law that a *party is not entitled to ascertain before trial* the tenor of the documentary evidence which the *adversary possesses to support his own case*.

However difficult and inconsistent this principle might be in its detailed application, it is essential to note its unquestioned acceptance as a principle; because whatever advances have been made in a more enlightened direction will thus be seen to be a distinct derogation from the established doctrine of chancery and to be wholly the creature of statute: [1]

1833, L. C. BROUGHAM, in *Bolton* v. *Liverpool*, 1 Myl. & K. 88, 91: "I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. . . . The plaintiff here does not claim anything positively or affirmatively under the documents in question; he only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. . . . He rests on the right which he has in common with all mankind to be exempt from dues and customs; and he says, 'Prove me liable if you can'; the corporation have certain documents which they say prove this liability. He cannot call for

§ 1857. [1] The details of chancery practice, for the reason already explained (*ante*, § 4), are without the purview of this work; the orthodox rules as to production of documents may be found in the usual treatises, and especially in the following: 1851, Pollock, Production of Documents for Inspection, pp. 6 ff.; 1895, Sutherland, Production and Inspection of Books and Papers; 1905, Ormerod *v.* St. George's Ironworks, 1 Ch. 505 (earlier practice as to taking copies, considered).

these documents merely because they may upon inspection be found not to prove his liability, and so to help him and hurt his adversary whose title they are."

1852, POLLOCK, C. B., in *Hunt* v. *Hewitt*, 7 Exch. 236, 244: "The right of a plaintiff in equity is limited, first, to a discovery confined to the questions in the cause; secondly, of such material documents as relate to the proof of his, the plaintiff's, case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must show, first, what is the nature of the suit, and of the question to be tried in it; and it seems also, that he should depose in his affidavit to his having just ground to maintain or defend it; secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents, in order that it may appear to the Court or judge that the documents are asked for the purpose of enabling the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may submit to show parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case."

1877, Professor *Langdell*, Equity Pleading, §§ 59, 171: "In equity the parties are never entitled to inspect each other's documents, nor to have copies of them, nor in any way to know their precise contents until they are read upon the hearing. . . . But it is not always easy to distinguish accurately between what is evidence for the defendant and what is evidence for the plaintiff. So long as each party confines himself to evidence in support of an affirmative case or defence, there is little difficulty. . . . But it is sometimes assumed that when evidence is sought in support of a merely negative case, the evidence itself (and consequently the charge) may be negative [and yet be the plaintiff's own evidence]; but this seems to be clearly erroneous. When, therefore, a plaintiff in equity alleges that the defendant founds his case or defence upon a certain document in his possession, and then charges that the document does not in fact establish any such case or defence, while he is ostensibly seeking evidence in support of his own negative case or defence, he is in truth merely seeking to pry into the defendant's evidence, either with a view to finding out its weak points or in the hope of finding something which will tell in his own favor. . . . It seems therefore that such a charge is wholly illegitimate."

§ 1858. **Inspection at Common Law (Oyer and Profert; Motion to Produce; Documents of Common Interest or of Trusteeship; Corporate Records; Insurance Policies).** At common law the party-opponent was absolutely privileged from producing on the trial documentary evidence in his possession (*post*, § 2219). It was natural, then, to find that an inspection of his documentary evidence before trial could also not be obtained. It would be conceivable that he might be compellable to produce it upon trial and yet not to exhibit it before trial, — in other words, that his privilege might be abolished (as it has been), while his duty to avoid surprise might not be granted (as it has not always been). But it was entirely unlikely to find the privilege to withhold at the trial coexisting with an obligation to allow inspection before trial. Accordingly, what we find is that the limited right of inspection which did exist ran more or less parallel with the situations in which the privilege was either not applicable or was virtually negatived in chancery practice and therefore (to avoid circuity) in common-law practice also.

In brief, there were five distinct classes of situations in which a court of common law allowed to the party the inspection before trial of documents in the adversary's possession. Of these five situations, two alone presented genuine and plain exceptions to the general rule (*ante*, § 1845) that a party is not entitled to ascertain before trial the tenor of his adversary's evidence; the others rested either on some independent rule of law or on an attempt to approach the chancery rule that a party was entitled to inspect his own evidence that happened to be in the adversary's hands.

(1) *Profert and Oyer.* By the doctrine of profert and oyer, a party pleading a deed of a limited class was obliged to set forth its contents in his pleading; the historical connection of this doctrine with the rule forbidding proof of documents except by the original has been already noticed (*ante*, § 1177). As a consequence of this profert, *i.e.* the proffer at the trial, the opponent was entitled to oyer, *i.e.* the hearing of the reading of the document. But these phrases had grown up in the early days of oral pleading; and, ever since the practice of written pleading, the two parts of the process had been replaced, respectively, the profert, by a statement of the tenor of the document in the pleading of the party offering it, and the oyer, by an opportunity for the opponent before trial to inspect it and be furnished with a copy. The practice in the early 1800s was thus described by the most famous pleader (next to Mr. Joseph Chitty) of his day:

1828, Mr. *Wm. Tidd*, Practice, 9th ed., I, 586: "Oyer of deeds, etc., is demandable by the defendant or by the plaintiff. If the plaintiff in his declaration necessarily make a 'profert in curia' of any deed, writing, letters of administration, or the like, the defendant may pray oyer of the deed, etc., and must have a copy delivered to him, if demanded, paying for the same at the rate of fourpence per sheet. And a defendant who prays oyer of a deed is entitled to a copy of the attestation and names of the witnesses, as well as of every other part of the deed. So likewise, if the defendant in his plea make a necessary 'profert in curia' of any deed, etc., the plaintiff may pray oyer, and shall have a copy at the like rate. And the party of whom oyer is demanded is bound to carry the deed to the adverse party. . . . Formerly all demands of oyer were made in court, where the deed is by intendment of law when it is pleaded with a 'profert in curia'; and therefore, when oyer is craved, it is supposed to be of the Court, and not of the party; and the words 'ei legitur in hæc verba,' etc., are the act of the Court. In practice, however, oyer is now usually demanded and granted by the attorneys."

The effect of this degenerated tradition was practically to accomplish the wholesome purpose of allowing an inspection of the adversary's own documentary evidence before trial.

Thus, to the extent that profert was required and oyer was demandable (and they were correlative), a genuine exception to the general contrary rule (*ante*, § 1845) was recognized. It will be seen, however, that its recognition did not depend on any radical inroad upon the usual policy; for the party pleading the deed had in effect already betrayed its general tenor, and there was little to gain by an inspection, unless the handwriting or the names of the attesting witnesses were desired to be ascertained. Moreover, the

narrow scope of the requirement, and the arbitrary quibbles governing its application, reduced it to a very limited usefulness. It contained the germ of great possibilities; but it was in practice not an extensive exception:

1831, *Common Law Practice Commissioners*, Third Report, 45: "By law, no profert is required to be made and consequently no oyer can be demanded of any instrument, except private deeds, letters testamentary, and letters of administration. If there are other cases, they are unfrequent and obscure. The following are consequently excluded: records and public writings of whatever description, private writings under seal but not falling within the legal definition of deeds (for example, a sealed will or a sealed award), and private writings not under seal of whatever description; and even of private deeds a numerous class is excepted, viz., such as take effect either by livery of seisin or by operation of the statute of uses. . . . The whole of this practice appears to be too strict, too intricate, and too prolix, and in some parts of it obscure and unsettled. It is strongly calculated to give rise to technical difficulty and formal objection, and tends in some other respects also to produce unnecessary delay and expense. The truth is that the law of profert and oyer was originally devised in reference to a state of things that no longer exists; being altogether founded on that method, now for so many ages obsolete, of oral pleading between litigants actually confronting each other in open court."

Profert and oyer have now virtually disappeared under modern statutes (*post*, § 1859*a*).

(2) *Corporate and Manorial Records.* That a member of a corporation or a copyholder of a manor had a right to inspect the records of the corporation or the manor had been settled before the 1700s; the membership of the one depended on the entry in the records and the title of the other passed by registration upon the books of the manorial lord. But this right to inspect rested not on a rule of Procedure or Evidence, but on the substantive law; in other words, the general right to inspect for a reasonable purpose existed apart from the pendency of litigation, and the right to inspect for obtaining evidence was merely an incidental exercise of the general and independent right. It would and did follow that a party to a cause could obtain evidence by inspection of the records of a corporation of which he was a member, even though the corporation was not a party to the cause,[1] and, conversely, that a party to a cause could not obtain inspection of the records

§ 1858. [1] 1730, Attorney-General *v.* Coventry, Bunb. 290 (cited *infra*, note 5); 1745, R. *v.* Hostmen, 2 Stra. 1223 (mandamus to admit a person to the fraternity; "the Court said that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others").

There was of course much learning as to whether a person had an entitling *interest* though not in strictness a member; moreover, the right was in those days confined to *public corporations* so-called; but these details are without the present purview; the following rulings illustrate them: 1701, R. *v.* Worsenham, 1 Ld. Raym. 705; 1734, Warriner *v.* Giles, 2 Stra. 954 (city market books); 1746, Brewers' Co. *v.* Benson, Barnes 236 (defendant allowed inspection of plaintiff's books, though no member, because their by-laws affected his right to trade); 1773, Allan *v.* Tap, 2 W. Bl. 850 (inspection of records of Clement's Inn, not a public corporation, not allowed); 1819, R. *v.* Sheriff of Chester, 1 Chitty 476 (action for neglecting to levy a writ; inspection of books of quarter sessions held not within the rule); 1824, Harrison *v.* Williams, 3 B. & C. 162 (action for penalty under a city by-law; inspection by defendant of corporate books allowed, the defendant being under corporate jurisdiction, though not a member).

of an opponent-corporation if he was not as a member entitled to inspection generally.[2]

Thus, whatever right of inspection was and still is recognized in such cases depends upon the extent of the substantive right of members of corporations, under the law of private corporations,[3] or of municipal corporations,[4] and is therefore without the present purview.

(3) *Documents subject to a Common Interest or a Trusteeship.* Apart from the preceding class of cases (which rested on no rule of Evidence properly so called), and from the rule of oyer, the common-law Courts at the beginning of the 1700s recognized no right to obtain before trial an inspection of documents in an adversary's hands:[5]

1698, *Groenvelt* v. *Burrell*, 1 Ld. Raym. 252 (refusing to the plaintiff an inspection and copy of the records of the college of physicians, in an action against one of them for false imprisonment): "This record may be pleaded without a 'profert in curia,' and therefore no oyer can be prayed of it, and therefore the defendants shall not be bound to give a copy, for it would be in effect to discover their evidence. And the plaintiff has no right in this record, therefore this case differs from the case of the public books of a corporation, for there the party has an interest. In the same manner, where there is a dispute between a lord and a copyholder, the copyholder shall see the rolls, because he has an interest in them."

In the first half of the 1700s are to be found rulings in which not only is the inspection refused where it would certainly have been granted a century

[2] 1744, R. *v.* Bridgeman, 2 Stra. 1203 (dispute between Wigan corporation and defendant; inspection refused, for otherwise "one private man would have as good a right to inspect the deeds and evidences of another"); 1800, Southampton *v.* Graves, 8 T. R. 590 (inspection of corporate records of defendant refused to plaintiff not a member; Lord Kenyon, C. J.: "Where the dispute is between different corporators, there an inspection may be granted; but I cannot conceive why an inspection of the muniments of a corporation should be granted when a similar inspection would be denied between private persons only").

[3] For the right of a *stockholder*, desiring to learn of the corporate doings, to obtain inspection (usually, whether he must proceed by mandamus rather than by bill of discovery), see the following cases:

CANADA: 1903, Merritt *v.* Copper Crown Co., 36 N. Sc. 383.

UNITED STATES: 1905, Guthrie *v.* Harkness, 199 U. S. 148, 26 Sup. 4; 1922, State ex rel. Theile *v.* Cities Service Co., — Del. —, 115 Atl. 733; 1910, Venner *v.* Chicago City R. Co., 246 Ill. 170, 92 N. E. 643; 1912, White *v.* Manter, 109 Me. 408, 84 Atl. 890; 1918, Knox *v.* Coburn, 117 Me. 409, 104 Atl. 789; 1915, Klotz *v.* Pan-American Match Co., 221 Mass. 38, 108 N. E. 764 (foreign corporation); 1920, Shea *v.* Parker, 234 Mass. 592, 126 N. E. 47 (whether the stockholder may copy the names of the stockholders); 1907, Hub Construction Co. *v.* New England B. Club, 74 N. H. 282, 67 Atl. 574; 1900, Fuller *v.* Hollander, 61 N. J. Eq. 648, 47 Atl. 646; 1901, Trimble *v.* American Sugar-Ref. Co., 61 N. J. Eq. 340, 48 Atl. 912; 1899, Re Steinway, 159 N. Y. 250, 53 N. E. 1103; 1919, Lien *v.* Savings Loan & Trust Co., 43 N. D. 260, 174 N. W. 621; 1915, State *v.* Ice, — W. Va. —, 84 S. E. 181; 1921, State ex rel. Dempsey *v.* Werra A. F. Co., 173 Wis. 651, 182 N. W. 354.

[4] For the right of a *citizen* to inspect *public records*, see the following: 1921, Caldwell *v.* Board of Public Works, — Cal. —, 202 Pac. 870 (county engineer's plans, etc., for a reservoir project in the Hetch Hetchy valley); 1905, State *v.* McMillan, 49 Fla. 243, 38 So. 666 (records of deeds, etc.); 1903, Marsh *v.* Sanders, 110 La. 726, 34 So. 752 (poll-tax books); 1906, State *v.* Grimes, 29 Nev. 50, 84 Pac. 1061 (collecting the cases); 1906, Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146 (State auditor's vouchers); 1904, Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927.

[5] *Accord:* 1730, Attorney-General *v.* Coventry, Bunb. 290 (action against trustees of a charity; inspection not compelled; "this being their private evidence, they shall not be obliged to discover it; and it is not like the case of corporation books or court rolls, which are of a public nature"; even for manorial rolls, a stranger to the manor could not obtain inspection, though otherwise for a copyholder, whether the lord of the manor is a party or not).

later, but even the very principle and distinction on which the Courts later proceeded were expressly denied a recognition.[6]

But with the accession of Lord Mansfield, in 1756, to that moral dominion in the common-law realm which he exercised throughout a generation, a decided change was noticeable. His ideas were a century in advance of his time, as subsequent events proved. But while he held sway, a broad and liberal practice prevailed — a practice whose avowed object was to afford summarily to a party at law, upon mere motion, as ample an assistance of the present sort as he could have obtained by the tedious and expensive process of a bill of discovery in chancery.[7] This advanced rule seems to have been unquestioned during Lord Mansfield's time.[8]

On the arrival of Lord Kenyon as his successor, in 1788, a halt was called. The antagonism of mental attitude between this reactionary and his brilliant predecessor, and between their respective schools of followers, is well known. The unprogressive influences of thought were now in command of the English judiciary. So far as any one man could nullify the (to him) dangerous innovations of the preceding régime, Lord Kenyon set himself to do it. Applying in decorous fashion and under the forms of law the maxim of a Kilkenny fair, he proceeded to strike wherever he saw such an innovation. That it had been introduced or developed by Lord Mansfield was enough for him; it stood condemned. The result was, in the first place, a repudiation of this general practice of granting inspection wherever it could have been obtained in chancery, and, in the next place, a mazy uncertainty as to the precise extent to which the right would still be conceded.[9] Not all the advance was lost; the tradition of Lord Mansfield's generation still lingered on in practice, in spite of his successor's unequivocal censure; and after Lord Kenyon's death in 1802, a counter-reaction set in. There was also still the

[6] 1705, Ward *v.* Apprice, 6 Mod. 264 (inspection not compelled of a book kept by the defendant as part-owner of a ship, but intrusted to the custody of the plaintiff as another part owner; "if he has broke his trust, you must seek for remedy in equity"; yet the Court "owned it to be a mischievous case," where "one common book of their transactions" was kept thus private; and conceded that in an action on a single indenture inspection would be allowed the opponent); 1707, Hill *v.* Aland, 1 Salk. 215 (action on special agreement in a note; defendant not allowed to have a copy from the plaintiff; to which, in 1795, Mr. Evans, the editor, appends the significant note, "*quære*, whether in modern practice such a rule would not be made absolute?").

The remarks of the Court in Jevens *v.* Harridge, 1 Wms. Saund. 8 (1667), sometimes cited as an early recognition of the later doctrine, do not seem to bear this meaning. Mr. J. Vaughan Williams, in Pritchett *v.* Smart (1849), 7 C. B. 625, says: "It is difficult to say how the Court acquired the equitable jurisdiction which they exercise in compelling the production of documents."

[7] 1785, Barry *v.* Alexander, Tidd's Pract. I. 592, 9th Eng. ed. (Mansfield, L. C. J.: "Wherever the defendant would be entitled to a discovery, he should have it here, without going into equity").

[8] In 1800, in Southampton *v.* Graves, 8 T. R. 590, Mr. J. Grose remarked: "When I first came into this court, it was understood to be the constant practice to grant rules of this kind as matters of course." It seems to have been generally conceded by the judges of the ensuing generation that the common-law right of inspection came in with Lord Mansfield and was under him more liberal than afterwards; *e.g.* by Dallas, C. J., in Threlfall *v.* Webster, *infra*.

[9] 1823, Dallas, C. J., in Threlfall *v.* Webster, 1 Bing. 161: "My mind is surrounded by difficulties on the subject of these applications, although it has been usual to comply with them."

unquestionable rule, noticed above (par. 2), permitting inspection of corporate and manorial books; and it was apparently upon the analogy of this doctrine that the phrasing of the general right of inspection by parties now came to be fashioned.

It began to be said, from 1800 onwards, that *a party was entitled to prior inspection whenever he had an interest* in the document, or (in another phrasing, meant to be equivalent) *wherever the opponent was the virtual trustee* of the document. But there was for a generation afterwards no semblance of judicial agreement, either as to this formal definition, or, when it was accepted, as to its application in similar cases. It is impossible to harmonize the rulings that ensued; until, in the second quarter of the century, something like a consensus was reached for a definition of the above tenor.[10]

[10] The rulings are as follows: 1798, Chetwind *v.* Marnell, 1 B. & P. 271 (inspection refused for defendant of a bond on which action was brought; the suggestion of forgery disinclined the judge to order the plaintiff to do that "which might be the means of convicting him of a capital felony"; a poor reason, since the plaintiff could not recover on trial without doing the same supposed dangerous thing); 1808, Blakey *v.* Porter, 1 Taunt. 386 (plaintiff allowed to inspect and copy an indenture of lease, in an action on a covenant therein, plaintiff never having had a duplicate original); 1811, Bateman *v.* Phillips, 4 Taunt. 157 (unstamped agreement of guarantee, in which plaintiff was interested, though not technically a party to it; order for production by defendant granted, that plaintiff might stamp it and render it admissible in evidence); 1812, King *v.* King, 4 Taunt. 666 (similar facts to Blakey *v.* Porter, with similar ruling; "it must be understood that when one part only is executed of a deed, the party who holds it is trustee for the other"); 1815, Street *v.* Brown, 6 Taunt. 302 (inspection refused for the plaintiff, in an action on a charter-party, of the defendant's counterpart, the plaintiff's part being lost; the principle of granting is "that the party holding the deed was a trustee for the other"); 1814, Harris *v.* Aldrit, 2 Chitty 229 (inspection allowed of a mortgage by defendant to plaintiff; being in plaintiff's possession, it had been seized and given in custody, with the plaintiff's other papers, to a constable apprehending him on a charge of felony); 1817, Cooke *v.* Tanswell, 8 Taunt. 131 (order for inspection of an indenture, recognized; "these applications are themselves of novel introduction; the Court is inclined rather to confine than to enlarge the practice"); 1819, R. *v.* Sheriff of Chester, 1 Chitty 476 (Abbott, C. J.: "The ordinary case where the Court allows a party to inspect documents in the hands of a third person is that in which the party called upon is the trustee for the applicant, . . . where the documents came originally into the trustee's hands . . . for the benefit and advantage of the party desiring to see them"); 1819, Morrow *v.* Saunders, 1 B. & B. 318 (inspection allowed to plaintiff of a partnership deed, in an action on a contract to form a partnership; no counterpart of the deed having ever existed); 1823, Threlfall *v.* Webster, 1 Bing. 161 (inspection refused for plaintiff of bills of exchange on which action was brought, said to have come into defendant's hands by fraud; Dallas, C. J.: "How to dispose of these cases must depend upon the discretion of the judges"); 1823, Beale *v.* Bird, 2 Dowl. & R. 419 (inspection of agreement forming the basis of the action, not allowed for the purpose of pleading in abatement); 1823, Pickering *v.* Noyes, 1 B. &. C 262 ("Is there any case where a deed has been ordered to be produced, unless it has been deposited in the hands of the holder as a trustee for others only or for others jointly with himself?"; inspection refused of a deed to defendant in an action of trespass *q. c. f.*); 1824, Hildyard *v.* Smith, 1 Bing. 457 (action on a bill of exchange; inspection refused to defendant, though forgery was suggested); 1825, Ratcliffe *v.* Bleasey, 3 Bing.148 ("The principle established by all the cases is that a party can only be compelled to produce a deed where he holds it as trustee for another"; here inspection of a partnership deed was refused to a plaintiff in an action for breach of agreement, the plaintiff not being a party to the deed; "if the plaintiff had any interest, the defendant would not be permitted to withhold the deed"); 1827, Woodcock *v.* Worthington, 2 Y. & J. 4 (lease; "where one part only is executed, the inspection may be obtained against the party who has the custody of it, who is considered to be a trustee of the other party; but where two parts have been executed interchangeably between the parties, the rule is different"); 1827, Browning *v.* Aylwin, 7 B. & C. 204 (inspection allowed to plaintiff of defendant's brokers' books, containing the sole original of a contract in issue; here the defendant's bond to the city covenanted to allow such inspection); 1828,

The rule thus established may properly be called a common-law doctrine, although it was modelled on equitable analogy, was late in permanent acceptance, and was seldom recognized in the practice inherited by American courts.[11]

Rundle *v.* Beaumont, 4 Bing. 537 (action on a charter-party; inspection of plaintiff's log-book refused to defendant, no interest being shown; Ratcliffe *v.* Bleasey held to express the law); 1828, Rowe *v.* Howden, 4 Bing. 539 (action by ship-owners against broker; inspection of a letter in defendant's hands refused, plaintiff having no interest); 1829, Bousfield *v.* Godfrey, 5 Bing. 418 (action on a written contract; inspection allowed, for stamping and copying, of a sole original of which defendant had surreptitiously obtained possession); 1830, Blogg *v.* Kent, 6 Bing. 614 (inspection allowed to plaintiff of the sole original of a contract sued upon); 1830, Imperial Gas Co. *v.* Clarke, 7 Bing. 95 ("trustee" rule recognized; here, the inspection was sanctioned for a director against the corporation); 1831, Hewitt *v.* Pigott, 7 Bing. 400 (deed to trustees for creditors; order for inspection refused; Park, J.: "In general a party is not bound to exhibit his muniments to an adversary"); 1883, Cocks *v.* Nash, 6 C. & P. 154 (trustee of a deed for the plaintiff, held not compellable to produce it for the defendant); 1835, Edginton *v.* Nixon, 2 Bing. N. C. 316 (copy granted against one who had obtained the original by spoliation); 1837, Charnock *v.* Lumley, 5 Scott 438 (action on an agreement by defendant to publish plaintiff's book; inspection of the agreement allowed to the plaintiff); 1838, Smith *v.* Winter, 3 M. & W. 309 (inspection refused to defendant of a deed to A., for whom defendant was surety; defendant held not to be "such a party as entitles him to inspect the deed"); 1841, Woolner *v.* Devereux, 9 Dowl. Pr. 672 (inspection allowed by defendant of a note on which action was brought; "the judge has jurisdiction to make such an order, if the circumstances call for it, as, if there is any suggestion of forgery, or that the instrument has been dealt with since it was executed, or where the party swears that he has no recollection that he has made such a note"); 1843, Thomas *v.* Dunn, 6 M. & Gr. 274 (action on a contract; inspection ordered for defendant of the original in plaintiff's attorney's hands; deposit with the masters being refused); 1845, Goodliff *v.* Fuller, 14 M. & W. 4 (inspection refused to plaintiff of plaintiff's letters to defendant, in an action for breach of promise of marriage; "this is not a case where the instrument is held by one of the parties as a trustee for the other"); 1846, Steadman *v.* Arden, 15 M. & W. 587 (facts like the next case; Alderson, B.: "All that is material is that both parties have an interest in the documents and that an inspection of them is material to the prosecution of the action"); 1848, Ley *v.* Barlow, 1 Exch. 800 (parliamentary contract and subscriber's agreement of a railroad corporation, the plaintiff being an allottee of shares; Parke, B.: "All the parties to that deed have 'prima facie' a right to inspect it, as it is not private property"); 1849, Pritchett *v.* Smart, 7 C. B. 625 (action on bill of exchange; inspection of opponent's books not allowed, since the applicant "has no interest in the book"); 1852, Doe *v.* Roe, 1 E. & B. 279 (right of entry for breach of covenant in lease; inspection allowed to tenant); 1853, Second Report of Common Law Practice Commissioners, 34 ("Independently of statutory enactment, the Courts of common law have exercised the power of compelling the production of documents for the purpose of being stamped so as to be available in evidence, as also the inspection of documents upon which the action or defence is immediately founded, as well as of documents necessary for the purpose of evidence in which the applicant has a direct interest and which are held by the opposite party in a fiduciary capacity, and of certain documents of a public character such as the rolls of a manor or corporation books"); 1860, Price *v.* Harrison, 8 C. B. N. S. 617, 634 (Williams, J.: "About 25 or 30 years ago, the rule laid down was that inspection would only be granted where there was but one copy of the document and the party holding it held it as a quasi-trustee for the other party; but long before the late act [of 14 & 15 Vict.] the rule had been extended so as to include every case where the party seeking to inspect has an interest in the document"); 1920, O'Rourke *v.* Darbishire, A. C. 581 (scope of proprietary right of discovery, considered).

[11] There were early statutes in many States, and this may explain the paucity of common-law rulings.

The early New York cases are as follows: 1811, Brush *v.* Gibbon, 2 Cow. 18, note (inspection allowed to defendant of a note in plaintiff's possession, defendant expecting to prove it a forgery); 1813, Lawrence *v.* Ins. Co., 11 Johns. 245, note (inspection allowed to an insured of documents in possession of the insurer); 1822, Willis *v.* Bailey, 19 Johns. 268 (inspection refused of papers not shown to be the foundation of the action; the prior decision was reached "not without some hesitation," and proceeded on the principle that similar discovery in equity could have been had); 1824, Denslow *v.* Fowler, 2 Cow. 592 (trover for a bond; inspection not allowed the plaintiff of the bond, which had been de-

The interesting question is whether it represented in fact an exception to the general rule against allowing prior inspection of the adversary's own evidence. On the one hand, it was clearly regarded by the common-law judges as something less than could be obtained in chancery; and in chancery, as already noticed (*ante*, § 1857), the inspection was limited to documents sustaining the applicant's own case. Moreover, its underlying theory was that the applicant was merely inspecting his own property. On the other hand, it is plain that the documents sometimes granted for inspection were purely revelations of the adversary's own evidence; that is to say, the applicant might have an "interest" in them, and yet they might be solely his adversary's muniments of claim, — as where to a defendant is granted inspection of a note sued upon. However this might be, it would seem that the common-law Courts believed that they were doing less, and never more. than the Chancellor would have done; and the apparent anomalous instances may perhaps be explained under the ensuing principle (par. 4).

(4) *Postponing Defendant's Pleading.* In the time of Lord Mansfield there arose a practice of securing inspection, by indirection, in favor specially of defendants. This consisted in allowing the defendant a stated *interval to plead* unless the plaintiff in the meantime permitted the inspection.[12] The effect of this seems to have been distinct from the order of inspection, just examined (*supra*, par. 3), in that, first, it was available only for defendants, and secondly, it was unlimited as to the class of documents. Nevertheless it was sometimes spoken of as an equivalent for a bill of discovery; [13] and its precise status does not seem clear. After 1800 it probably became merged in the confused practice already noticed as to orders to produce, and it is probable that some of that confusion was due to precedents in which defendants, under the present principle, had received different treatment from plaintiffs.

(5) *Insurance Documents.* In actions upon insurance policies, the practice

livered to defendant); 1824, People *v.* Vail, 2 Cow. 623 (inspection allowed of an application for a highway, as being a public document); 1824, Jackson *v.* Jones, 3 Cow. 17 (ejectment; inspection allowed to the plaintiff of deeds relied on by the defendant for his defence, the plaintiff expecting to prove them forgeries); 1825, Wallis *v.* Murray, 4 Cow. 399 (inspection allowed to plaintiff of a written contract on which the action was founded, though a counterpart, now lost, had once been in plaintiff's hands; the English limitation as to trusteeship, discarded; equitable principle of discovery adopted); 1826, Bank of Utica *v.* Hillard, 6 Cow. 62 (inspection not allowed to defendant of entries in plaintiff's books relating to a note declared on; "this practice is of recent origin in England"); 1832, Townsend *v.* Lawrence, 9 Wend. 458 (Wallis *v.* Murray held to represent the sound doctrine).

Occasionally a modern court notices the doctrine: 1904, Alabama G. I. School *v.* Reynolds, 143 Ala. 579, 42 So. 114 (books kept by a party in a fiduciary relation are subject to inspection for pending litigation, irrespective of the general limitations of discovery in equity).

[12] 1789, Witter *v.* Cazalets, Tidd's Practice, I, 592, 9th Eng. ed. (Buller, J., giving as a reason that the defendant within the time might in any case obtain discovery in equity); see it also recognized by Heath, J., in Bateman *v.* Phillips (1811), 4 Taunt. 157, 163; and by Eldon, L. C., in Princess of Wales *v.* Lord Liverpool (1818), 1 Swanst. 114.

[13] 1808, Clifford *v.* Taylor, 1 Taunt. 167 (defendant allowed to plead after delivery to him of copies of policies, etc., by plaintiff; Mansfield, C. J.: "This practice of compelling the delivery of copies is very convenient, for it saves the delay and expense of a bill in equity").

became settled, in the early 1800s, to grant inspection of all relevant documents.[14] Whether this was merely a clear instance of the principle of par. 3, above, or fell rather under the practice noted in par. 4, above, or formed a distinct arbitrary rule by itself, is not clear. In this class of cases, at any rate, the right to inspection had become settled, irrespective of whether the documents belonged to one's own case.[15]

(6) Any right of inspection before trial was available solely against the opponent, and, except for the case of corporate records (*ante*, § 1857, par. 2), not against a *third person not a party;*[16] this was upon the analogy that a bill of discovery did not lie against a third person (*ante*, § 1856*d*), and though open to argument as a needless restriction, it seems not to have been changed under most modern statutes (*post*, § 1859*f*).

§ 1859. **Inspection under Statutes.** By the middle of the 1800s, in England, and long before that time, in a few of the United States, professional opinion had come to be satisfied that some better methods, more summary in effect and more broad in scope, should be made available for parties seeking inspection of documents in the adversaries' hands; and legislation everywhere made changes.[1] This legislation was plainly animated by a conviction

[14] 1808, Goldschmidt *v.* Marryat, 1 Camp. 559, 562 (in actions on policies of insurance, orders to the plaintiff to produce all papers concerning the cause "had become extremely common, . . . as they often obviate the necessity of going into a court of equity"); 1808, Clifford *v.* Taylor, *supra*, note 13; 1866, Rayner *v.* Ritson, 6 B. & S. 888 (insurer is entitled to inspect all documents in insured's possession material to the issue, irrespective of whether they form a part of the insurer's case; the traditional practice is not taken away by St. 14 & 15 Vict.); 1904, Boulton *v.* Houlder, 1 K. B. 784 (action to recover insurance money paid in excess; the plaintiff was allowed discovery of certain ship's papers; practice in insurance cases reviewed).

[15] It was not recognized in the United States: 1813, Sage *v.* Ins. Co., 5 Day Conn. 409, 413 (inspection not required, for the insured, of documents in an insurer's hands; "this would be a very extraordinary and novel practice in our courts of law"); except perhaps in New York; Lawrence *v.* Ins. Co., *supra*, note 11.

[16] 1735, Crew *v.* Saunders, 2 Stra. 1005 (action against postmasters; plaintiff refused inspection of books of post-office authorities, not being parties; the plaintiff not having a personal interest in the books); 1833, Cocks *v.* Nash, 9 Bing. 723 (inspection refused to defendant, surety for N. of a deed between N. and her creditors, held by H. as trustee; the apparent reason being that the trustee on the trial might appear to be absolutely privileged from disclosure); 1825, Davenbagh *v.* M'Kinnie, 5 Cow. 27 (inspection not allowed of a deed in E.'s hand, constituting a link in plaintiff's title); 1888, Henry *v.* Ins. Co., 35 Fed. 15, *semble*.

§ 1859. [1] The statutes are as follows; the list includes those which in any way affect the right of inspection before trial or the compulsory production upon trial; in the latter aspect, however, they will be again considered in dealing with the Party's Privilege as to Documents, *post*, § 2219:

ENGLAND: 1851, St. 14 & 15 Vict. c. 99, § 6 (upon action pending, any judge may on application by either party "compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same or procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity"); 1853, Second Report of Common Law Practice Commissioners, 35 (recommended that the application for documents be accompanied by a right to discovery whether the opponent had in fact such documents in his possession, so as to make the process coextensive with that of a bill in chancery; the following statute carried this out); 1854, St. 17 & 18 Vict. c. 125, § 50 ("Upon the application of either party to any cause or other civil proceeding in any of the superior courts upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, it shall be lawful for the Court or judge to

that the existing principles were defective, and that, for the reasons already examined (*ante*, § 1847), a determined inroad should be made on the sports-

order" that the opponent answer as to such custody and as to the objection if any to production; and then "the Court or judge may make such further order thereon as shall be just"); 1883, as amended to 1921, Rules of the Supreme Court, Order XXXI, Rule 12 (any party may apply for an order "directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit. Provided that discovery shall not be ordered when and so far as the Court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs"); Rule 14 (a judge may at any stage during a cause "order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just"); Rule 15 (any party may give notice to any other party "in whose pleadings or affidavits reference is made to any document," to produce such document for inspection and copying by the opponent; and a party not complying shall not be allowed to put such document afterwards in evidence, "unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient," etc.); Rule 18, par. 2 ("Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court or judge shall not make such order for inspection of such documents when and so far as the Court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs"); Rule 19A, par. 1 ("Where inspection of any business books is applied for, the Court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the Court or a judge may order inspection of the book from which the copy was made"); Rule 21 ("If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly").

CANADA: *Alberta:* Rules of Court 1914, Nos. 238–241, 364–376; *British Columbia:* Rules of Court 1912, Rules 343–370*t*; *Manitoba:* Rev. St. 1913, c. 46, Rules 424–441; *New Brunswick:* Consol. St. 1903, c. 111, §§ 240–255, c. 112, §§ 72–80; *Newfoundland:* Consol. St. 1916, c. 83, Ord. 28; *Northwest Terr.* Consol. Ord. 1898, c. 21, Rules 191–200, 207, 208; *Nova Scotia:* Rules of Court 1900, Ord. 30, Rules 12–22; *Ontario:* Rules of Court 1914, Rules 274, 341, 348–353; *Prince Edward Isl.* St. 1873, c. 22, §§ 244–248; St. 1853, c. 12, §§ 1, 9; *Yukon:* Consol. Ord. 1914, c. 48, Rules 201–210.

UNITED STATES: *Federal:* St. 1789, c. 20, § 15, Rev. St. 1878, c. 12, § 724, Code 1919, § 1361 (in trials at law, the U. S. courts may on motion require the parties "to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery"; on failure to produce, judgment of nonsuit or default may be given); St. 1874, June 22, c. 391, § 5, Code § 10104 (in civil suits under revenue-laws, on failure to produce, allegations are to be taken as confessed, unless nonproduction is explained to the Court's satisfaction); Equity Rules 1912, Rule 58 ("documents . . . containing evidence material to the cause of action or defense of his adversary"); 1920, Admiralty Rules, U. S. Sup. Ct., 268 Fed. No. 4, p. ix, Rule 32 ("documents which are or have been in his possession or power, relating to any matter or question in issue"); 1909, Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 29 Sup. 370 (an order under the Arkansas Anti-Trust Act of 1905, striking out an answer of refusal

man's theory that the adversary is entitled to keep his own evidence to himself until the trial. Nevertheless, looking merely at the words of the statutes

and entering judgment by default, held not a violation of the 14th Federal Amendment);
Alabama: Code 1907, §§ 4058, 4059 (in trials at law, "on motion and due notice thereof," the Court may "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery"; on penalty, for failure to comply, of judgment of nonsuit or default);
Alaska: Comp. L. 1913, § 1322 (like Or. Laws 1920, § 533);
Arizona: Rev. St. 1913, § 1759 (like Cal. C. C. P. § 1000; but using "any book, document, or paper" as the description of the things to be inspected); § 1760 ("Any party to a civil action may, not less than five days before the trial, serve upon the adverse party, or his attorney, a written notice requiring such adverse party to produce at the trial such books, papers, documents or writings, in his possession, or under his control, as may be specified in such notice, and if the adverse party fails to produce the same at the trial the party giving the notice shall be entitled to give secondary evidence of the contents of such books, papers, documents or writings");
Arkansas: Dig. 1919, §§ 4137–4141 (the Court may compel "any party to a suit pending therein to produce any books, papers, and documents in his possession or under his control relating to the merits of such suit or to any defense therein," upon suitable affidavit; on failure to comply, a nonsuit may be ordered or a plea struck out or a particular defence barred); § 4143 (regulating proceedings in equity for producing documents);
California: C. C. P. 1872, § 1000 (the Court may, in a pending action, "upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense therein"; on penalty, in case of refusal, of exclusion of the document from evidence or of direction to presume it to be as alleged, and also of punishment for contempt); 1901, San Fernando C. M. & R. Co. *v.* Humphrey, 111 Fed. 772 (statute applied);
Colorado: Comp. L. 1921, C. C. P. § 390 (like Cal. C. C. P. § 1000); § 1774 (in irrigation proceedings, no party "willfully refusing to produce any book or paper, if in his or their power to do so, when rightfully demanded for examination and copying, shall be allowed the benefit of any testimony or proofs in his, her, or their behalf"); § 3350 (stolen ore; claimant may inspect the books of any person engaged in milling, shipping, etc., ores); § 5377 ("the books and accounts of any deceased person or mental incompetent shall be subject to the inspection of all persons interested therein");
Columbia (Dist.): Code 1919, § 1072 ("In an action at common law the Court may, on motion, and on reasonable notice thereof, require the parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery");
Connecticut: Gen. St. 1918, §§ 5764–5769 (covers documents "material to the support or defense of the suit");
Delaware: Rev. St. 1915, § 4228 ("At any time during the pendency of actions at law, the Court, on motion and due notice thereof, may order a party to produce books or writings in his possession or control, which contain evidence pertinent to the issue, under circumstances in which the production of the same might be compelled by a court of chancery"; upon failure to comply, judgment of nonsuit or default may be given, and the chancery powers of enforcement may be used);
Florida: G. S. 1919, § 2733 (on ten days' notice, the Court may require the opponent "to produce books and other writings in his possession, power or custody, which shall contain evidence pertinent to the issue"; on failure to comply without excuse, judgment of nonsuit or default may be given);
Georgia: Rev. C. 1910, §§ 5837–5842 (Courts of common law may on ten days' notice require "either party to produce books and other writings in his possession, power, custody or control which shall contain evidence pertinent to the cause in question, under circumstances where such party might be compelled to produce the same by the ordinary rules of proceeding in equity"; detailed rules as to notice; penalty of judgment of nonsuit or default may be imposed); 1904, Branan *v.* Nashville C. & St. L. R. Co., 119 Ga. 738, 46 S. E. 882 (Code applied);
Hawaii: Rev. L. 1915, § 2591 (the Court may "compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such party relating to such cause or other proceeding, and if necessary to take examined copies of the same, in all cases in which previous to Sept. 19, 1876, a discovery might have been obtained in a court of equity" by the applicant);
Idaho: Comp. St. 1919, § 7193 (like Cal. C. C. P. § 1000);

concerning documentary evidence, it is not in every case apparent that they have done so. This, therefore, became a chief question in the application of

Illinois: Rev. St. 1874, c. 51, § 9 (Courts are empowered "in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties or either of them to produce books or writings in their possession or power which contain evidence pertinent to the issue"); 1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (provided the terms of the order require the exhibition of relevant documents and entries only, the statute is not unconstitutional; here, the books of an insured, in an action by a liability-insurer, were produced to show the date on which the premium was agreed to be based; but there is no occasion for invoking the Constitution to limit such statutes);

Indiana: Burns' Ann. St. 1914, § 502 (a Court may "upon affidavit of their necessity and materiality upon motion compel by order either party to produce at or before the trial any book paper or document in his possession or power," upon reasonable notice); § 503 (a Court may "under proper restrictions upon due notice order either party to give the other within a specified time an inspection and copy of any book, or part thereof, paper or document in his possession or under his control containing evidence relating to the merits of the action or the defense therein"; on refusal, the Court may "exclude such or punish the party refusing or both");

Iowa: Code 1897, § 4654, Code 1919, § 7361 (a Court "may in its discretion by rule require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them"); Code 1897, §§ 4655, 4656, Code 1919, §§ 7362, 7363 (requisites of petition stated; on failure, without excuse to obey order, the same consequences prescribed as for failure to obey subpœna);

Kansas: Gen. St. 1915, § 7241 (in civil cases, any party may take the deposition of the adverse party or agent, etc., if out of the jurisdiction or cannot be reached; and if due production of documents, etc., is not made, the Court may strike from the files the pleadings of such adverse party and render judgment against him); § 7269 (either party may demand of the opponent "an inspection and copy, or permission to take a copy, of a book paper or document in his possession or under his control containing evidence relating to the merits of the action or defense therein"; the demand to be written and to specify particulars; on refusal within four days, the Court may on motion and notice order such inspection or copy, and on failure to comply with the order, may exclude the document or direct it to be presumed to be as alleged); § 7270 (either party, if required, shall deliver to the other "a copy of any deed instrument or other writing whereon his action or defense is founded or which he intends to offer in evidence at the trial"; on refusal, the party's original shall be excluded at the trial); § 6420 (anti-trust law);

Louisiana: C. Pr. 1900, § 140 (the Court may order a party to bring into court "the books, papers and other documents which are in his possession and which are material in the cause," upon sworn petition; on refusal, unless production is shown impossible, the facts are to be taken as confessed); § 473 (on motion, a party may be ordered to produce in court on the trial day "books, papers or other documents" in his possession);

Maine: Rev. St. 1916, c. 87, § 24 ("Where books, papers, or written instruments material to the issue" are in opponent's possession, "and access thereto is refused," production "for inspection" may be ordered upon motion; nonsuit or default may follow failure to comply);

Maryland: Ann. Code 1914, Art. 75, § 99 (the Court may on motion require the parties to produce certified copies of books or writings "in their possession or power," containing evidence "pertinent to the issue," in cases where they might be compelled to give discovery in chancery; on failure to comply, judgment may be given by default);

Massachusetts: Gen. L. 1920, c. 231, §§ 7, 32 (for written instruments declared on by plaintiff or relied on in answer, a Court may on motion order the filing of a copy or the original; quoted *post*, § 1859*a*, n. 4); § 38 ("no party shall be required [in his pleading] to state evidence, or to disclose the means by which he intends to prove his cause"); §§ 61–67 (quoted *ante*, § 1856*a*); § 68 ("Every party to any cause or proceeding may inspect and take copies of any document referred to in the pleading or particulars of any other party and relied on by such other party," unless it is not in opponent's control or that he has "some other reasonable excuse," etc.);

Michigan: Comp. L. 1915, §§ 12025–12027;

Minnesota: Gen. St. 1913, § 7529 (in justices' courts, "when a cause of action or counterclaim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver the account or instrument to the Court" and state the amount due; the Court may at the time of pleading require that such writing or account be exhibited to the inspection of the adverse party with liberty to copy the same; or, if not so exhibited, may prohibit its being afterward given in evidence); § 8447 (like Cal. C. C. P. § 1000);

these statutes; namely, whether they had not merely furnished a more summary procedure in common-law courts (for this was usually clear), but had

Mississippi: Code 1906, § 1003, Hem. § 723 ("The Court in which any action or suit is pending may on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereto"; on penalty, for a refusal, of having the documents excluded from evidence, or nonsuit or judgment by default); 1902, Equitable Life Ass. Soc'y *v.* Clark, 80 Miss. 471, 31 So. 964 (statute of 1900 applied);
Missouri: Rev. St. 1919, § 1374 (the Court shall have power "to compel any party to a suit pending therein to produce any books, papers and documents in his possession or power relating to the merits of any suit or of any defense therein"); §§ 1375–1377 (procedure regulated; on failure to obey, the Court may order nonsuit or strike out the answer or bar a particular defence or punish as for contempt); § 1378 (substantially like Cal. C. C. P. § 1000, adding a provision for photographs, but omitting the clause as to directing a presumption of contents); § 5411 (in an action for recovery of a sum due on account, and where the matter is "a proper and usual subject of charge on books of account," the Court may require from either party the production of "either his ledger or original book of entries, or both; and no disputed account shall be allowed upon the oath of the party, when it shall appear that he has a book of original entries, unless such book shall be produced upon reasonable request");
Montana: Rev. C. 1921, § 9771 (like Cal. C. C. P. § 1000);
Nebraska: Rev. St. 1922, § 8901 (if a party refuses to give inspection and copy, after demand in writing "specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it," followed by a judge's order to give a copy, the judge may exclude the document when offered in evidence; the rule applies to a "book, paper, or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein"); § 8902 (a party refusing "if required" to give "a copy of any deed, instrument, or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial," "shall not be permitted" to give the original in evidence); §§ 8904–8906 (the Court may by rule require "the production of any books or papers which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them"; procedure regulated; failure to produce, without excuse, may be treated as on failure to obey subpœna);
Nevada: Rev. L. 1912, § 5416 (like Cal. C. C. P. § 1000);
New Hampshire: Pub. St. 1901, c. 224, § 14 ("no party shall be compelled, . . . in giving a deposition, to produce any writing which is material to his own case or defense," unless on taking his own deposition); St. 1903, c. 37 (discovery of books, etc., from non-resident director of domestic corporation);
New Jersey: Comp. St. 1910, Practice, §§ 142, 143 (the Court may, "in their discretion and upon five days' notice of the application, order either party to give to the other, within a specified time and under such terms as may be imposed, an inspection and copy or permission to take a copy of any books, papers or documents in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereto"; on refusal, such documents shall not be given in evidence, and the Court may punish for contempt); St. 1912, c. 231 (Practice Act Supplement), Schedule A, Rules of Court No. 66 ("Any party may without affidavit apply for an order directing any other party to make discovery on oath of the books, papers, or other documents, which are or have been in his possession or under his control relating to any matter in question in the cause. The granting of the order shall be discretionary, as to the whole or any part of the discovery applied for");
New Mexico: Annot. St. 1915, § 4130 ("no party shall be required to state evidence in his pleadings, or to disclose therein the means by which he intends to prove his case"); §§ 4215–4217, 4245 (the Court may "in his discretion and upon due notice order either party to give to the other, within a specified time, an inspection and a copy, or permission to take a copy, of a paper in his possession or under his control containing evidence relating to the merits of the action"; on refusal, the Court may on motion exclude the paper as evidence or punish for contempt or both; on failure to obey in prescribed time the order for production, the Court may order nonsuit or strike out answer or bar a particular defense affected or punish by contempt); § 4146 (original or copy of an instrument "upon which the action or defense is founded" must be filed with the pleadings, if in the party's "power or control," and on failure without sufficient reason, "such instrument of writing shall not be admitted in evidence upon the trial");
New York: Rev. St. 1828, pt. III, c. I, tit. III § 21 (vol. II, p. 199) ("The Supreme Court

also expanded the scope of the class of documents of which inspection was demandable.

shall have power in such cases as shall be deemed proper to compel any party to a suit pending therein to produce and discover books, papers, and documents in his possession or power, relating to the merits of any such suit or of any defence therein"); § 22 (the Court "shall be governed by the principles and practice of the Court of chancery in compelling discovery"); 1830, Rules of N. Y. Supreme Court, No. 28, as quoted in Cowen & Hill's edition of Phillipps on Evidence, note 832 (application for discovery may be made, 1, by the plaintiff, to compel the discovery of papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to declare or to answer any pleading of the defendant; 2, by the defendant, to enable the defendant to answer any pleading of the plaintiff; 3, the plaintiff after declaring, and the defendant after pleading, may be compelled to produce and discover all documents on which the action or defence is founded; 4, after issue joined, either party may be compelled to discover all documents necessary to enable the other to prepare for trial); C. C. P. 1877, § 803, C. P. A. 1920, § 324 ("A court of record, other than a justice's court in a city, has power to compel a party to an action pending therein to produce and discover, or to give to the other party an inspection and copy or permission to take a copy or photograph, of a book, document or other paper, or to make discovery of any article or property, in his possession or under his control relating to the merits of the action or of the defence therein"); C. P. A. 1920, §§ 325–328, 345 (proceedings regulated; the rules of practice will regulate the procedure; upon refusal to comply, the Court may dismiss a complaint or strike out an answer, etc., or bar a particular claim or defence, or, for refusal to allow inspection and copy, exclude the document or punish for contempt or both);
North Carolina: Con. St. 1919, § 1823 (like N. D. Comp. L. 1913, § 7861); § 1824 (like U. S. Code, § 1361, but omitting the limitation as to rules of proceeding in chancery); 1905, Mills *v.* Biscoe L. Co., 139 N. C. 524, 52 S. E. 200 (procedure of inspection considered);
North Dakota: Comp. L. 1913, § 7861 (the Court may "in his discretion and upon due notice order either party to give to the other within a specified time an inspection and copy or permission to take a copy of any books papers and documents in his possession or under his control relating to the merits of the action or the defense therein"; on refusals, the Court may exclude the paper from evidence or punish the party or both); § 9960 (action against a violation of the laws against pools and trusts; on failure of an officer, agent, etc., to attend and testify or produce books, the Court may strike out the party's pleading and give judgment by default);
Ohio: Gen. Code Ann. 1921, § 11551 (the Court may, on motion and reasonable notice, "require the parties to produce books and writings in their possession or power which contain evidence pertinent to the issue in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery"; on failure to comply, the Court may give judgment of nonsuit or default); §§ 11552, 11553 (either party may demand in writing, specifying "with sufficient particularity to enable the other party to distinguish it," "an inspection and copy or permission to take a copy of a book paper or document in his possession or under his control containing evidence relating to the merits of the action or defense"; procedure regulated; on refusal within four days, the Court may issue order for inspection and copy; on failure to obey order, the Court may exclude the document, or direct it to be presumed as alleged); § 11554 (either party "shall if required deliver to the other party" "a copy of any instrument of writing whereon the action or defense is founded or which he intends to offer in evidence at the trial"; on refusal, the original shall be excluded from evidence);
Oklahoma: Comp. St. 1921, §§ 634, 635 (substantially like Oh. Gen. Code Ann. §§ 11552, 11554);
Oregon: Laws 1920, § 533 (like Cal. C. C. P. § 1000, omitting "upon notice," substituting "any book, document or paper" to describe the material, and substituting, "neglect or refuse" obedience for "refuse" compliance);
Pennsylvania: St. 1798, Feb. 27, § 1, Dig. 1920, § 10296, Evidence (Courts are to have power, in a pending action, "on motion and upon good and sufficient cause shown by affidavit or affirmation, and due notice given, to require the parties or either of them to produce books or writings in their possession or power which contain evidence pertinent to the issue," upon penalty, on failure to comply, of judgment of nonsuit or default as to the subject to which the documents apply);
Porto Rico: Rev. St. & C. 1911, § 5358 (like Cal. C. C. P. § 1000);
Rhode Island: Gen. L. 1909, c. 212, § 50 (if a party makes affidavit "that the opposite party is in the possession or control of some document which the applicant is entitled to examine, and prays for its production," a Court may hear the petition and answer, and "if proper, compel the party having the same in his or its possession or control to allow the applicant to examine the same and if necessary

In considering the statutes for this purpose, then, it must be remembered that there were already three chief modes available; one of these was the right of oyer of documents liable to profert; the others were the equitable bill of discovery and (its related process) the motion at common law for inspection of documents held under a common interest. (I) For the first, the question now was whether oyer was still demandable. (II) For the second

to take examined copies of the same or have such original documents impounded and make such further order in the premises as shall be just");
South Carolina: C. C. P. 1922, § 665 (like N. C. Con. St. 1919, § 1823);
South Dakota: Rev. C. 1919, § 2196, Justice Courts ("When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may by an order require the original to be exhibited for the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; and, if such order is not obeyed, the account or instrument cannot be given in evidence"); § 7212 (like N. D. Comp. L. 1913, § 7861); 1909, McGeary *v.* Brown, 23 S. D. 573, 122 N. W. 605 (statute applied);
Tennessee: Shannon's Code, 1916, §§ 5684–5693 (either party is entitled to discovery "in all cases where the same party would by the rules of equity be entitled to a discovery in aid of such suit");
Utah: Comp. L. 1917, § 7204 (like Cal. C. C. P. § 1000; omitting reference to "inspection");
Virginia: Code 1919, §§ 6237, 6238 (a party may file an affidavit that there is "a book of accounts or other writing, in possession of an adverse party or claimant, containing material evidence for him, specifying with reasonable certainty such writing or the part of such book"; if it appears that the affiant "has no means of proving the contents" except by the desired production, and that the request is not tardy and the contents are "relevant and material," an order may issue; and judgment of nonsuit or default may be given; this method to be an optional remedy alternative with a bill of discovery in equity);
Vermont: Gen. L. 1917, § 2044 ("Supreme, county, municipal and city courts may, in the trial of actions at law, on motion and due notice thereof given, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue or relative to the action, where they might be compelled to produce the same by the ordinary rules and proceedings in chancery, and if the party fails to comply with the order, the court may render judgment against such party by nonsuit or default. When an action is pending in court against a person, as cashier, director or other officer of a bank, for a violation of the provisions of the general banking laws of this state, or on a bond for the performance of his duties as cashier, director or other officer of a bank, such court may compel the production of the books, papers and records of the bank, upon trial, by service of a subpœna 'duces tecum' on the officers of the bank having the same in charge"); St. 1919, Apr. 3, No. 126, amending Gen. L. §§ 4951–4953 (production of documents by corporation);
Washington: R. & B. Code 1909, § 1262 (like Cal. C. C. P. § 1000; but defining the material as "any book, document or paper");
West Virginia: Code 1914, c. 130, § 43 (upon affidavit by a party "that a particular book of accounts or other writing or paper is important for him to have in the trial of his cause," a subpœna *d. t.* may issue upon "any party to the action," to produce the document before the court to "be used as evidence on the trial"; and unless the opponent can prove that he has not control of the document or that it is "such as should not be used as evidence on the trial," he may be attached, and judgment of default or nonsuit may be given);
Wisconsin: Stats. 1919, § 4182*a* (special regulations for insurance companies' records); § 4183 (like N. D. Comp. L. § 7861); Circuit Court Rule 18 under § 4183 (application may be made by either party for documents "which may be necessary to enable the applicant to frame his complaint answer or reply, as the case may be, or which shall be material to any application made by him for any provisional remedy"; or by either party, after issue joined, for documents in the opponent's "possession or control, on which his action or defense is founded or which may be necessary to enable the party applying therefor to prepare for trial"; on failure without excuse to comply, judgment may be given after striking out the complaint reply or answer);
Wyoming: Comp. St. 1920, §§ 5855–5858 (like Oh. Gen. C. Ann. §§ 11551–11554).

The rulings interpreting these statutes will not be given here (except upon some general questions ensuing), because they depend so much upon the special wording of the local statute, and because they cannot be fully understood without examining the orthodox chancery rules, which are without the present purview. The annotations to the above collections of statutes contain in most instances the relevant rulings in the respective jurisdictions.

and third, the questions were (1) whether the discovery-process of Chancery had been transferred to the common-law Courts, so as to grant or enlarge the right of inspection before trial; and (2) if it had been thus transferred, whether the discovery-process itself had been enlarged, so as to include even more than had been obtainable in equity, *i. e.* to include inspection of the adversary's own documentary evidence.

These questions depended in part upon the words of the statutes and in part upon the supposed objects of the reform; and upon the latter consideration it is relevant to remember that at the same time as these statutes, or just previously to them, the opponent's privilege to withhold his own testimony at the trial (*post*, § 2218) had almost everywhere been abolished.

§ 1859*a*. **Same: Civil Opponent's Documents; (I) Oyer Extended.** One of the recommendations of the Practice Commissioners in England in 1831 [1] was that the principle of oyer be extended to include all documents pleaded; and the result, though long-deferred, of this recommendation was the abolition, in 1852, of profert as a requirement and the implied retention and enlargement of oyer.[2] This implication the Courts confirmed.[3] In the United States, a few statutes have expressly made a similar enlargement.[4]

§ 1859*a*. [1] Quoted *ante*, § 1858, par. 1.

[2] St. 15 & 16 Vict. c. 76, §§ 55, 56 (the terms are quoted in the next note).

[3] 1860, Penarth Harbour D. & R. Co. v. Cardiff W. Co., 7 C. B. N. S. 816 (Willes, J.: "The 55th section, which abolishes profert and oyer, is not the material one, but the 56th, which provides that 'a party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material'; . . . that gives him the right to set out any document mentioned or referred to in his opponent's pleading, whether under seal or not, and by necessary implication it gives him a right to apply to the Court for inspection and a copy, in order to enable himself to do so"; Williams, J.: "I think we are bound to take care that a party shall not incidentally be prejudiced by a provision which has 'diverso intuitu,' by abolishing profert, deprived him of that advantage"; but the majority did not desire that the inspection could extend beyond sealed instruments; in 1852, Lord Campbell had said 'obiter' in Doe v. Roe, 1 E. & B. 279, 285, that inspection could always be obtained "where an action is brought on an instrument"); 1860, Price v. Harrison, 8 C. B. N. S. 617, 635 (Williams, J.: "It may now be considered as fully established in all the courts that the right to inspect [in analogy to oyer] extends to any writing, whether under seal or not, which is relied on by the other side as the foundation of his claim or defence").

[4] *Alabama:* Code 1907, § 5326 (no profert is required; but "at any time previous to trial the defendant may have inspection of the bond or other instrument sued on, upon notice to the attorney of the party"); *Florida:* Rev. Gen. St. 1919, § 2626 (like St. 15 & 16 Vict. c. 76, § 55, abolishing profert and oyer, but entitling the opponent to set out the document in his pleading); *Illinois:* Rev. St. 1874, c. 110, § 20 ("It shall not be necessary in any pleading to make profert of the instrument alleged; but in any action or defence upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may have oyer thereof and proceed thereon in the same manner as if profert had been properly made according to the common law"); 1820, Mason v. Buckmaster, Breese 27 (under the early statute, profert was not necessary for a note sued on, since the Court on plea of oyer could order production); 1894, Lester v. People, 150 Ill. 408, 417, 23 N. E. 387, 37 N. E. 1004 (the statute does not apply to documents used as evidence only); St. 1907, June 3, p. 443, § 34 (reënacts the foregoing c. 110, § 20); *Massachusetts:* Gen. L. 1920, c. 231, § 7 ("Written instruments" shall be declared on, except insurance policies, by setting out a copy or the part relied on, or the legal effect; "if the whole contract is not set out, a copy or the original, as the Court may require, shall be filed upon motion of the defendant," and the copy may be made a part of the record as if oyer had been granted; "no profert or excuse therefor need be inserted in a declaration"); ibid. c. 231, § 32 (similar for instruments in an answer or subsequent pleading); *Virginia:* Code 1919, § 6082 ("It shall not be necessary . . . to make profert of any deed, letters testamentary, or commission of administration; but a defendant may have

§ 1859*b*. **Same: (II) Adoption of Chancery Rule; (1) Time of Disclosure.** In *England* the statutes which purported to deal with these practices were passed as a result of the general agitation for reform headed by Lord Brougham and Lord Denman. They had been recommended by the Practice Commissioners in a cautious way, as early as 1830; but they were not enacted until 1851 and 1854.

In the *United States* the earliest statute seems to have been that of the Federal Congress in 1789, followed by Pennsylvania, in 1798, and this closely by Georgia, in 1799. But the movement for revision and codification in New York, a quarter of a century later, seems to have been the signal for a general progress, or at least to have attracted more attention and to have furnished more frequently (in the statute of 1828) a model for adaptation than the earlier statutes for which Congress and the States of Pennsylvania and Georgia are entitled to credit.

In applying these statutes, several distinct questions of principle (as already noted) are presented: (1) first, whether the Chancery process of inspection before trial was transferred to common-law Courts.

(1) In the great majority of these statutes, their express terms make it clear that in common-law proceedings a mode has been sanctioned for obtaining inspection and copy *before trial.*

But in those statutes of which the *Federal law* is the type,[1] the enactment does no more, in form, than nullify the opponent's common-law privilege (*post*, § 2219) of withholding in general his documentary evidence *at the trial*, *i.e.* it merely authorizes the Court to "require the parties to produce books or writings in their possession." Thus the doubt arises whether this provision was intended not only to take away the above privilege *at the trial*, but also to require the furnishing *before trial* of an opportunity of inspection and copying. The argument against the larger view of the statute's intention has been thus phrased:

1853, CURTIS, J., in *Iasigi* v. *Brown*, 1 Curt. 401: "By the common law, a notice to produce a paper merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. . . . I think the Court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand, whether a paper was pertinent to the issue, and whether it was so connected with the case,

oyer in like manner as if profert were made"); *West Virginia:* Code 1914, c. 125, § 33 (like Va. Code, § 6082); 1905, Riley *v.* Yost, 58 W. Va. 213, 52 S. E. 40.

The following statute seems to belong here: *Miss.* Code 1906, § 735, Hem. § 518 (for "any writing of which profert is made or ought to be made," no evidence shall be admitted unless a copy is annexed to or filed with the pleading).

In *Tennessee*, it may be assumed that oyer survives: Shannon's Code 1916, § 4608 ("Profert shall be required as heretofore").

§ 1859*b*. [1] Including those of Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Illinois, and Pennsylvania.

that a Court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen."

That this illiberal and unprogressive view is unsound is sufficiently indicated in the following passages:

1895, SIMONTON, J., in *Lucker* v. *Phœnix Assurance Co.*, 67 Fed. 18: "It seems to be a narrow construction of § 724 to limit its operation to the actual trial. Its purpose clearly is to provide a substitute for a bill of discovery and to secure at law the purposes which such a bill would subserve; all the cases recognize this. On a bill for discovery, necessarily the facts sought would be discovered before trial. Besides this, the section says that this order for the production of papers can be made 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery'; the proceedings in chancery require the deposit of the papers called for with the clerk, who upon notice produces them in court or before the examiner. There is another point of view of this matter. The object of a motion of this character is to enable a party, in advance of the submission of the issue, to ascertain the strength or weakness of his case. An inspection of the papers may end the case. It is better to reach this result in this short way than in the middle of a trial."

1900, BRADFORD, J., in *Blocde Co.* v. *Bancroft Co.*, 98 Fed. 175, 182: "No reason is perceived why a Court of law after issue joined in an action pending therein should have greater difficulty in determining the pertinency of evidence contained in documents of which production before trial is sought than a Court of equity in deciding on the propriety of compelling discovery or production of similar documents for inspection before trial in aid of the plaintiff's or defendant's case in an action at law. To adopt the narrower construction of § 724 on the ground that a Court of law cannot well ascertain after issue joined but before trial the pertinency of the contents of books or writings would practically involve condemnation of the long established and beneficial practice in chancery of awarding discovery or production of documents in aid of an action at law. . . . It is, and was at and prior to the time of the passage of the Judiciary Act, within the settled jurisdiction of chancery and a usual practice to order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein and desiring to use the same in preparing himself for trial. It must be assumed that Congress in passing the Judiciary Act was aware that the 'circumstances' under which production might be compelled in chancery embraced cases where the purpose of the party applying was to inspect, examine, and take copies of the books or writings before the trial of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the Court in actions at law to order production for inspection, after issue joined, in all cases and under all circumstances where it might have been ordered in chancery in aid of parties to such actions, and that this Court sitting as a Court of law can in such actions under pain of nonsuit or default enforce the production of books or writings to the same extent and for the same purposes as when sitting as a Court of equity and compelling production in aid of such actions. Unless the terms 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery' are to be wrested from their natural meaning, it is difficult to perceive that production before trial is not equally with production at the trial within the scope of the provision. There is no sufficient warrant for an assumption that Congress intended that production of books and writings for inspection should be had only at the trial. Such a practice would in many instances be inconvenient, dilatory, and expensive, with nothing to justify it, leading to postponements to allow time for inspection and calculated to embarrass or defeat the due administration of justice."

Such, was the view taken in the greater number of Federal circuits;[2] but the illiberal view, after long conflict of rulings in the intermediate courts, was finally sanctioned by the Federal Supreme Court.[3]

In some of the other jurisdictions having statutes of similar form the liberal view has been judicially adopted, *i.e.* that a mode of obtaining inspection and copy before trial is provided in them.[4]

§ 1859c. **Same: Statutory Rule; (2) Opponent's Own Case not Disclosable.** Supposing the statutory process to have provided for inspection and copy before trial, the question next arises whether, as regards the *class of documents* obtainable, the scope of the process is merely coextensive with the equitable bill of discovery or is larger than that. Did the statute not only supply to common-law Courts a speedy mode of doing what could have been done by applying to Chancery and thus merely enlarge the scope of the common-law motion (*ante*, § 1858) to equal that of the chancery bill, but also enlarge the statutory process beyond that of the chancery bill? The question is one of vital principle, since the chancery bill of discovery, as already noticed (*ante*, § 1857), did not presume to doubt the general common-law doctrine that there is no right of inspection of the *adversary's own documentary evidence*. Was an advance in this respect intended to be made by the statute, and was the enlightened step (*ante*, § 1847) intended to be taken of conceding the right of prior inspection and copy of even the adversary's own documentary evidence?

On the one hand, some of the statutes make expressly a negative answer, in that they declare the inspection obtainable "under the circumstances

[2] 1879, Choate, J., in U. S. *v.* Hutton, 10 Ben. 268; 1895, Lucker *v.* Phœnix Assur. Co., 67 Fed. 18 (reviewing the conflict of rulings; quoted *supra*); 1898, Ryder *v.* Bateman, 93 Fed. 31, Hammond, J.: 1900, Bloede Co. *v.* Bancroft Co., 98 Fed. 175 (quoted *supra*); 1902, Gray *v.* Schneider, C. C., 119 Fed. 474.

[3] *Accord:* 1896, U. S. *v.* National Lead Co., 75 Fed. 94 (going upon the strict sense of the words of the statute, "on the trial"); 1907, Cassatt *v.* Mitchell C. & C. Co., C. C. A., 150 Fed. 32, 39 (careful but unconvincing opinion by Lanning, J.; Buffington, J., partly dissenting); 1907, Webster Coal & C. Co. *v.* Cassatt, 207 U. S. 181, 28 Sup. 108 (reversing Cassatt *v.* Mitchell C. & C. Co., *supra*, but on another point); 1911, Carpenter *v.* Winn, 221 U. S. 533, 31 Sup. 683 (commented on in Ill. L. Rev. VI, 266); 1916, General Film Co. *v.* Sampliner, 6th C. C. A., 232 Fed. 95 (Carpenter *v.* Winn followed).

[4] *Ga.* 1854, Faircloth *v.* Jordan, 15 Ga. 511, 515; *Ill.* 1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (Lester *v.* People, *infra*, repudiated; the power is to require production, "whether before the trial, for the purpose of preparing for the same, or at the trial, to be used as evidence"; "Sect. 9 was intended in actions at law to be substitute for the bill of discovery"); *N. H.* 1917, Lacoss *v.* Lebanon, 78 N. H. 413, 101 Atl. 364 (personal injury; the power to compel disclosure of documents by a party *at* the trial implies also, without express statutory provision, the power to require discovery *before* trial; rational opinion by Young, J.); *Pa.* 1837, Arrott *v.* Pratt, 2 Whart. 565.

Contra: Ill. 1894, Lester *v.* People, 150 Ill. 408, 419, 23 N. E. 387, 37 N. E. 1004 (the statute does not authorize a compulsory submission to inspection by the opponent before trial in preparation therefor); *Pa.* 1890, Raub *v.* Van Horn, 133 Pa. 573, 574, 19 Atl. 704 ("uniform practice under the Act" recognizes no right to inspection before trial; such inspection is therefore confined to the common-law doctrine as to "parties having a common interest in the instrument"; the opinion does not give due consideration to the authorities); *Wis.* 1919, Cousins *v.* Schroeder, 169 Wis. 438, 172 N. W. 953 (applying Stats. § 4096, and following Carpenter *v.* Winn, U. S., *supra*).

Of course, the common-law practice (*ante*, § 1858) remains unless superseded by the statute: 1851, Bluck *v.* Gompertz, 7 Exch. 67 (action on a guarantee as to bills of exchange; inspection allowed); 1890, Raub *v.* Van Horn, *supra*.

determined by the ordinary rules of proceeding in chancery."[1] On the other hand, some statutes make it clear that the scope of a chancery bill was not to be the limit of the statutory process.[2] There are, however, also certain statutes which either contain no significant words of definition, or use a general phrase describing the documents as "pertinent to the issue" or "relating to the merits of the action or defence" or "relating to any matter in question." Under such statutes it is easy to see that a progressive and enlightened view (*ante*, § 1847), discarding the sportsman's theory of litigation and obliging the adversary in ordinary cases to disclose his documentary evidence, might justly have been taken in the application of the statutory process.[3] But it is regrettable to notice that this has rarely been done; the instincts of professional technicality and conservatism have been too strong, and the limitations of the orthodox bill of discovery have been perpetuated.[4] That this has resulted, in many instances, in doing violence to the broad language of the statutes is plain enough; whether it is also a disobedience to the

§ 1859c. [1] Such, for example, is the Federal statute, and such its necessary application: 1806, Hylton's Lessee *v.* Brown, 1 Wash. C. C. 298, 344; 1818, Bas *v.* Steele, 3 Wash. C. C. 381, 386; 1885, Boyd *v.* U. S., 116 U. S. 616, 631, 6 Sup. 524; 1894, Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. 46; 1898, Ryder *v.* Bateman, 93 Fed. 31; 1916, Wolcott *v.* National Electric S. Co., D. C. Mass., 235 Fed. 224 (under new Rule 58, Federal Equity Rules, 1912, the scope of discovery is no different). But the change of 1912 has been otherwise construed for interrogatories: *ante*, § 1856*b*, n. 1, and rulings cited in Mr. W. R. Lane's article cited *ante*, § 1856*a*, note 3.

So also under the original English statute of 1851: 1852, Hunt *v.* Hewitt, 7 Exch. 236; 1859, Metropolitan S. O. Co. *v.* Hawkins, 4 H. & N. 146; 1859, Shadwell *v.* Shadwell, 6 C. B. N. S. 679; 1859, London Gaslight Co. *v.* Chelsea, 6 C. B. N. S. 411; 1868, Boyd *v.* Petrie, L. R. 5 Eq. 290; 1871, Wilson *v.* Thornbury, L. R. 17 Eq. 517; 1875, Vale *v.* Oppert, L. R. 10 Ch. App. 340; 1878, Taylor *v.* Batten, L. R. 4 Q. B. D. 85; 1881, Dauvillier *v.* Myers, L. R. 17 Ch. D. 346.

[2] As, for example, in California, by a provision that the adversary refusing inspection may be prohibited from using the document in evidence at the trial; this could apply only to documents in support of the adversary's own case.

[3] This has been done in New York, for example: Mr. J. Daly, in The Brief, vol. II, p. 308, quoted *supra*, § 1856; so, too, now in Massachusetts and elsewhere: 1912, Looney *v.* Saltonstall, 212 Mass. 69, 98 N. E. 698 (*semble*, under St. 1909, c. 225, quoted *ante*, § 1856*a*, the discovery is not limited to the party's own case); 1918, Fox *v.* Derrickson, 7 Boyce Del. 129, 104 Atl. 155 (sale of tomatoes; the discovery includes not merely papers constituting the cause of action, but "all documents relating to the merits of the case"); 1917, Lacoss *v.* Lebanon, 78 N. H. 413, 101 Atl. 364 (personal injury; photograph of machinery made by defendant, required to be discovered; that it evidenced facts also involved in the defendant's case, held not to prevent discovery; P. S. 1891, c. 224, §§ 13, 14, distinguishing between a deposition and a party's discovery, explained).

[4] Such has been the interpretation in *England*, even under the unqualified terms of the Rules of 1883: 1881, Bewicke *v.* Graham, L. R. 7 Q. B. D. 400; 1883, Attorney-General *v.* Emerson, L. R. 10 Q. B. D. 191; 1883, Kearsley *v.* Philips, L. R. 10 Q. B. D. 465; 1883, Re Pickering, L. R. 25 Ch. D. 247; 1893, Lewis *v.* Londesborough, 2 Q. B. 191; 1895, South Staff. T. Co. *v.* Ebbsmith, 2 Q. B. 669; 1899, Attorney-General *v.* Newcastle-upon-Tyne Co., 2 Q. B. 478 (documents which impeach the defendant's case, though they do not support the plaintiff's case, are privileged; precedents examined); 1906, Nelson & Sons *v.* Nelson Line, 2 K. B. 217 (discovery from a nominal plaintiff); 1920, O'Rourke *v.* Darbishire, A. C. 581.

So in *Canada:* 1872, Stovel *v.* Coles, 4 Ont. Ch. C. 9; 1910, Von Ferber *v.* Enright, 19 Man. 383 (a party is still "not entitled to discovery of the evidence which relates exclusively to the case of the opposite party").

So also in several of the *State Courts:* 1894, Lester *v.* People, 150 Ill. 408, 418, 23 N. E. 387, 37 N. E. 1004; 1921, State *v.* Minneapolis Cold Storage Co., — Minn. —, 184 N. W. 854 (delinquent taxes); 1832, Townsend *v.* Lawrence, 9 Wend. N. Y. 458 ("the object of the statute was to substitute the rule of court in place of a bill of discovery"); 1893, Arnold *v.* Pawtuxet V. W. Co., 18 R. I. 189, 194, 26 Atl. 55.

intended wishes of the Legislature is a matter for mere speculation; but in any event these Courts have lost an easy opportunity to take a creditable part in effecting solid legal progress with the powerful means freely placed in their hands by the Legislature.

§ 1859*d*. **Same: Statutory Rule**; (3) **Relevancy**; **Specification of Documents**; **Opponent's Oath**; **Copies**; **Impounding**. The Chancery rule, it will be remembered, applied only to *relevant* documents, *specifically described*, and existing in the opponent's *possession or control*, and this limitation tends to be preserved under the statutory rule.[1] In Chancery, there was here much learning as to the *conclusiveness of the opponent's oath* as to the relevancy of the document and the fact of his possession.[2]

The discovery authorized by the statutes usually includes, in express words, an opportunity to make and *take a copy*, and not merely to inspect the original.[3]

§ 1859*d*. [1] *England:* 1917, The Consul Corfitzon, A. C. 550 (prize claim of condemnation of ship on the ground of contraband cargo; defining the limits of the judge's power to specify documents); *Canada:* 1918, Royal Bank *v.* Wallis, 41 D. L. R. 383, Alta. (mode of specifying contents of a ledger).

United States: 1908, Oro W. L. & P. Co. *v.* Oroville, C. C. N. D. Cal., 162 Fed. 975 (the relevancy of the documents shown must be as fully shown, under the statutory rule, as under the former Chancery practice); 1921, Burleson Mica Co. *v.* Southern Exp. Co., — N. C. —, 109 S. E. 853 (non-delivery by a bailee; plaintiff's application for inspection of papers, under Cons. St. §§ 1823, 1824, held not sufficiently specific).

But such rulings seem an unfortunate loss of an opportunity for progress; the old Chancery practice of discovery was a stench on the threshold of justice; why keep any of its nauseous elements? Compare the simple practice under a subpœna *d. t.* against a third person (*post*, § 2200).

This rule must be distinguished from the analogous questions which arise under the party's *documentary privilege* (*post*, § 2200), and the client's *privilege for documents communicated* to his attorney (*post*, § 2318).

[2] Langdell, Equity Pleading, §§ 164, 169; *England:* 1855, Adams *v.* Lloyd, 3 H. & N. 351, 361; 1891, O'Shea *v.* Wood, Prob. 237, 286; 1912, British Ass'n of Glass Bottle Mfrers. *v.* Nettlefold, A. C. 709; *Canada:* 1912, Stapley *v.* Canadian P. R. Co., Alta. S. C., 6 D. L. R. 97, 180; 1912, MacMahon *v.* Railway P. Ass. Co., Ont. H. C. J., 5 D. L. R. 423 (cross-examination of the opponent; learned opinion by Riddell, J.); *United States:* 1906, Nelson *v.* U. S., 201 U. S. 92, 26 Sup. 358; 1918, Swepston *v.* U. S., 6th C. C. A., 251 Fed. 205 (accused's "disavowal by sworn answer or otherwise is not conclusive" in proceedings for contempt); 1916, Russell *v.* Bush, 196 Ala. 309, 71 So. 397 (witness who had destroyed a letter containing some irrelevant matter, held compellable to state the entire contents for the judge's decision).

Another question arising under these statutes is the *burden of proof* where the opponent denies possession: 1908, Schlesinger *v.* Ellinger, 134 Wis. 397, 114 N. W. 825.

The primitive and childish technicality with which some Courts still handle this part of procedure may be seen in the following ruling, dated not 1414, nor 1814, but 1914: State *v.* Trimble, 254 Mo. 542, 163 S. W. 860 (appeal from an order granting discovery to plaintiff; the action was for the death of a track-watchman, said to have been killed by train No. 6 running with no headlight; the discovery asked for covered all train sheets, etc., as to all trains on that night at that place, but the discovery conceded by defendant covered only train sheets, etc., for No. 6; held that the order of the trial judge granting the plaintiff's request was "absolutely null and void," unamendable and incurable, by reason of its excessive scope; any the slightest excess in discovery-orders beyond the exact limits of the legislative authority being a Violation of the Constitution; the opinion must be read to be appreciated; here may be noted that its doctrine not only commits the absurdity of declaring civil discovery protectible under the Constitution, but humiliates the Judiciary by announcing that the Legislature in its statute on this subject "limits the authority of the Courts of this State"; if Courts had exercised more of their legitimate authority in the machinery of justice, and less of their interference in economic matters, the Nation would be better off).

[3] 1922, Re Becker, Sup. App. Div., 192 N. Y. Suppl. 754 (mayor's records; "the right of inspection includes the right to copy").

Whether the *applicant* party may *himself make the copy* from the document at the office of the producing party, or whether he is obliged to be satisfied with a copy made and furnished by the latter, is an interesting and often im-

Whether the originals may be *impounded*, in the Court's discretion, is a larger question, which involves also the practice under the ordinary process of subpœna 'duces tecum' (*post*, § 2200).

§ 1859*e*. **Same: Statutory Rule; (4) Consequences of Refusal to Disclose.** The statutes usually provide, as a means of enforcement, in case of the opponent's *refusal to allow inspection of copy* before trial, (*a*) that the judge may *direct the jury to presume* the document to be of the tenor alleged by the demandant, or may refuse to allow the opponent to prove it as a part of his own case;[1] and (*b*) that a *judgment of nonsuit* or of *default* may be entered; the latter provision being not 'per se' a penalty but merely a remedial measure.[2]

§ 1859*f*. **Third Persons' Documents.** A *bill of discovery* does not lie *against a third person not a party*, either for his testimony or for documents in his possession (*ante*, § 1858, par. 6). But in a few jurisdictions a wise regard to the due flexibility of procedure has led to the statutory authorization of such documentary discovery.[1] The same considerations

portant point of practice: 1905, Ormerod *v.* St. George's Ironworks, 1 Ch. 505 (approving the former alternative).

§ 1859*e*. [1] *Kan.* 1920, Stone *v.* Jarbalo State Bank, 107 Kan. 332, 190 Pac. 1094 (defendant's copy of a contract, demanded under C. C. P. 1915, § 7270, but not produced for inspection before trial, held properly excluded when offered by defendant at trial; informality of notice held not material; possession of document by defendant's employee held no excuse); *N. J.* 1884, Brown *v.* Farley, 38 N. J. Eq. 186, 190 (defendant refusing to produce his deed for inspection and photographing, not allowed to give it in evidence, under express statute); 1897, Flemming *v.* Lawless, 56 N. J. Eq. 138, 38 Atl. 864 (similar; the statute is "a mere declaration of a power which already existed in the Court").

[2] *Fed.* 1908, Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 342, 350, 29 Sup. 370 (anti-trust statute; constitutionality affirmed of St. 1789, § 15, Rev. St. 1878, § 724, giving power to enter judgment by default against a party refusing to obey an order to produce books or evidence; distinguishing Hovey *v.* Elliot, 167 U. S. 409, which dealt with punishment for contempt decreed without a hearing); *Ala.* 1916, Russell *v.* Bush, 196 Ala. 309, 71 So. 397 (party destroying purposely a letter called for); *Ill.* 1911, Walter Cabinet Co. *v.* Russell, 250 Ill. 416, 95 N. E. 462 (in the absence of express statutory authority, the trial Court cannot enter judgment against a claim, for non-production of documents); *Ind.* 1920, Kwiatkowski *v.* Putzhaven, 189 Ind. 119, 126 N. E. 3 (statute valid; but the party cannot be held in contempt until a judicial order has been made upon him to answer, with an opportunity to comply, subsequent to a refusal before a master or notary); *Ia.* 1907, Free *v.* Western U. Tel. Co., 135 Ia. 69, 110 N. W. 143 (method of penalizing a refusal by entering judgment, etc., considered); *Mo.* 1912, Miles *v.* Armour, 239 Mo. 438, 144 S. W. 424 (applying Rev. St. 1909, §§ 6361, 6389); *N. Dak.* 1906, Hanson *v.* Lindstrom, 15 N. D. 584, 108 N. W. 798 (plaintiff failed to supply on demand before trial a copy of a contract, for the defendant's use in preparing his answer; on the facts the statute, Rev. C. 1899, § 5644, was held not applicable); *Wash.* 1906, Lawson *v.* Black Diamond C. M. Co., 44 Wash. 26, 86 Pac. 1120 (Code & Stats. 1897, § 6047, construed in relation to ib. §§ 6009, 6113, providing for giving judgment against a party refusing to answer interrogatories discovering documents); *Wis.* 1904, Roberts *v.* Francis, 123 Wis. 78, 100 N. W. 1076 (penalty for non-production, not enforced on the facts).

§ 1859*f*. [1] ENGLAND: 1854, St. 17 & 18 Vict. c. 125, §§ 47, 48 (provides for interlocutory production of writings by witnesses on terms to be imposed by the judge); 1907, L'Amie *v.* Wilson, 2 Ir. R. 130 (applying St. 1879, 42 Vict., Bankers' Books' Evidence Act, c. 11, § 7, as to the mode of obtaining inspection of a third person's account in a bank).

CANADA: *Alta.* Rules of Court 1914, No. 385 (the Court may order a witness to produce documents on examination before trial); *B. C.* Rules of Court 1917, No. 489 (any person may be required to produce documents at any stage); *Ont.* Rules of Court 1913, No. 341 (a person on examination before trial may be ordered to produce any document which "he could be required to produce at a trial"); Rules of Court 1913, No. 350 (when a non-party possesses a document liable to production at the trial, the Court may direct "the production and inspection thereof" be-

which apply to interrogatories of discovery to a third person (*ante*, § 1856*d*) here also demand a liberal and flexible rule.

A special class of statutes, not related in origin to any of the preceding kinds, is formed by those which, in permitting the *party's use* of *copies of documents*, usually *being in a third person's possession*, require the party intending to use one to *show the copy or the original before trial* to the opponent, so that the latter may by comparison with the original protect himself against imposition. Such a provision is a genuine exception to the common-law rule against requiring disclosure of evidence before trial (*ante*, § 1845). This measure has been taken in many jurisdictions for *certified copies of recorded deeds* in general;[2] for *reports of surveyors;*[3] for copies of *abstracts of title* whose originals are in the control of some conveyancer or title-guarantor and are by statute made usable under the principle already examined,[4] and for copies of *sundry documents*.[5]

§ 1859*g*. **Criminal Cases.** At common law, no right of inspection of documents before trial was conceded to the *accused;*[1] and of course the privilege against self-crimination prevented any such concession to the *prosecution* (*post*, § 2264).

But the same considerations of fairness which led to the statutes providing for a list of witnesses to be furnished the accused (*ante*, § 1851) call also for conceding the opportunity of inspection of documents; the danger of an

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fore trial, and the preparation of a certified copy); *Yukon:* Consol. Ord. 1914, c. 48, Rule 278.

The following ruling holds such a statute to be *constitutional:* 1906, Washington Nat'l Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53 (cited *post*, § 2193, n. 3).

[2] The statutes are collected *ante*, § 1651.

[3] The statutes are collected *ante*, § 1665.

[4] The statutes are collected *ante*, § 1705.

[5] The following statutes have already been set out elsewhere, for other principles: CANADA: *Dom.* Rev. St. 1906, c. 145, Evid. Act, § 28, as amended by St. 1921, c. 18 (reasonable notice, not less than seven days, required for using certain certified copies; cited *ante*, §§ 1651, 1680, 1681); *Alta.* St. 1910, 2d sess., c. 3, § 50 (cited *ante*, § 1223); *B. C.* Rev. St. 1911, c. 78, § 39 (like Dom. Evid. Act, § 28); §§ 40, 42 (notice of copy of will; cited *ante*, § 1681); § 45 (notice of copies of deeds, etc.; cited *ante*, § 1651); § 46 (notice of commercial documents; cited *ante*, § 1223); *Man.* Rev. St. 1913, c. 65, § 22 (like Dom. Evid. Act, § 28); §§ 27, 28 (like Ont. Rev. St., c. 76, § 49, substituting three days, for the counter-notice); *N. B.* Consol. St. 1903, c. 127, § 35 (telegrams; cited *post*, § 2154); § 41 (incorporation-document; cited *ante*, § 1680); § 63 (registered conveyances in general; quoted *ante*, § 1225); § 69 (notice of sale under mortgage; cited *ante*, § 1225); *N. Sc.* Rev. St. 1900, c. 163, § 22 (probated wills; cited *ante*, § 1681); *Ont.* Rev. St. 1914, c. 76, § 43 (probate of wills; cited *ante*, § 1681); § 47 (registered documents; cited *ante*, § 1225); § 49 (commercial documents; cited *ante*, § 1223); *P. E. I.* St. 1889, § 43 (cited *ante*, § 1225); § 48 (cited *ante*, § 1223); *Sask.* Rev. St. 1920, c. 44, § 26 (cited *ante*, § 1223); *Yukon:* Consol. Ord. 1914, c. 30, § 23 (probated wills; cited *ante*, § 1681).

UNITED STATES: *Mass.* Gen. L. 1920, c. 152, § 9 (physician's report of industrial accidents).

§ 1859*g*. [1] 1792, R. *v.* Holland, 4 T. R. 690 ("the rule for inspection is confined to civil cases, and those where the party applying is interested in the papers"); 1911, Com. *v.* Jordan, 207 Mass. 259, 93 N. E. 809 (cited *post*, § 1863).

In Farnham *v.* Colman, 19 S. D. 342, 103 N. W. 161 (1905), where the defendant, charged with murder, asked mandamus against the committing magistrate to compel the State's attorney to produce a written dying declaration, which he had refused to produce on subpœna, the refusal of the writ was placed on other grounds.

Compare the practice as to inspection of *chattels*, etc. (*post*, § 1863), and inspection of testimony before the *grand jury* or *magistrate* (*ante*, § 1850); also the practice as to compulsory production by the prosecution *at the trial* (*post*, § 2224).

unscrupulous tampering with documents, and the possibility of manufacturing a refutation, are here far less than for witnesses:

1888, CARPENTER, J., in *Daly* v. *Dimock*, 55 Conn. 579, 589 (granting an order for the inspection of testimony at the coroner's inquest): "The argument that the writ ought not to be granted because it is the indicted party who asks for it, is not a very weighty one. The law presumes every man to be innocent until the contrary appears; and its policy is to give every man accused of crime a reasonable opportunity to prepare and present to a jury his defense. The State does not desire to procure convictions by any unfair concealment or surprise. It concerns itself quite as much in having the innocent acquitted as in having the guilty convicted. While it affords every reasonable facility for the prosecution of offenders, it is no less solicitous to give to every accused person a fair and reasonable opportunity to make his defense."

Thus far, however, this just concession has been made in only a few jurisdictions.[2]

§ 1860. **Same: Other Rules affecting Production of Documents, Discriminated.** These rules for compelling prior inspection and opportunity for copying or for excluding a document unless prior inspection and copying has been allowed must be distinguished from other rules, bearing upon the same situation and sometimes applied in the same statute or decision.

(1) At common law the party had a *privilege not to* give testimony or *furnish documents*, either before or during trial. The above-mentioned statutes have of course equally struck away this privilege so far as it affects the production at the trial (*post*, § 2219).

(2) At common law, the *original of a document must be produced*, or its non-production excused, by the party desiring to use it. (*a*) If the party, in proving his own case, *notified* the opponent possessing a document to *produce* it *at the trial*, and the opponent refused to do so, the party was thereupon allowed to use a copy, because the original had proved unavailable for him (*ante*, § 1200). (*b*) In that situation, if the party was thus forced to use a copy, the *opponent-possessor* was in consequence, by way of penalty, *forbidden* thereafter to *use the original in contradiction* of the tenor of the copy (*ante*, § 1210). This prohibition, it will be seen, affected only the case where *at the trial* production was refused and the party demanding, in proving his case, used a copy. But some of the discovery-statutes just examined equally forbid the opponent's *proof of his own case* by an original document which he has refused either to show *before trial* or to produce at the trial (*ante*, § 1859*d*).

(3) At common law, a party's *non-production at the trial* of a relevant document was always regarded as allowing the *inference*, under certain conditions, that its *tenor was unfavorable* to him and was what his opponent claimed it to be (*ante*, § 291). The principle has often been applied to the

[2] 1910, State *v.* Hinkley, 81 Kan. 838, 106 Pac. 1088 (applying Cr. C. § 209, Gen. St. 1901, § 5651); 1917, U. S. *v.* Riera, 10 P. R. 186 (bringing lottery-tickets into the U. S.; motion by accused to have inspection of the numbers of the tickets, so as to obtain evidence from Spain; denied, because no necessity was shown).

present situation, by the statutes noted in § 1859; *i.e.* in case of a refusal to allow inspection or furnish a copy before trial, the judge may direct the jury to presume it to be the tenor alleged by the party demanding; this measure being suitable for a document forming part of the demanding party's case and desired by him to be proved (*ante*, § 1859*d*).

(4) The party-possessor's *non-production* or non-exhibition, on notice, whether before or at the trial, by some statutes authorizes the Court to direct a judgment of *nonsuit* or *default* respectively (*ante*, § 1859*d*).

(5) The party-possessor's *non-production* or non-exhibition, on notice, would also, after order by the Court, be a *contempt*, and this the statutes sometimes expressly provide.

(6) The opponent's *failure by affidavit to deny the execution* of a document is usually, by statute, made equivalent to an *admission of its genuineness*, so that he cannot at the trial dispute its genuineness. This rule (*post*, § 2595) is in form a rule of pleading; yet in policy it rests in part on the consideration that in fairness the opponent should give prior notice of his intention to dispute execution; it thus works in the spirit of an exception to the general common-law principle dealt with in the foregoing sections.

(7) The statutes authorizing inspection are not intended to override any of the settled *privileges* for withholding evidence (except the general privilege of a party-opponent as such). Hence, any order of inspection must be subject to an exception for documents falling within one of the privileges. The privileges most likely to be invoked are those for *trade-secrets* (*post*, § 2213), *official secrets* (*post*, § 2213), *marital communications* (*post*, § 2336). and *client-and-attorney communications* (*post*, § 2307).

§ 1861. **Document shown to Opponent at Trial; Opponent's Inspection as making it Evidence.** For the reasons of policy already considered (*ante*, § 1847, par. 4), the general rule suffers a virtual exception, well recognized at common law, where a party, having a document *at the trial*, uses it for any evidential purpose. Here it is no hardship to him, and it is a decided dictate of fairness, to require him to *submit it for the opponent's inspection*, even though the former has not yet technically and finally put it in evidence.

(*a*) In the first place, this rule applies where the party's witness employs a writing *in aid of recollection*, whether as a record of past recollection or merely to stimulate present recollection; in this aspect it has already been considered (*ante*, §§ 753, 762).

(*b*) In the second place, when a writing is *offered to a witness* for the preliminary purpose of testifying to its *execution* or *identity*, with the object of not actually offering it in evidence until a later stage in the case, fairness requires that the opponent should see it then or before the witness leaves the stand, in order that the opponent may cross-examine as to the writing; for otherwise the writing might not be actually offered until after the witness had left the court-room and become unavailable for the purpose of cross-

examination. This application of the rule is in the United States generally accepted.[1]

(*c*) In the third place, whenever a document is *finally put in evidence*, it would seem that the general principle requiring the production of the original signifies a production for *inspection by the opponent*, and not merely by the jury.[2]

From the present question is to be distinguished the rule of some Courts (dealt with *post*, § 2125) that where a party has voluntarily produced at the trial his own document, at the request and for the use of the opponent, the opponent's *mere inspection of the document*, without using it, *makes the whole of it admissible* in the first party's favor. This rule is in form a rule of Completeness, and must therefore be considered under that head. But the motive for its adoption is only to be explained by remembering the general common-law rule

§ 1861. [1] ENGLAND: 1849, Collier *v.* Nokes, 2 C. & K. 1012 (the defendant, on cross-examination, having obtained from the plaintiff's witness testimony to the execution of a lease and an inventory and the handwriting of some letters, the plaintiff claimed the right to see them; Wilde, C. J., said: "My own opinion is that if the handwriting, or any of the contents of any paper shown to a witness, is deposed to, the opposite counsel is entitled to see it, otherwise he perhaps would not be able to shape his line of conduct; he would not be so entitled if the witness merely deposed to the nature of the paper, or to its having been produced on a given occasion, or any similar thing"; but he deferred to the opposite ruling of Parke, B.; the distinction taken by Wilde, C. J., seems untenable).

UNITED STATES: *Federal:* 1916, Prdjun *v.* U. S., 6th C. C. A., 237 Fed. 799 (here a letter in a foreign language; the failure to let the opponent hear it translated by the interpreter before it was read aloud by the interpreter, held not material); *Alabama:* 1890, Richmond & D. R. Co. *v.* Jones, 92 Ala. 218, 226, 9 So. 276 (document said to have an attesting witness, shown to another witness to prove his execution; refusal to show beforehand to opposing counsel, held improper, because it deprived him of the opportunity to require the attesting witness to be first called); *Alaska:* Comp. L. 1913, § 1504 (like Or. Laws 1920, § 866); *Arkansas:* Dig. 1919, § 4194 ("Whenever a writing is shown to a witness, it may be inspected by the adverse party"); *California:* C. C. P. 1872, § 2054 ("Whenever a writing is shown to a witness, it may be inspected by the opposite party, and no question must be put to the witness concerning a writing until it has been so shown to him"); 1877, People *v.* Stevens, 52 Cal. 457 (after a witness had identified papers, they were not read nor offered in evidence; held, that the opponent had the right to inspect before cross-examination, or at least before the close of testimony); *Idaho:* Comp. St. 1919, § 8041 (like Cal. C. C. P. § 2054, first clause only); *Louisiana:* 1905, State *v.* Rogers, 115 La. 164, 38 So. 952 (here the ruling, that the opponent is entitled to see a contradictory letter before the witness answers whether it is his, seems overstrict); *Maryland:* 1913, Eckels & S. I. M. Co. *v.* Cornell E. Co., 119 Md. 107, 86 Atl. 38 (rule held not applicable to a printed article used improperly on cross-examination of an expert under § 1700, *ante*); *Mississippi:* 1847, Anderson *v.* Root, 8 Sm. & M. 362; *Montana:* Rev. C. 1921, § 10671 (like Cal. C. C. P. § 2054); *Oregon:* Laws 1920, § 866 (like Cal. C. C. P. § 2054); *Philippine Isl.* C. C. P. 1901, § 345 (like first two clauses of Cal. C. C. P. § 2054); *Porto Rico:* Rev. St. & C. 1911, § 1529 (like Cal. C. C. P. § 2054).

Contra: Eng. 1824, Sinclair *v.* Stevenson, 1 C. & P. 582, 583 (per Best, C. J., citing no authority); 1830, Grindall *v.* Grindall, K. B., Butterworth's Rep. 293 (Tenterden, L. C. J.: "When it is read is your time to look at it; I cannot tell whether it may be read or no"); 1834, Russell *v.* Rider, 6 C. & P. 416, *semble*, Bosanquet, J.; *U. S.* 1891, Calderon *v.* O'Donahue, 47 Fed. 39 (mere showing for identification does not give the right to inspection; unless the document is offered in evidence or its contents are mentioned other than for identification; this is apparently unsound); 1914, Com. *v.* Dorr, 216 Mass. 314, 103 N. E. 902 (in the trial Court's discretion).

For the *time of reading the document to the jury*, see *post*, §§ 1883, 1884.

In *chancery practice*, the documents produced at the hearing are to be available for the opponent's inspection; 1874, Hilyard *v.* Harrison, 37 N. J. L. 170 (for documents offered in evidence and thus under control of Court, an opportunity for inspection will be ordered in open Court or before an officer or the party-possessor; but not delivery to the opponent).

[2] Compare the rule in The Queen's Case, *ante*, §§ 1185, 1261.

now under consideration, namely, that the opponent was not of right entitled to any prior warning of the tenor of the first party's evidence; so that, if he requested the production of a document to aid his own case, and if he was allowed to peruse it for selecting such parts, he might request it upon that pretext and then decline to use any part, and yet would thus have obtained some information as to his opponent's documents. This appeared (to the Courts adopting the above rule) as a surreptitious evasion of the common-law principle which favored keeping him in total ignorance; and hence they strove indirectly to prevent this evasion by penalizing the opponent, *i. e.* by allowing him to accept inspection at the risk of making the whole of the document admissible against him, even though it would otherwise have been inadmissible. This measure, though illiberal, was thus at any rate logical; but it never obtained a general vogue.

4. Premises, Chattels, and Bodily Members

§ 1862. **Inspection before Trial**; (1) **Civil Cases.** (*a*) So far as concerned *chattels* and *premises* in his possession or control, the adversary in *common-law actions*, like the true gamester that the law encouraged him to be, held safely the trump cards of the situation, free from any legal liability of disclosure before trial; in this respect there was not recognized even the limited right of inspection (*ante*, § 1858) which after the days of Lord Mansfield had been conceded for documentary evidence.[1] But in *chancery*, under the same whole-some principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession (*ante*, §§ 1856, 1857), the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it. Whether the precise limitations of the bill of discovery for documents prevailed, namely, the limitation to facts supporting the applicant's own case (*ante*, § 1857), is not clear. But the general power to require the adversary to permit inspection was settled:

1819, *Kynaston* v. *East India Co.*, 3 Swanst. 248 (bill to recover tithes; inspection of defendant's premises by plaintiff's witnesses demanded, to discover the value thereof). Messrs. *Wetherell* and *Palmer*, for the plaintiff: "The principle is that wherever, in respect of the property of one individual, a right accrues to another which cannot be measured without inspection of the subject of property, the Court is competent to compel the proprietor to permit that inspection, as indispensable to the purposes of justice." L. C. ELDON, approving this: "Though novel in circumstances, this case is not novel in principle. The purpose of inspection is to inform the conscience of the Court, and witnesses appointed by it are entitled to be considered as its officers. . . . The question is, whether in such a case

§ 1862. [1] 1825, Dell *v.* Taylor, 6 Dowl. & R. 388 (inspection not allowed to plaintiff of copper-plates, delivered to defendant by plaintiff, and forming the subject of the action; "no instance is to be found in which the Court has ordered an inspection, to either party to a suit, of anything which is not the common property of both"); 1840, Turquand *v.* Guardians, 8 Dowl. Pr. 201 (action for work done on the defendant's premises; a common-law judge held to have no power to order inspection by witnesses; defendant's refusal could only be the subject of comment to the jury).

the Court must not have the means of ascertaining by the inspection of witnesses the nature of the premises, in order to ascertain their value; and whether the law meant to leave it thus, that the defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value, but on the other hand the plaintiff was to be in such circumstances that he could examine no witnesses who knew with precision the value of the premises. . . . It is admitted that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case where, on the suggestion that a machine used by the defendant was an infringement of a patent, the Court ordered the defendant to allow an entry into his premises for the purpose of ascertaining by inspection whether the machine was an infringement. . . . If without this proceeding the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is that, on principle, it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom order is made."

1902, CHASE, J., in *Reynolds* v. *Burgess S. F. Co.*, 71 N. H. 332, 51 Atl. 1075 (allowing a bill of discovery of a strap said to have caused an injury): "Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law, — points that are hereinafter considered, — it is certain that the defendants, through their officers and agents, might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made; in short, all the facts within their knowledge, information, or belief tending to show that it was defective. If they had in their possession a plan of the strap or of the broken pieces, they might be compelled to produce it for examination by the plaintiff. Why, then, may they not be compelled to produce the broken pieces themselves? [1] Two reasons are suggested: One — positive, and, if well founded, substantial — that the defendants' right to possess and control the property, growing out of their ownership of it, cannot be infringed in this way; and the other — negative, and not applying to the merits of the question — that there is no precedent for a discovery and inspection of such property. It must be admitted that the defendants' right of property in the broken strap will be interfered with to some extent if they are required to produce it, and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books for inspection. The rights of the defendants arising from the ownership of the strap are no more sacred than would be their rights arising from the ownership of a plan of the strap, if they had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendants. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitableness or unsuitableness for the office it was to perform than any possible description or plan of it could afford, and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan. . . . [2] The defendants' second objection is because the discovery and inspection are sought for the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of the strap, the manner of its construction, or the character of the materials from which it was made. The defendants have ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right — if she

have one — without having the opportunity. . . . [3] The defendants place much reliance upon their third point, viz., that the equitable remedy for discovery cannot be invoked in aid of an action at law for a personal tort. They do not question, and, in view of the authorities, cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc. But they say that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort, because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. . . . If the absence of authorities is entitled to any weight, it is, under the circumstances, very slight. Cases for personal torts arising from the action of the defendant, — wilful torts, so to speak, — in which the defendant could make discovery without incriminating himself, must, from the nature of the case, be very rare. It is possible that there have been none excepting Macaulay *v.* Shackell, and cases of like nature that have been decided in accordance therewith without again raising the question. Cases for negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, largely through the agency of Lord Campbell (17 & 18 Vict. c. 125), by which, among other things, it was provided that either party to a civil action in the superior courts 'shall be at liberty to apply to the court or 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.' . . . In passing, it may be remarked that if the act and the reason of its enactment do not show that its author understood that Courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of bill of discovery in aid of actions at law for negligence since that time. . . . If Macaulay *v.* Shackell [2] and Wilmot *v.* Maccabe [3] are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new case in specie, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable."

This power was in England exercised in ordering inspection of *mines*, and in *sundry other instances*,[4] particularly in *patent cases*.[5]

[2] 1 Bligh N. s. 96.

[3] 4 Sim. 263.

[4] 1686, Marsden *v.* Panshall, 1 Vern. 407 (bill to discover whether cloths improperly pawned by the plaintiff's factor B. were in the defendant's hands; the defendant not ad-

[5] 1815, Bovill *v.* Moore, 2 C. P. Coop. 56 (patent infringement; L. C. Eldon allowed the plaintiff "to inspect the defendant's machine and see it work"); 1816, Browne *v.* Moore, 3 Bligh 178 (infringement; inspection of plaintiff's machine allowed; ordered "that the plaintiff should put the machine into a state to work, according to the specification enrolled, etc., and permit Mr. J. M. to see it work in that state on the succeeding morning"); 1832, Russell *v.* Cowley, 1 Webster Pat. Cas. 457; Brougham, L. C. (infringement; two persons on each side having been agreed to be appointed as inspectors of the works, to give evidence, an order was made for inspection by them, "it being the object and intention of this Court to enable the said plaintiff to give such evidence . . . as will enable him to make out, if the fact be so, the infringement"); 1835, Morgan *v.* Seaward, 1 Webster Pat. Cas. 167, 169, Shadwell, V. C. (infringement; injunction refused, but account ordered, "the plaintiffs and their witnesses to be at liberty to inspect at all seasonable times, giving reasonable notice," the machinery to be made); 1856, Jones *v.* Lee, 36 Eng. L. & Eq. 558, Exch. (action on a licensee's covenant; plaintiff allowed "to go to the defendant's factory and inspect any machines he has there").

Compare the rule for names of witnesses (*ante*, § 1856*c*).

In the United States, there seem to have been few instances of a demand for it in chancery cases;[6] nor under the simplified code-procedure has there been a disposition to adopt these transferred equitable powers.[7] But by

mitting the identity of the cloths, it was ordered that the defendant "let the plaintiff, with two or more persons present, have a sight of the cloths pawned by B.," so that the plaintiff might bring an action at law); 1799, Lonsdale *v.* Curwen, 3 Bligh 168, note (bill to prevent the digging of coal by defendant in mines under the plaintiff's premises; to obtain "a perfect and complete report of the workings," the defendant was ordered to permit certain persons to inspect the mines"; the reporter adds, "The practice in courts of equity of granting orders for inspection of mines, machines, etc., is well settled"); 1804, Walker *v.* Fletcher, 3 Bligh 172 (similar to the preceding case; form of order given); 1814, Earl of Macclesfield *v.* Davis, 3 Ves. & B. 16 (jewels, etc., bequeathed to the plaintiff as heirlooms, and said to be in an iron chest in the possession of the defendant's banker, the defendant claiming a lien; on motion, L. C. Eldon allowed the plaintiffs an order to the defendant "to permit the said box with its contents to be inspected by the plaintiffs, or any person they may appoint, at all seasonable times, upon request"); 1815, Kynaston *v.* East India Co., 3 Swanst. 248 (quoted *supra*); 1821, East India Co. *v.* Kynaston, 3 Bligh 153, 157, 168 (order of the Chancellor in the preceding case affirmed by the House of Lords); 1848, Twentyman *v.* Barnes, 2 DeG. & Sm. 225 (fraudulent alteration of a document; order for experts' inspection, declined, on an undertaking by the opponent not to remove the document from the record-office); 1849, Attorney-General *v.* Chambers, 12 Beav. 159 (order of inspection of coal mines, granted); 1849, Lewis *v.* Morris, 8 Hare 97 (the plaintiff's inspection of his mine, leased to the defendant, allowed); 1860, Bennett *v.* Whitehouse, 28 Beav. 119 (trespass to a mine; the plaintiff allowed to inspect the defendant's mine); 1860, Ennor *v.* Barwell, 1 DeG. F. & J. 529 (an order to allow trenches to be cut, to ascertain a geological formation, held too extensive, but the power not doubted); 1861, Bennett *v.* Griffiths, 3 E. & E. 467, 476 (inspection of a mine; "the power to order an inspection of real or personal property has long existed in courts of equity; and we find that, as ancillary to that power, the Courts of equity have ordered the removal, where necessary, of obstructions to the inspection").

Distinguish the following: 1841, Blakesley *v.* Wheildon, 1 Hare 276 (specific performance decreed under a contract of sale of a mine reserving the power to inspect).

[6] Compare here the citations *post*, §§ 2221, 2224 (party's privilege not to disclose chattels and premises); *Federal:* 1867, Thornburgh *v.* Savage M. Co., U. S. Dist. Ct., 1 Pac. Law Mag. 267, 7 Morris Mining R. 667 (quoted *post*, § 2221; inspection of a mine, allowed); 1894, Montana Co. *v.* St. Louis M. & M. Co., 152 U. S. 160, 14 Sup. 506 (quoted *infra*, n. 9); 1907, Mutual Life Ins. Co. *v.* Griesa, C. C. Kansas, 156 Fed. 398 (bill in equity to cancel a policy of life insurance; the deceased was killed by falling from the roof of his house; the issue was whether he had taken morphine, just previously, with intent to suicide thereby, and had deliberately thrown himself from the roof to conceal the suicide; the insurer applied for an order to exhume the body of the deceased; granted, in a scholarly and sensible opinion by Smith McPherson, J.; the order directed the appointment of a pathologist to examine for the effect of the fall, and a chemist to examine for morphine; the opinion repudiates a privilege protecting from such disclosure); 1909, Griesa *v.* Mutual Life Ins. Co., 8th C. C. A., 169 Fed. 509 (same case on appeal; point not decided); *Massachusetts:* 1869, Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80, 82, 88 (mine trespass; order of inspection made, apparently by consent, but apparently sanctioned by the Court without regard to this); *Missouri:* 1917, State ex rel. American Mfg. Co. *v.* Anderson, 270 Mo. 533, 194 S. W. 268 (action pending for an unspecified cause; application by plaintiff for an order to permit plaintiff to enter defendant's premises, with witnesses, and to measure and to make photographs; held that the trial Court had inherent power, without statute, to make such an order; able opinion by Woodson, J.); *New Hampshire:* 1902, Reynolds *v.* Burgess S. F. Co., 71 N. H. 332, 51 Atl. 1075 (bill granted for discovery of the pieces of an engine-strap of the defendant, alleged to have caused death; inspection by plaintiff's witnesses and attorneys allowed; quoted *supra*); *New Jersey:* 1877, Thomas Iron Co. *v.* Allentown M. Co., 28 N. J. Eq. 77, 82 (inspection of a mine, allowed; Bennett *v.* Whitehouse, Eng., approved).

Compare also the cases cited *ante*, § 1163 (view by jury), *post*, § 2194 (subpœna 'duces tecum,' for chattels), and *post*, § 2220, (party's privilege).

[7] 1901, Sullivan *v.* Nicoulin, 113 Ia. 76, 84 N. W. 978 (services in plastering a house; right to obtain inspection of the house by plaintiff's witnesses on order of Court, not decided); 1883, Cooke *v.* Lalance G. M. Co., 3 N. Y. Civ. Proc. 332 (order for inspection of defendant's machine, on which plaintiff was injured, refused); 1910, Danahy *v.* Kellogg, 126 N. Y. Suppl. 444 (action for death in an automobile collision; the defendant asked for

statute in a few jurisdictions ample express power has been given for ordering an opportunity of inspection, not only of premises and chattels but also of bodily members.[8] The commoner instances of the application of the principle

an order to permit exhumation of the body and examination by the microscope to discover whether death resulted from heart disease independently existing; denied; "we base our decision squarely on the absence of any right or authority in the court to grant the inspection asked," *i.e.* under the Code of Civil Procedure).

See a valuable article by Charles E. Townsend, "The Possibilities of Discovery in Patent Cases; Some Recent Judicial Developments," California L. Rev., IV, 1 (1915).

[8] The following statutes apply to *premises* and *chattels* only, and should be compared with those cited *ante*, § 1163, *post*, § 2221; the statutes as to inspection of the *person's body* are placed *post*, § 2220:

ENGLAND: 1854, St. 17 & 18 Vict. c. 125, § 58 ("Either party shall be at liberty to apply to the 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," and the Court may make such order as seems fit); 1861, Bennett *v.* Griffiths, 3 E. & E. 467 (statute applied; quoted *supra*); 1883, Rules of the Supreme Court, Order 50, Rule 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 an 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"); 1893, Macalpine *v.* Calder, 1 Q. B. 545 (Order 50 applied); 1852, St. 15 & 16 Vict. c. 83, § 42 (in patent cases, inspection may be ordered); 1860, Patent Type Founding Co. *v.* Lloyd, 5 H. & N. 192 (statute applied).

CANADA: *Alta.* Rules of Court, 1914, R. 196 (like Ont. Rule 266); *British Columbia:* 1898, Esquimalt & N. R. Co. *v.* New Vancouver Coal Co., 6 Br. C. 194 (inspection of a mine allowed, under Court Rule 514); 1902, Star Mining & M. Co. *v.* White Co., 9 Br. C. 422 (similar; inspection of the plans, and copies thereof, also allowed); 1916, Seattle Construction & D. D. Co. *v.* Grant Smith & Co., 26 D. L. R. 671, B. C. (samples of the hull of a floating wharf, not directed to be taken under Rule 659, in the trial Court's discretion); *Manitoba:* R. S. 1913, c. 46, Rules 605, 891 (like Eng. St. 1854, § 58, and Order 50, Rule 3); *Newfoundland:* Consol. St. 1916, c. 83, Ord. 46, Rule 4 (like Eng. Ord. 50, Rule 3); *Nova Scotia:* Rules of Court 1919, Ord. 50, Rule 3 (like Eng. Ord. 50, Rule 3); 1896, Gray *v.* Hardman, 28 N. Sc. 235 (the judge's discretion controls; here, the inspection of a mine); *Ontario:* Rules of Court 1913, No. 266 (inspection of property before trial may be ordered for a party or his witnesses); § 370 (the judge may order the detention, inspection, etc., of property, etc., like Eng. Ord. 50, R. 3); 1899, Hills *v.* Union L. & S. Co., 19 Ont. Pr. 1 (rule not applied to order inspection of premises not in occupation of the opponent); *Prince Edward Isl.* St. 1873, c. 22, § 252 (jury's view or inspection by the party or his witnesses "of any real or personal property the inspection of which may be material to the proper determination of the question in dispute" may be ordered).

UNITED STATES: *Federal:* 1894, Montana Co. *v.* St. Louis M. & M. Co., 152 U. S. 160, 14 Sup. 506 (Montana statute held constitutional; the power "has never been denied; if it exists [for a court of equity], 'a fortiori' the State has power to provide a statutory proceeding to accomplish the same result"); *Arizona:* Rev. St. 1913, Civ. C. § 1636 (ejectment; Court may allow party "to enter upon the land in controversy and make survey thereof for the purposes of the action"); *California:* C. C. P. 1872, § 742 (in an action for "recovery of real property or for damages for an injury thereto," the judge may authorize either party to "enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein," etc.); St. 1917, May 23, p. 831, § 19*a* (workmen's compensation, etc.; commission may direct an "inspection of the premises where the injury occurred to be made"; quoted in full *ante*, § 4c); *Colorado:* Comp. St. 1921, C. C. P. § 399 (provisions for inspection of mining property in dispute); Gen. St. § 3318 (the Court may order defendant to allow the inspection of a mine, in a claim for drainage, where defendant has refused to allow plaintiff's inspection); § 3300 (same for an action involving title or right of possession of a mining claim); *Florida:* Rev. Gen. St. 1919, § 2688 ("Either party shall be at liberty to apply to the Court for a rule or order for the inspection 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"); *Hawaii:* Rev. L. 1915, § 2690 (like Fla. Rev. Gen. St. § 2688); *Idaho:* Comp. St. 1919, § 6965 (on an issue as to a mining claim, the Court may

are issues of *mining trespass, industrial accidents, title to realty,* and *insurance claims* (involving *exhumation of a corpse*).

on 3 days' notice order to permit "examination, survey, and other privileges," including removal of loose rock, etc., and work to be done); 1910, Bacon *v.* Federal M. & S. Co., 19 Ida. 136, 112 Pac. 1055 (statute applied); *Iowa:* Code 1919, § 737 (landowner adjoining coal mine may have examination and survey to ascertain encroachments); *Michigan:* Comp. L. 1915, § 13368 (actions relating to realty; on application by either party, court may direct a survey); *Montana:* Rev. C. 1921, §§ 9492–9494 (whenever it is "necessary for the ascertainment, enforcement, or protection" of a mining right, "that an inspection examination, or survey of such mine," etc., be had, the judge may order it, after three days' refusal of the possessor upon demand in writing); 1890, St. Louis M. & M. Co. *v.* Montana Co., 9 Mont. 288, 23 Pac. 510 (statute applied and held constitutional; learned opinion by Blake, C. J.); 1901, Anaconda C. M. Co. (State ex rel.) *v.* District Court, 25 Mont. 504, 65 Pac. 1020 (statute applied); 1902, Heinze (State ex rel.) *v.* District Court, 26 Mont. 416, 68 Pac. 794 (statute applied); 1902, Geyman (State ex rel.) *v.* District Court, 26 Mont. 483, 68 Pac. 861 (statute applied); 1903, Parrot S. & C. Co. (State ex rel.) *v.* District Court, 28 Mont. 528, 73 Pac. 230 (applied and held constitutional; Holloway, J., diss., on the ground that the defendant could not be compelled to use its hoists, etc., for enabling the inspection to be made); 1903, Heinze (State ex rel.) *v.* District Court, 29 Mont. 105, 74 Pac. 132 (Parrot S. & C. Co. *v.* District Court, *supra*, followed; Holloway, J., diss.); 1904, Mendenhall (State ex rel.) *v.* District Court, 29 Mont. 363, 74 Pac. 1078 (preliminary conditions for an order determined); 1904, Boston & M. C. C. & S. M. Co. (State ex rel.) *v.* District Court, 30 Mont. 206, 76 Pac. 206 (preliminary conditions for an order, determined); *New Jersey:* Comp. St. 1910, Evidence, § 30 (the Court may order a party to permit inspection by witnesses or the opponent of any premises or chattels in his control, where inspection would aid the ascertainment of truth); *New Mexico:* Annot. St. 1915, §§ 3467–3474 (mines and minerals; any party to a suit may enter the place, to measure or survey, after notice; on refusal of the party in possession to permit entry, the judge may exclude all his evidence or order judgment for the other party, or direct the sheriff to put the other party in possession for measuring or surveying); *New York:* C. P. A. 1920, § 324 ("discovery of any article or property"; quoted *ante*, § 1859); § 982 (action for realty; when a survey is necessary or expedient to enable either party to prepare his case, court may order opponent to permit entry for survey); *North Carolina:* Con. St. 1919, §§ 6929, 6930 (damage by adjacent mining operations; Court may order survey, *i. e.* examination, by a "competent disinterested surveyor or mining engineer or both"; for this purpose "there shall be given free access to the mine," and suitable transportation in the mine shall be furnished); *Ohio:* Gen. Code Ann. 1921, §§ 969, 970 (adjacent owner alleging a need for protection of his interest may have a survey of a mine made, by entry with assistants); *Rhode Island:* Gen. L. 1909, c. 292, § 20 (in actions for personal injuries the Court may require the defendant to permit the plaintiff's attorney, with or without experts, "to view and examine the place and cause of such injury" as directed by the judge); *Utah:* Comp. L. 1917, § 7251 (like Cal. C. C. P. § 742, adding in first clause, "or to quiet title or to determine adverse claims thereto"); *Vermont:* Gen. L. 1917, § 2621 ("A superior judge or the attorney general may, to prevent a failure of justice, upon the petition of the state's attorney, order an autopsy to be made in the preparation of a state cause for trial in any court, and fix the compensation therefor, not to exceed twenty-five dollars"); § 2620 ("A superior judge or the attorney general may, to prevent failure of justice, order an examination to be made by an expert or experts, either within or without the State, in the investigation of a crime supposed to have been committed within the State. Such order shall be made only on the petition of the State's attorney for the county in which the crime is supposed to have been committed, setting forth the facts because of which the order is applied for, and verified by affidavit, and shall name the expert or experts by whom the examination is to be made, and limit the expense of the examination, and such expense shall be paid in the manner provided for the payment of witness fees in state causes in the county court"); *Wisconsin:* Stats. 1919, § 3825 (where the concealment of a deceased's property is suspected, Court may compel production of documents or writings); § 4095*a* (in any civil action a party may obtain an order "for the inspection by such party or his witnesses of any real or personal property in the possession or control of an opposing party the inspection of which may be deemed material and necessary to the trial and determination of the action or proceeding"); 1913, Horlick's Malted Milk Co. *v.* Spiegel Co., 155 Wis. 201, 144 N. W. 272 (action for unfair competition; the plaintiff had obtained some evidence of the defendant's methods by buying at the defendant's store bottles in which the defendant was selling its product under the defendant's name, and the defendant asked for inspection of these bottles, etc.; allowed).

It must be noted the present question, *i. e.* of the right to inspect the opponent's premises or chattels *before trial*, is distinct from that of the opponent's *privilege* to withhold them from evidence *at the trial* (*post*, §§ 2194, 2221), and from that of the propriety of ordering a *jury's view* during trial (*ante*, § 1163); the precedents are sometimes not to be discriminated.

(*b*) In personal injury claims, an inspection of the claimant's *body*, to enable the defendant to prepare for trial, is as necessary as any other aspect of discovery ever was. This measure has been conceded wherever the larger question of Privilege has been answered in the negative; the authorities are therefore considered under that head (*post*, § 2220).

§ 1863. **Same: (2) Criminal Cases.** The 'non possumus' tendency of the common-law Courts to refuse any measure of discovery before trial is seen at its extreme phase in criminal cases. The accused was conceded no right to inspect beforehand chattels (or premises) in the control of the prosecution.[1]

This attitude was consistent with the refusal to require a list of witnesses to be furnished (*ante*, § 1850). But the same considerations which led to the universal legislative reversal of policy in that measure should have availed to include this one also. The danger of manufacturing counter-evidence is even less in the case of chattels and premises. Moreover, that danger, however great, is not a valid reason. The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law (*ante*, § 575) to allow the accused to produce any witnesses at all. Modern rationalism should extend to the accused this right of inspection.[2]

§ 1863. [1] 1921, State *v.* Howard, 191 Ia. 728, 183 N. W. 482 (accused is not entitled to inspect exhibits — here, a pistol, etc. — used by grand jury and filed with minutes; the statute requiring them to be filed is directory only); 1868, Com. *v.* Andrews, Mass., Davis' Rep. 4 (murder; a motion by defendant to require the Attorney-General to allow an inspection of parts of the deceased's body and of personalty of the defendant in the prosecution's possession, subject to restrictions as to mutilation, was rejected; subject to the Court's discretion to allow a postponement, etc., in case of surprise at the trial); 1911, Com. *v.* Jordan, 207 Mass. 259, 93 N. E. 809 (defendant not entitled to a copy of the autopsy report or to an opportunity to inspect weapons, etc., in the prosecutor's possession, apart from his right to a bill of particulars to enable him to prepare his defence; the rule thus announced is needlessly harsh on defendants, and should not be accepted elsewhere; to lay down such a rule at the present day shocks one's sense of reasonableness); 1887, State *v.* Brooks, 92 Mo. 542, 578, 5 S. W. 257, 330 (murder; whether the defendant was entitled to have expert witnesses examine the exhumed corpse, about which the prosecution had declared its intention to offer experts who had examined it; undecided).

For production or inspection *at the trial*, see *post*, § 2224.

For inspection by *autopsy* or by *view*, see *ante*, §§ 1152, 1162, 1862.

[2] 1917, State *v.* Howland, 100 Kan. 181, 163 Pac. 1071 (statutory rape; a child was born; the mother was of Indian blood, and the accused was of dark complexion; the defendant's counsel was refused access by the State's attorney to the hospital for the purpose of inspecting the child to ascertain whether its color and features would furnish evidence of paternity; held error).

END OF VOL. III